Negotiating in Good Faith: Only a Civil Law Obligation?
A comparative view between English common law and Puerto Rico’s mixed legal system

Mayra C. Artiles Fonseca

What is Good Faith?

The doctrine of “good faith” is a general notion that applies to many legal and judicial acts. However, there is no agreement, among those countries that recognize it, as to what exactly constitutes its core principle.[1] Good faith is said to require more than just honesty[2] or reasonableness:[3] as it also requires affirmative acts and fair dealing.[4] Some may consider it as a moral requirement to not harm others.[5] As one commentator has put it:

It connotes subjective honesty, genuineness and integrity, not an objective standard of any kind, whether reasonableness, care or objective fair dealing. It cannot be equated with “utmost good faith” and although its exercise in practice may involve different actions or restraint, the concept is not one which goes beyond the notion of truthfulness, honesty and sincerity.[6]

As such, every act should be studied in light of its particular circumstances to be able to apply the doctrine correctly.

Recognizing a duty of good faith performance is helpful for the judicial system, as it distinguishes a particular duty to contract in good faith from other duties that, for example avoid unjust enrichment or that are imposed for public policy reasons.[7] The application of this doctrine is not as abstract or arbitrary as it may appear at first glance. One way to determine what good faith constitutes is to focus
the analysis on two specific issues: 1) the subjective intent of the party exercising discretion; and 2) the objective reasonable expectations of the parties when contracting.[8]

Good faith is believed to enhance economic efficiency, as it helps reduce costs during contract negotiations.[9] It aims to achieve this by allowing the parties to rely on legal protection instead of having to incur additional due diligence costs.[10] As such, the good faith doctrine can help protect “weaker” parties from the undue influence or bad intent that may arise from a “stronger” party’s bargaining power.[11] Finally, many systems have recognized that the duty of good faith cannot be completely waived, although some contracting parties may limit the scope of their obligations.[12]

It is important to acknowledge that almost all international private law instruments make references to the good faith doctrine. For example, the Vienna Convention on Contracts for the International Sales of Goods[13] (hereinafter CISG) states, in Article 7, that in its interpretation, regard is to be had to the observance of good faith in international trade.[14] The Draft Common Frame of Reference, prepared by The Study Group on a European Civil Code, also incorporates the use of “good faith and fair dealing” as a standard that parties must meet during transactions.[15] Indeed, it makes reference to the doctrine all of forty times in the document,[16] defining it as “a mental attitude characterized by honesty and an absence of knowledge that an apparent situation is not the true situation.”[17]

The starkest difference in the application of the good faith doctrine can be found between common law and civil law systems. Generally speaking, the common law system is more commercially oriented. Its focus is on justice in each particular situation, and it tends to favor commercial certainty over justice.[18] Civil law systems, on the other hand, focus more on consent and the moral behavior of the parties.[19] We can see this difference most clearly when comparing the Puerto Rican and English legal systems.

Use of Good Faith in Puerto Rico

Pangeaupr.org
The island of Puerto Rico was a Spanish colony that subsequently was conquered by the United States of America (hereinafter US).[20] As a Spanish colony it developed a civil law legal system. Following its annexation of the island, the US implemented its common law traditions. Therefore, the Puerto Rico legal system became, and today remains, a mixed system between Spanish civil law and US common law. The Puerto Rican Civil Code (hereinafter PRCC) does not have a specific provision that expressly recognizes the doctrine of good faith. However, various provisions of the PRCC apply a requirement of good faith to different types of obligations.[21] Moreover, Puerto Rico case law has consistently applied this doctrine.[22] The Puerto Rican good faith doctrine is thus an overarching principle of law that can be found in many instances. Scholars have suggested that good faith in Puerto Rico can be defined as a duty of loyal and cooperative behavior, before other subjects of law, such that our behavior is expected to reflect the common expectations that both parties are trying to achieve.[23]

In regards to contract law, Article 1210 of the PRCC states that “[c]ontracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law.”[24] The doctrine and case law–of Puerto Rico, Spain and the US–base such doctrine on a definition of loyalty that goes beyond just acting correctly.[25] This duty arises at the start of contract negotiations,[26] and requires continuous loyalty and fidelity during the entire process.[27] It also entails that acts that may generate expectations are to oblige the person to perform in a certain way, also known as estoppel;[28] as this is needed to preserve trust, security and honor.[29] Due to all the aforementioned, good faith has been declared an integral part of our judicial system.[30] However, as a general doctrine of law, it is important to bear in mind that it will not be used when a more specific legal doctrine or norm is applicable to the particular facts of the case.[31]

There are several potential consequences of the application of good faith: 1) exoneration of sanction in cases of illicit conduct; 2) limitation of subjective law; and 3) creation of special duties of conduct in accordance with the nature of the judicial
relation. It is one of the judicial figures that arise from notions of equity, and therefore requires examining the specific actions of the party to see if it complies with the legal concept. It tries to protect a great variety of values, amongst them the legitimate expectations of the parties to act loyally. The application of this doctrine requires: 1) the existence of a judicial relationship creating expectations based on mutual trust; 2) that the duty of loyalty and trust be defined according to ethical values and social norms; and 3) that the content of such conduct be studied in light of the particular circumstances.

Although the US is a common law system, it also recognizes a duty of good faith. US Courts have stated that “[e]very contract implies good faith and fair dealing between the parties to it.” Indeed, a majority of American jurisdictions recognize a duty of good faith in the performance of contracts. However, Courts have interpreted it in various ways. Some scholars discuss good faith as an extension or tool of equity. Others have distinguished between objective good faith and subjective good faith. Objective good faith is descriptive of the mental state; it thereby allows the inflicted party to invoke excusable ignorance. One example of this would be the case of the ignorance that comes from relying on the accuracy of the property registry. However, in obligations and contract law this will not be the case, as ignorance is not an accepted excuse. Instead, in this context Courts rely on the contracting parties using a criterion of reasonableness; which is known as subjective good faith. Scholars also discuss good faith as limiting the exercise of discretion in the performance of a contract, as it impedes parties from trying to recapture an opportunity lost while contracting.

In contract law, the Uniform Commercial Code and Restatement Second of Contracts recognizes a good faith and fair dealing duty to perform and enforce contracts. The latter explains that “[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” This concept, however, does not apply to pre-contractual negotiations, but rather only to “performance and enforcement.” Here, we thus find a substantial difference between the Puerto Rican civil law tradition and US common law. Many US courts have also used
the estoppel doctrine, to reach the same results as would, a Puerto Rico court applying the good faith doctrine.[50] Nevertheless, there is still much debate as to the precise use of the good faith doctrine among the different US jurisdictions.[51]

As can be seen, the Puerto Rican notion of good faith is reinforced by both its common law and civil law traditions. Both systems favor the use of good faith when performing contract obligations to protect the spirit of the contract and parties’ expectations. Consequently, contracts in Puerto Rico will be protected by good faith regardless of whether Federal (US) or State law is invoked. However, Puerto Rican courts are nevertheless able to extend good faith protections further because of their civil law traditions.

**Lack of Good Faith in England**

English law presents an interesting comparative case-study, as it is generally known as the quintessential example of a system that lacks the doctrine of good faith. However, the truth is that, although its case law certainly reflects an ingrained reluctance towards the application of the doctrine, this view is currently changing. Most scholars will say that there is no good faith in English law, and that any similar outcome would be based on equity instead.[52] The system promotes *pacta sunt servanda* as an absolute doctrine.[53] In this way, the adversarial process honors parties’ arrangements and avoids leaving room for interpretation; thereby excluding an implied doctrine of good faith. One of the most cited opinions, when opposing the application of good faith, is *Interfoto Picture Ltd. v. Stiletto Visual Programmes Ltd.*[54] Here Lord Bingham states:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one's cards face upwards on the table.’ It is in essence a principle of fair open dealing [...] English law has, characteristically, committed itself to no such overriding principle but has
developed piecemeal solutions in response to demonstrated problems of unfairness.\[55\]

Many have cited this quote to oppose the application of good faith in English law, as it states that good faith is a civil tradition unfamiliar to English law. It has also been stated that such duty is “inherently repugnant to the adversarial position of the parties when involved in negotiations” and “unworkable in practice.”\[56\] Some scholars have suggested that this resistance towards the doctrine may be due to: 1) the English method of seeking particular solutions instead of general overarching principles; 2) the belief that contracts under English law are to be pursued under the parties’ own self-interest; and 3) the belief that a general vague and subjective doctrine of good faith may create uncertainty.\[57\] The UK has also emphasized this belief at an international level. Although a party to the CISG, it has still not ratified it. Many observers believe that this is due to the perceived vagueness of some of the convention’s provisions, specifically those regarding the application of good faith.\[58\]

Regardless of the aforementioned, recent case law shows English courts have accepted, under certain circumstances, the use of good faith in particular types of contracts, such as employment and partnerships.\[59\] The courts have also applied the use of the term “implied in fact” and “contractual discretion” to achieve similar results as would be used through good faith.\[60\] This preserves the principle of autonomy of the parties, while still reflecting their intention.\[61\] As a result, “the nature and purpose of the contract will be crucial in determining whether or not a limitation is to be implied to control the exercise of a discretionary power.”\[62\] English courts will then look for different “piecemeal” results for each case, which requires Judges to study the limits to each party’s power under the contract terms, as well as their scope.\[63\]

In a recent case, *Yam Seng v. ITC*,\[64\] Justice Leggatt decided that parties should perform commercial contracts in good faith, when that is the expectation of the parties.\[65\] He stated that:
the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.\[66\]

This decision is important because in arriving to his conclusion Justice Leggatt studied English case law and determined that it does not fundamentally reject the use of good faith and fair dealing. He also stated that different figures in English law protect the same principles as good faith; such as honesty,\[67\] reasonableness,\[68\] and protection of reasonable expectations, \[69\] among others.\[70\] Also, equitable reliefs are applied to protect these values. Examples of these are the English application of doctrines such as implied contract, claims of restitution, misrepresentation, equitable estoppel or unjust enrichment application to protect some pre-contractual negotiation breaches.\[71\]

Justice Leggatt also stated that it is a mistake to still perceive good faith as a purely civil law tradition, as other common law jurisdictions—such as Australia, Canada and US—have already recognized it.\[72\] Nevertheless, he acknowledged English law was not ready to accept this concept completely. As he stated,

I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.\[73\]

Another basis for this conclusion was the references to good faith that European Union legislation has introduced into English law.\[74\] The Common European Sales Law, for example, includes a duty upon the parties to act in good faith and fair dealing;\[75\] defining it as “honesty, openness and consideration for the interests of
the other party to the transaction or relationship in question.”[76] The Principles of European Contract Law states that parties’ freedom to contract will be subject to the rules of good faith and fair dealing.[77] It specifies that this means that parties must act in accordance to this duty, and may not exclude or limit it.[78] This poses an interesting dilemma as this latter restriction exists in civil law countries, but is precisely one of the exceptions to the application of good faith that Justice Leggatt mentions in the judgment.[79] As can be seen, this attempt towards harmonization will continue to increase the application of this doctrine in English law.[80]

Finally, the judgment concluded that the use of good faith for protection of reasonable expectations should not be seen as contrary to English law because: 1) the duty arises in the context of the contract which is establish during negotiation, therefore still requiring the common law case-to-case approach;[81] 2) it does not restrict party autonomy, as it depends on the intentions of the parties in their implicit and explicit agreements;[82] 3) it is based on parties’ intentions, so they can modify the scope of such duty in their contract terms;[83] 4) fair dealing is defined by the contract, making it an objective standard which does not call for Courts to impose their views;[84] 5) English unwillingness to require certain interpretations or duties interpreting good faith can be seen as a difference of opinions which reflect cultural differences, rather than a refusal of the principle;[85] and 6) the application of the doctrine does not imply any more uncertainty than is already inherent when interpreting contracts.[86] Justice Leggatt thereby concluded that “the traditional English hostility towards the doctrine” is misplaced.[87]

As could be expected, this judgment generated many comments and critiques.[88] Some believed it had “narrowed the gap” between the European Civil Law systems and English Common law.[89] English Courts nevertheless continue to interpret contracts as not including a general duty of good faith, whilst giving effect to expressly stated duties of good faith.[90] The latter refers to contracts that include clauses which state that a specific duty will be applied with good faith. English Courts have interpreted this to mean that, since there is no general doctrine of good faith, such expressed duty will only be applied to that specific clause.[91] This means that when “the duty to co-operate in good faith” is used in a contract it will be limited only
to the stated purposes.[92] To avoid an interpretation permitting an application of the principle of good faith, parties may opt to include clauses that expressly exclude such duty.[93] This contrasts with civil law jurisdictions, where such action is prohibited.[94] Consequently, good faith is still not a general doctrine in English law and will not be applied automatically in all cases.

**Comparative view of both systems**

As previously explained, the good faith doctrine in Puerto Rico is based on both civil law and common law traditions. It encompasses more than just fraud, as it is based on the legitimate expectations of the parties to demonstrate cooperation and loyalty.[95] The English system does preserve this notion of loyalty and honesty in contracts. However, it does not rely on those notions on the basis of good faith. It rather sees them applicable only when expressly agreed so by the parties. As such, good faith in English law is not a general principle, as it is in Puerto Rico. Due in part to this same reason, English law does not recognize good faith in pre-contractual negotiations—and neither do other common law jurisdictions for that matter[96]—while it is recognized in Puerto Rico. In the English system, good faith will only exist in certain circumstances, specifically to certain types of contracts. It will also only be expected in regards to the specific clauses of the contract which the parties agreed to, and parties can also expressly exclude such obligation from the contract. In Puerto Rico, like many civil jurisdictions, the doctrine applies to all obligations and cannot be excluded out of a contract. Both jurisdictions allow this doctrine to be interpreted by standards of reasonableness and honesty. However, the Puerto Rican system allows judges more discretion in contract interpretations based on good faith. Nevertheless, this does not necessarily mean that there a greater degree of ambiguity in Puerto Rican case law. On the contrary, there is an expectation that good faith obligations will be upheld by Puerto Rican judges in all contracts, as well as in their negotiations. Due to the recent use of good faith doctrine in English law, there currently exists uncertainty as to whether or not it might be applied by judges in different types of contracts; thus, ironically enough, making English law more unpredictable, at least in that respect.

**Conclusion**
In conclusion, good faith is a general principle that can be found in any type of legal jurisdiction. However, there are differences as to its application. Civil law jurisdictions interpret their obligations law in accordance with this good faith and fair dealing principle throughout its entire process. Common law, specifically English, jurisdictions are more reluctant to permit its application in any type of contract. Nevertheless, more recent developments in English law suggest that courts may begin to apply this doctrine in contract interpretation more frequently. There are differences in English and Puerto Rican contract interpretation. These differences are in terminology, in many occasions, as they still reach the same result. Both systems try to protect some of the same principles, whether by good faith or equity, that lead to a fair interpretation and/or solution. However, this is not always the case. English law does favor commercial parties; thereby often imposing literal interpretations of contracts. It lacks, in this sense, a broader interpretation of good faith aimed at the protection of weaker parties. But this may not always be so. The implementation of many of the international private law instruments previously referenced may nudge English law towards that broader interpretation, by using harmonization to expand this doctrine. Which ultimately demonstrates that, despite the differences between systems of law, contracting in good faith is becoming more of an international norm that will be found in many different types of contracts, regardless of their judicial traditions.

[8] Id.
Negotiating in Good Faith

[10] Id.
[19] Id.
[23] Godreau, supra note 5, at 382.
[27] See Godreau, supra note 5, at 374; Colón v. Glamorous Nails, Id.
[28] Intl. General Electric PR v. Concrete Builders of PR, 104 DPR 871 (1976); See also Godreau, supra note 5, at 389.
[30] Velilla v. Pueblo Supermarkets, supra note 22; See also Godreau, supra note 5, at 369.
[31] Godreau, supra note 5, at 383.
[33] Godreau, supra note 5, at 377.
[34] Id, at 379.
[35] Id, at 380.
[36] Id, at 382.
[38] Burton, supra note 7, at 369.
[40] Teri J. Dobbins, Losing Faith: Extracting the implied covenant of god faith from (some) contracts, 84 Or. L. Review 227, 233 (Spring 2005).
[41] See Godreau, supra note 5, at 375; Farnsworth, Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 668 (1963); Hooley, supra note 1; Sim, supra note 18.
[42] Godreau, supra note 5, at 375.
[43] Id.
[44] Id.
[45] Sim, supra note 18.
[46] U.C.C. §1-203 (amended 2003); See also Restatement (Second) of Contracts §205 (1981).
[47] Restatement (Second) of Contracts § 205 (1981)

[50] Burton, supra note 7, at 235.

[51] Dobbins, supra note 40, at 266.


[57] Mckendrick, Contract law 221-2 (9th ed 2011); See also Hooley, supra note 1, at 72.


[60] Hooley, supra note 1, at 68.

[61] Id, at 67.

[62] Id. at 70.

[63] Id, at 71.

[64] Yam Seng v. ITC, supra note 59.

[65] Id.

[66] Id, at ¶148.


[68] Id, at ¶137.

[69] Id, at ¶145.
[70] Id, at ¶138-141.


[72] Yam Seng v. ITC, supra note 59, at ¶125-129; See also Sim, supra note 19, at 9.

[73] Yam Seng v. ITC, supra note 59, at ¶131.

[74] Id, at ¶124.


[76] Id, at Article 2b.


[78] Id, at Art. 1:201.

[79] See Yam Seng v. ITC, supra note 60, at ¶148.

[80] Id, at ¶124.

[81] Id, at ¶147.

[82] Id, at ¶148.

[83] Id.

[84] Id at ¶150.

[85] Id, at ¶151.

[86] Id, at ¶152.

[87] Id, at ¶153.


[89] Shröder, supra note 59.

[90] Id.

[92] Id, at ¶ 109.

[93] Trowers and Hamlins LLP, Dispute Resolution and Litigation Update on implied duty to deal in good faith, Trowers and Hamlins (February 2013) http://www.trowers.com/uploads/Files/Publications/2013/Bulletins/Update_of_implied_duty_to_deal_in_good_faith.pdf (last visit 1 December 2013).


[95] Godreau, supra note 5, at 393.

[96] Sim, supra note 18, at 9.