Unlike in many civil law systems, there is no general doctrine of good faith in English contract law. Parties can expressly agree to act in good faith, and there are certain categories of contracts, such as insurance, employment and partnership contracts and those governing other fiduciary relationships, in which such a duty will be implied. However, the courts generally remain reluctant to imply a duty of good faith in dealings between commercial parties.

Here we consider the basics of:

- What acting in good faith really means;
- Expressly agreeing to act in good faith;
- Why there remains a continued reluctance by the courts to imply such a term;
- Good faith in 'relational' contracts;
- Good faith when exercising a contractual discretion; and
- Some drafting tips to consider to help ensure that the ambit of an express good faith clause is clear and readily understood.

What does good faith mean?

The duty of good faith has no universally accepted meaning and what it means in a commercial contract will depend on the contract in question and its commercial context. It has been held to
entail an obligation to:

- adhere to the spirit of the contract;
- observe reasonable commercial standards of fair dealing;
- be faithful to the agreed common purpose;
- act consistently with the justified expectations of the other party;
- prevent action that frustrates the purpose of the agreement;
- require disclosure of all material facts to the other party;
- not knowingly lull the other party into a false belief; and
- not provide false information upon which the other party will rely.

Can contracting parties expressly agree to act in good faith?

Yes. Parties may agree an express obligation to act in:

- good faith;
- in the utmost good faith; or
- in absolute good faith or other similar expression.

Unlike with endeavours clauses, the courts do not appear to distinguish between the degrees of good faith. But given there is uncertainty as to what such an obligation might entail, parties would be better advised to set out expressly the particular efforts which they consider one party should take in order to provide the other party with the sort of reassurance that they hope a "good faith" clause might achieve.

Why is there a reluctance to imply a term of good faith?

The reluctance arises because:

- in English contract law where two or more commercial parties negotiate at arm's length, each is deemed to be capable of looking after its own best interests in both negotiating and performing the contract. Implying a duty of good faith would go against this - especially as the parties have the ability to agree expressly to impose such a duty should they desire;
- by its nature, the duty of good faith is vague and subjective and to imply it would bring contractual uncertainty where the parties have expressly agreed their obligations under the contract; and
the courts prefer a piecemeal solution to unfairness in specific contracts by relying on the principles of construction and implication of terms where appropriate rather than having an overarching principle. The courts may imply a duty of good faith where the contract would lack commercial or practical coherence without it but such instances are likely to be rare.

**What about good faith in 'relational' contracts?**

Although a trend began to emerge in recent years of recognising the need for an implied duty of good faith in certain 'relational', long term contracts, such as distribution agreements, franchise agreements and joint venture agreements, the Court of Appeal has discouraged this trend commenting that it prefers the traditional piecemeal solution as referred to above. It considers that the recognition of a general duty of good faith would be a significant step in the development of the law of contract with potentially far reaching consequences.

**What about good faith when exercising a contractual discretion?**

Where a contract provides one party with the discretion to make a decision which may have an effect on both parties, such as setting or varying the charges in a contract, then in the absence of clear language to the contrary, there will be an implied term that the discretion must be exercised in good faith and not arbitrarily or capriciously. This is aimed at preventing the decision maker from abusing its role. The test as to whether a decision has been exercised rationally is subjective but there must be a proper process and some logical connection between the evidence and the apparent reason for the decision.

Making the decision maker's discretion 'sole' or 'absolute' will not exclude the rationality requirement.

**What drafting tips can the parties consider?**

- If the parties intend there to be a duty to act in good faith, the contract should specifically say so - don't leave the obligation to be implied. The courts are reluctant to imply additional terms where commercial parties are legally represented in the negotiations.
- Although there is flexibility around the wording used, take care in how the duty is framed as the courts have found some wording, such as an obligation to "champion the partnering relationship," to be too uncertain to impose the duty.
- Be specific about what acting in good faith requires the parties to do. Requiring a party to act
honestly and with integrity is uncertain whereas specifying what is required, such as consulting and disclosing information, is clearer.

- Is a party obliged to act against its own commercial interests? If so, say so specifically, and to what extent, as the duty of good faith is unlikely to require either party to act contrary to its own commercial interests.
- A general good faith provision will not fetter express terms, such as in relation to termination.
- Do any good faith obligations apply generally to the contract or to a specific obligation only? The courts are more likely to find it applies in a narrower context rather than to all terms and conditions.

By considering the above tips, parties can aim to ensure that an express, defined, duty to act in good faith is incorporated into their commercial contracts and expensive, time consuming disputes over implication and/or uncertainty of terms is avoided.

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