The Legal Principle of Honourable Dealing - An Implied Term?

A Comparative Historical Study of Kuwaiti Civil Code and English Law

Dr. Bashayer AlMajed

Collge of Law, Kuwait University- Kuwait
E-mail: Dr.bashayer.almajed@gmail.com

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Dr. Bashayer AlMajed
Assistant Professor
Collge of Law, Kuwait University- Kuwait

Abstract

A duty to perform one's legal obligations in an honourable way should be a legal norm. Without a moral core, the law loses its validity. Kuwaiti Civil Law, with its French and Islamic roots, readily accepts this premise, both explicitly and implicitly. English law, however, has a long-standing antipathy to any requirement of moral obligations and good faith in parties' dealings, supposedly due to the need for contractual autonomy and commercial certainty. This paper explores this position and contends that, historically, the use of a 'gentleman's agreement' meant that contracts were less formal, with no need to interpret an implied term of honourable dealing. However, this is changing, especially in relational contracts, meaning that English law and Kuwaiti Civil Law are now drawing closer. The explosion of electronic contracts, however, is a challenge for the concept of honourable dealing, in both countries.

Keywords: Civil Law – History of law – Honourable dealing – Kuwait Civil Law – English law - Obligations -Historical comparative study – Jurisprudence

القيمة القانونية لمبدأ شرف التعامل في القانون المدني

(دراسة تحليلية تاريخية مقارنه بين القانون المدني الكويتي و القانون الإنجليزي)

د . بشاير يوسف عبدالعزيز الماجد
أستاذ مساعد
كلية الحقوق، جامعة الكويت – الكويت

الملخص

يعتبر مبدأ شرف التعامل في العقود المدنية من أهم القواعد الأخلاقية التاريخية الراسخة، التي تحوّلت إلى قواعد قانونية، وجسّدت –بدورها– صورة من صور تداخل القواعد الأخلاقية مع القواعد القانونية في القانون الوضعي، وقد تبنّاها القانون المدني الكويتي رقم ٦٧ لسنة ١٩٨٠ في التعاملات التعاقدية بين أطراف العقد، وجاءت بنصه تحديداً المواد ١٩٣ – ١٩٥ – ١٩٧، بحيث تثور مسؤولية المتعاقد المدنية في حال تم الإخلال بهذا المبدأ، وذلك على خلاف القانون الإنجليزي، الذي يتبنى منهجاً مختلفاً تماماً، ولا يعترف بمبدأ شرف التعامل في العقود، بل على النقيض؛ فإنه يسعى لتعزيز مبدأ (استقلالية العقود) ودعمها وانفصالها عن الأحداث التي ترتبط بها، وهو يؤكد كيانها المستقل.

تقدّم هذه الدراسة تحليلاً فلسفياً تاريخياً مقارناً، بين القانونين الكويتي والإنجليزي من حيث تطبيق هذا المبدأ على التعاملات التعاقدية بين أطراف العقد وتطورها التاريخي، وصولاً للإشكالات المستجدة التي يمكن أن تواجهها العقود الحديثة، ولا سيما بعد ثورة التعاقدات الإلكترونية.

الكلمات الدالة: تاريخ القانون – القانون المدني الكويتي – مبدأ شرف التعامل – العقود المدنية – القانون الإنجليزي – القواعد الأخلاقية – استقلالية العقد .

Introduction

It is assumed by many that moral and honourable obligations form the basis of all law and that, furthermore, these morals are commonly recognised by all civilised nations. Law provides a legal framework for our behaviour and therefore it is obvious that society would wish that behaviour to be honourable, moral and based on good conscience. This assumption applies to the field of contracts in particular, as they form the basis of legal transactions between two parties, having a fundamental role to play in personal and commercial transactions. If the duties of honourable dealing and moral obligations are not expressly stipulated in a contract, they should be inferred or implied, to give the contract a moral, conscionable basis.

However, although historically this is true in Kuwaiti law, as derived from French and Roman law and reflecting Islamic religious tenets, it is not the case in England where the law traditionally does not recognise any moral component reflecting trust and cooperation. Rather, English law is rooted historically in the idea of contractual autonomy and business efficacy. This is controversial, and has been challenged – with a certain success – in recent cases, but the underlying principle of English law is still that stated by Jackson LJ in 2013: "I start by reminding myself that there is no general doctrine of "good faith" in English contract law".[1] Indeed, the English rejection of honour as a universally accepted aim of the law can be seen with Lord Ackner claiming that imposing moral obligations is "inherently inconsistent with the position of a negotiating party".2 The rather shocking implication of this statement is that, for some, contracts are simply a business means to the best deal, regardless of dishonesty, unfair dealing or lack of transparency. However, despite the historical strength of this position, there has recently been pressure in English law for a more enlightened approach, especially in commercial, relational contracts and in the growing acceptance of conscionability as a better approach to that of good faith.

The traditional English law approach also runs counter to the way many other areas of law are developing. The principles of goodwill and honour have an evolving legal relevance within the framework of contemporary international law, both private and public, combining moral notions such as

1. Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd' (Trading as Medirest) [2013] EWCA Civ 200

2. Walford v Miles [1992] 1 All ER 453

integrity, honesty and transparency.[3] In this way, Kuwaiti law seems to be in line with the modern approach. English law, however, despite recent moves, still lags behind. It is this counterpoint between the two systems that merits further analysis.

Moral obligations form a normal part of modern life. The need to act with honour and probity is universally respected. Good intentions and bad intentions are two terms widely used in every society, each of them an ethical basis.[4] However, there is not always a specific definition, but it is left for the discretion of the judiciary, as goodwill and intention are social provisions linked to the prevailing societal values at a certain time.[5] Consequently, the concept of goodwill differs from one society to another, and from one intellectual belief to another. Despite this, the overarching understanding of the duty to act honestly, with honour and in cooperation is well understood.

With the increase in modern technology and electronic transactions, the question of morality and honour is even more crucial. It is no longer possible under the traditional form of business to allow all contractual parties to meet and therefore form their own judgement as to whether someone is honourable or not. History is changing. Electronic contracts are the norm and are largely anonymous: therefore, moral standards have to be imposed. People nowadays have little choice, online contracts are a fact of life and cannot be avoided, and this will increase. For this reason, the question of moral obligations is even more relevant than ever before.

In view of recent crises, society now needs morality and honour more than ever. However, business efficacy and certainty are also vital. The different approach to the same problem by Kuwait and England therefore deserves further investigation.

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3. Raghad Abdul Amir Hamid Mathloum Khazraji, 'The Principle of Good Faith in The Implementation of International Treaties', 2014, Journal of Diyala, University of Diyala, 64, 175. See also, Ghazal Boubacar, 'Good Faith in the Insurance Contract', (University of Ouargla, Algeria, 2018) 1

4. Ramzi Rashad Abdel-Rahman al-Sheikh, 'The Impact of Bad Faith on the Trade-offs in the Decades of Civil Law' (The New University House, Alexandria) 29

5. Abdel-Moneim Moussa Ibrahim, In Good Faith Contracts: A Comparative Study, Zain Human Rights Publications, Beirut, Lebanon, 2006, 74. See also, Rosanne Taleb Mahmoud Sweiti, 'The Principle of Good Faith in the Conclusion of the Contract in Accordance with the Provisions of the Draft Law of the Palestinian Civil Compared with the Magazine Judicial Judgments' (Jerusalem, 2018) 1

The Principle of Moral Obligations and Honourable Dealing in Contracts in Kuwaiti Law

Whether law as a whole incorporates morals as part of its fundamental essence is an academic discussion that has engaged many jurisprudential lawyers and philosophers over history. Specific domains of the law show different approaches. This chapter presents a critical analysis of the position of honour, honesty and good faith within Kuwaiti law, looking at both the Civil Code in general and specific domains, including the concept during different parts of a contract's life and the nature of the obligation in general. It is shown that Kuwaiti Civil law, based on both its French historical roots and cultural heritage, accords a very high value to the tenets of honour and honourable dealing.

The Legal Historical Principle of Moral Obligations

There are many different academic schools of thought that try to provide a disciplined definition of the principle of goodwill, morality and honour. Legal jurisprudence has presented many concepts that indicate goodwill, both directly in Kuwaiti law and via the French influence. Linguistically, the legal principle of good faith is rooted in the ancient Roman phrase, bona fides, a term with a legal and religious basis. Islamic principles also recognise the importance of honesty, openness and fairness in all dealings. As such, whatever the historical root, moral obligations are to act in a manner of honesty, openness and fairness, and form an integral part of many legal systems, both in domestic laws such as Kuwait and France, and international.[6] Whereas morality is more of an individualistic principle, for parties to a contract, this implies a need for honourable dealing between the two.

Kuwaiti law has embraced this principle in many areas of contract law, both as an underlying legal requirement and as one of the factors that the judge relies upon as a guide in order to interpret contracts. This emphasis can also be seen in the Kuwait legal system as a whole, with moral obligations in the Constitution, Civil code, Civil Procedure code and Criminal Code, as well as in the general principles and guidelines for judges and in the customs, which is a main source of the general rules and legislations in the country.

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6. Turky Shayna Omar 'The Principle of Good Faith in Contracts and an Analysis of Islamic Law', (The Institute of Economic Sciences and Commercial Sciences Management 2018) 1

Moral obligations and honour, however, are rather vague. A key understanding of the requirements of the "portrayal of the intentions of non-violence and rigour, a trend that is associated with compassion and moderation."[7] The concept includes, but is not limited to, morality, honesty, honour, trust, loyalty, cooperation, good faith, conscionability, goodwill and many other similar core values. This gap in any specific accepted definition is important. Exceptionally, a couple of articles in the Kuwait Civil Code, 1980, hereafter referred to as the Kuwait Civil Code or abbreviated to the Civil Code, do provide a definition of good faith in their specific area. Article 189, for instance, uses the term to cover intention and whether the party was good or ill-intentioned. However, the general position is that there is no precise definition in the law overall. This lack of precise definition throws up a few interesting questions. The Kuwaiti legislator uses the terms 'honour and good faith' rather than 'trust and honesty', as seen in the Civil Code, Article 193(2), for contractual interpretation, and Article 195 and elsewhere, as detailed below.

It is slightly strange that trust and honesty do not figure, explicitly, as part of good faith or honour dealing. They would seem to be fundamental: how can someone act honourably if they do not act honestly? However, in the broader context of caselaw, this distinction is often less clear-cut and is based on a more general understanding of honour and good will. Equally, it should be noted that other areas of the Civil Code, such as Article 152 regarding misrepresentation in the negotiating phase, does refer to a specific obligation of honesty. It is clear, therefore, that the areas do overlap, and the Kuwaiti legal system is flexible in its linguistic terms, relying quite heavily on common sense and customary interpretation.

Indeed, the concept of honesty can be seen in other, more general, traditional scholarly definitions. Back in 1961, one eminent scholar wrote that good faith included honesty: "in order to abide by the limits imposed by law, and the need to observe sincerity and honesty and to fulfil what is required by the contract, despite the fact that the matter is based on moral considerations and stems from foundations incited by morality and religion."[8]

7. Mohammed Hussein Mansour, The General Theory of Commitment: Sources of Commitment, The New University House, Alexandria 2006, 373

8. Mohamed Labib Shanab, 'Ingratitude Anticipatory Contract', 1961, 3/1, The Journal Legal and Economic Research, 61

Accordingly, the principle of honour and morality is originally an ethical rule, based heavily on Islamic law and Kuwaiti historical and cultural traditions, as well as a global understanding as to what is 'good' behaviour, allowed by a good conscience, and what is not. This has been incorporated into the legal system, reflecting society's values, and now occupies an important role in the field of obligations, and in particular in the conclusion and implementation of contracts. It is also used to suppress arbitrariness and fraud and represents the due sincerity in carrying out the commitment of the contractor.[9]

Current Legislation

In Kuwaiti law, morality and honour can be seen both in certain areas of the general Civil Code as well as dedicated legislation in specific legal domains. Again, the question of definition is not completely clear. As with many other jurisdictions, honour is understood on a more basic, ethical level, without the need for explicit definitions.

General Civil Law:

Article 195 of the Civil Code shows the need for good faith, honour and justice but not the specific requirements of honesty or trust. The overarching clause of the article states that a contract is not limited to its express clauses and terms provisions but also includes what are referred to as the 'essentials' of the contract (mustalzamat[10]). These essentials are implied to all contracts and include generally accepted custom, justice, the specific circumstances and nature of the dealing, and the 'requirements of good faith and honourable dealing'. This puts the requirement of good faith and honour to be an umbrella term, overreaching the whole contract, as an essential, integral part of the contract.

The need for correct morality can also be seen in contractual interpretation. Article 193(2) states: "Where, however, there is room for interpretation of the contract, the common intent of the contracting parties must be ascertained from the totality of its tenor and the circumstances of its execution without considering the literal meanings of its words or phrases, and be guided by the nature of dealing and current customs and the good faith and honourable dealing which must be satisfied by the parties".

9. Hussein Amer, Abuse of Rights and The Cancellation of Contracts, Egypt Publisher, 1996, 7

10. Arabic term: مستلزمات

Equally, Article 197 also makes it clear that "the contract should be performed and comply with good faith and honourable dealing". This shows that, in many areas of the contract's life, there is an express requirement under Kuwaiti law for honour and good conscience to form an integral part of that contract.

1- Conscionability as a general duty in a Contract

Conscionability has a slightly different slant but overlaps with that of honour and goodwill. The duty to act in good conscience is based on not abusing or taking advantage of your position.

The Kuwaiti Civil Code, Article 159, emphasises that a contract can be voided where one party exploits his position of moral authority over the other, taking advantage of weakness.

It states that:

"If Party A uses the desperate need of Party B or his obvious immaturity or visible weakness or a great love or Party A uses his moral position and thereby lets Party B sign a contract that is in the interest of Party A or a third party, and this contract when concluded thereby has a great inequality, as regards what Party B has to do to comply or the benefit that comes to Party A, either moral or financial, and when it was concluded it was against the honourable dealing and the good faith, then the judge can, at the request of victim, reduce Party B's obligation or increase Party A's obligation or void the whole contract, in accordance with the circumstances and the justice of the case".

It is clear that the article in Kuwaiti Civil law was written in a very general form to cover the largest possible number of cases that may be marred by bad faith or doubt regarding the morals of the relationship party. Morality in its broadest form is thereby incorporated. An important to point to note is that the clause refers to an imbalance in the positions of the two contracting parties – the idea is to prevent the stronger party exploiting the weaker party. In the event of need, one person is in a state of weakness and consequently his decision is not necessarily the decision of a reasonable man in sound judgment, but it is the decision of a person with an urgent need, under pressure and stress. As such, the Kuwaiti legislator did not lose sight of this issue and this text greatly enhances ethics in the law. Again, the law is drafted

broadly. Immaturity, for instance, is not referring to children or minors. It covers people who behave 'immaturely', no matter what their age. As such, the law puts an obligation on the stronger party not to take advantage of someone due to their weakness, irresponsible behaviour or other character default. It can, in one way, be considered as recklessness as this does not end with a certain age, indeed recklessness differs from the lack of discrimination as the absence of discrimination can end in age, but recklessness is more general and more comprehensive. However, it does not even have to include recklessness as there is no requirement for the person to realise that their behaviour is irresponsible. Rather the onus is on the stronger party to realise that the person has put himself in a vulnerable position by his behaviour: if the stronger party does not realise that the weaker party is disadvantaged, then obviously he cannot be said to have 'used' that power, to have exploited it.

Apparent weakness is also a wide term, used in a comprehensive way, as in deed is 'great love' or passion. Indeed, the use of 'love' or 'passion' in the text is rather daring on the part of the legislator, recognising that people do not behave rationally when in love and, therefore, are in a position to be taken advantage of. This represents a courageous and practical approach by the legislative that is to be welcomed. The law must reflect the actual world and be of use to people in that world, and love/passion is great driving force for good and also for foolishness.

The other clauses refer to the state of a moral breach, and this situation is widespread and abundant in Kuwaiti society, where there are many people exploiting their influence and social position of security to conclude unbalanced contracts and disturb the principle of social justice. The deliberate mention that the contract must not be in the interest of party A, or indeed a third party, shows that the legislative recognises that abuse of position is a common action for self-interested parties. The idea to remove any area of manipulation. Equally, the idea of benefit and detriment can be either moral or financial.

However, it should be noted that Article 159 does not undermine the offer-acceptance trading nature of a contract. There will be many contracts where one party is stronger and the other weaker. Indeed, where one party profits and the other loses. As the Kuwaiti Civil Code 1980, Explanatory Memorandum for Article 159 writes, it is not designed to go against the normal inequality of

giving and taking which is the nature of deal, only against any great inequality which results in usury, in abuse or exploitation. Equally, the judge's powers are slightly curtailed in that he is specifically ordered to decide 'in accordance with justice', meaning that the principle of justice remains the principle governing the contractual process. As such, morality does not stand alone but must be viewed in a legal context.

This article, therefore, is deliberately very detailed: it could have been drafted in very general terms, but the legislator chose to be specific, giving examples of the different situations where it applied. This is quite distinctive and indicates the keenness of the Kuwaiti legislator on this principle and the call for its deep root into the contract. Overall, therefore, is a generous and broad sweeping clause, imposing the duty to behave in good conscience. Moreover, not only is the article very wide-sweeping but the power it gives the judge is equally broad. The Explanatory Memorandum for Article 159 brings attention to the fact this, claiming that it is unique as it gives the judge the ability either to reduce or increase obligations, which makes it different from nearly all other clauses.[11]

Other clauses including revocation and misrepresentation

The Civil Code Article 189 highlights the presence of moral obligations in revocation, stating that a contract cannot be revoked if one party received his part in good faith.

One point to note is that, under 189(2), good faith is actually defined in this clause. This is different to most other clauses and makes it stand out. Moral obligations here are based on whether the party is well-intentioned or not, namely whether they had actual knowledge of the reason to revoke or if they should have had knowledge based on normal, reasonable circumstances. On the other hand, the legislator made it clear that bad faith if a person knows or is in a position to know, by exerting the care of the usual man, that it is not permissible to annul the contract for his benefit.

11.Article 159 runs counter to the German Civil Code Article 138 (Bürgerlichen Gesetzbuches or BGB, 2002, Section 138: Legal Transaction Contrary To Public Policy; Usury) whereby the judge can only revoke the contract or, Swiss Civil Code Article 21 (Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations) which says the contract is revocable. Rather, it comes from French Civil Code 2016 and the Italian Civil Code, Article 22 (Il Codice Civile Italiano, 1942), thence incorporated in to Egypt and thereby to Kuwaiti law.

Although this definition is part of Article 189, there is a principle in Kuwaiti law of general legal applicability; this means that all legal principles have to complement each other. Based on this, it is arguable that this definition could also be used for other clauses, such as Article 195. Article 213 operates in a similar fashion as regards termination.

The concept of misrepresentation is also seen in Kuwaiti codified contract law clauses in the Civil Code. Article 152 lays down that it is considered as "tricks of fraudulent deception" if one party provides information about the facts of the contract and its circumstances, or indeed fails to mention something and chooses to remain silent. Therefore, that action or lack of action can be viewed as a violation of an obligation of honesty or openness imposed by law, agreement or the nature of the transaction or private confidence. In which case, the contract can be voided at the request of the victim. In Kuwait law, the emphasis here is on the honesty of the party: if they innocently misrepresent the contract, and a reasonable personable would not have thought differently, they are not liable under Article 152, even if the contract was, in fact, wrongly portrayed.

Morality as Seen Throughout the Stages of a Contract's Life

A contract has a lifespan, from the first conversation between the two potential parties, right up to the moment that it is terminated. However, the principle of honesty and good conscience do not necessarily apply equally throughout that period.

Negotiation, Performance and Termination

It should be noted that, in Kuwaiti law, there is no specific element of honourable dealing in the pre-contractual phase, during negotiation. Although this seems rather strange, as shown below, this is primarily because the original French Code, as passed through to Egypt, did not include such a duty in the negotiation phase.

Interestingly, this has been amended in the amended French Civil Code, 2016, Article 1105 (later referred to as the French Civil Code). The obligation of good faith in negotiation now comes from the general principles of law. Part of this reform can be seen in the duty of disclosure. The new code states that a party has a duty to disclose information which is "essential" to the other contractual party. Information on the value is excluded (after all,

otherwise how would profit be made). But the principle shows a big move in the application of honour to the early part of a contract's life.

However, for the time being the Kuwaiti law has no plans to reform its law along the same lines and therefore contractual negotiations are not specifically covered by the need to act honourably. This seems strange in a trading country where negotiations are a key part of contract; however, it is historical, based on Al Sanhuri's[12] knowledge of French law.

However, the law against misrepresentation in the Kuwaiti Civil Code Article 152, does show that even if there is no specific requirement of honour in the pre-contractual phase, there is no right to misrepresent the nature of the offer. This covers not only actual representation but, effectively, implied representation by remaining quiet about something that you know should be disclosed. It is interesting that this clause talks about a specific 'obligation of honesty'.

The next part of a contract comes in its performance. As shown above, this is clearly covered in the Civil Code. Articles 193-197 put a strong obligation on the contractual parties to act in good faith, in accordance with honourable dealing, but not specifically in terms of adhering to honesty.

However, termination is also not covered in Kuwaiti law as part of the contract's life that needs to be carried out in good faith. Again, this is primarily based on the original 1804 French Civil Code or Nepoleonic Code (Code Napoléon 1804). The fact that this was been amended in the 2016 reform of the French Civil Code may well pave the way for the Kuwaiti legislators to review the Kuwaiti law at some time in the future. For the time being, however, the moral obligations of a contractual party are basically only during the actual performance of the contract.

It is worth noting, however, that whether the party acted conscionably or not will be taken into account by the judge when awarding remedies for breach. The Kuwait Civil Code Article 267 states that:

"- If the one who received the undeserved is well-intentioned, he shall not be obligated to return only what he received. If he is ill-intentioned, then he is obliged to return the fruits that he collected or that were short-lived,

12. Abd Al-Razzaq Al-Sanhuri (1895-1971) was an Egyptian legal scholar, with expert knowledge in Islamic Law, and who studied law in France. He is responsible for drafting the first Civil Code in Egypt, based on the French system, which was then used as a basis for many other Middle Eastern Civil Codes, including that of Kuwait, established in 1980.

from the day he received the thing, or from the day he became ill-intentioned, according to the circumstances.

- In any case, whoever receives the non-due is obliged to return the fruits from the day the lawsuit was filed against him, to return it."

Many other clauses also cover the same principle: the good will or not of the claimant is not only relevant during the life of the contract but in the remedy that he/she can expect to receive if they have been wronged.

By referring to the position of French law and some Arab countries, therefore, we find that good faith can be viewed as a general stable principle in all stages of the contract, whether in terms of negotiation, which is carried out in the previous stage of the contract and includes the stage of setting the contract conditions and formulating them in a clear technical way, indicating the goodwill of the contractors or on the one hand or implementing the contract and performing all agreed obligations in good faith. Certain scholars and practitioners, therefore, say that the principle of good faith is a general principle that is not only limited to the stage of implementing the contract but also includes the previous stage of contracting.

This is based on the fact that the contract interpretation and implementation processes are complementary and therefore, the principle of good faith must be implemented also in the interpretation stage, where it cannot stand to solve the problem especially the implementation of the contract without resorting to Interpretation, according to the principle of good faith. Thus, the scope of goodwill includes all stages of the contract,[13] in concluding contracts, and also in implementing them.[14]

Although the judiciary may well in practice use this more overarching approach to include honour and good conscience in all the life of a contract, the fact that the Code only has specific texts for the performance of the contract may be seen as a limiting factor. Alternatively, allowing a wide-sweeping clause, to cover all dealing, as the judge sees fit, allows flexibility to incorporate the need for honour is a more general way. This might well be lost if the law was more prescriptive.

However, despite no specific clause covering negotiation or termination, there is an alternative argument that morality can be implied into the both

13. Omar, n6, 32
14. Ibid, 15

phases due to general custom, which forms part of a contract's interpretation, and the overarching requirement for honourable dealing as seen in the Civil Code Article 195. Under 195, the 'essentials' of the contract (mustalzamat) are implied to all contracts, that this and includes generally accepted custom, justice, the specific circumstances and nature of the dealing, and the 'requirements of good faith and honourable dealing'. Therefore, this can be read as requiring good intention and loyalty even in parts of the contract's life, such as the pre-contractual part, that are not covered by specific law. Indeed, according to this argument, this may well be the very intention of the legislator in codifying that rule.

Thus, the good faith in the negotiations stage shows through two types of obligations, one positive which is the obligation to disclose the information necessary and for the crisis in the contract, and the other negative is the lack of Fraud or deception and exploitation externa t in the other. Therefore , this ethical rule needs to be applied and highlighted in all actions and negotiations that take place before the conclusion of the contract , so both parties to the contract must adhere to good faith and deal honestly and safely in the stage of contract negotiations, and not to violate the obligations imposed on it so as not to prejudice the balance of the contract.[15]

Standard of Morality and Honour: Objective v Subjective

Given that morality and honour are such nebulous concepts, understood more by their breach than their respect, it is important to try and clarify whether the law requires a personal, subjective standard in the application of honour and goodwill, or an objective one based on society's expectations.

Personal standard

A personal, subjective standard focuses on the intention of the disposer him/herself. It includes the motives and psychological factors that stirred faith, and therefore, the basis of this standard in the contracts and conduct legal is the idea of the rules of justice and morality.[16]

15. Abdel Nasser Al-Attar, A Theoretical Commitment to Islamic Law and Arab Legislation, The First Book, Printing Press Happiness, 1975, 163

16. Abdul Halim Abdul Latif Konya, In Good Faith and Its Impact on Behaviour in Islamic Jurisprudence and Civil Law, House Publications University, Alexandria 2004, 295

Thus, the good faith in the idea of self depends on the intention of the contractors and therefore, being human, may be well-intentioned or otherwise.[17] It requires knowledge or ignorance of a certain person's own reality.

Thus, according to this criterion is not the responsibility of the person if it is proven that there was no intention to cause harm to others.18 This ties in with other areas of Kuwaiti Civil law where the focus is on the actual intention of the parties.

Objective standard

The objective criterion, however, means the standard of usual and customary behaviour. The judge looks at the behaviour of the sane, ordinary, reasonable man who exists in the same circumstances, stripped of the internal conditions inherent to him as a person.

Consequently, the judge does not look whether the party was of modest intelligence or irritable mood or other conditions that are close to the person. Rather he looks at the external conditions of the person and the behaviour that would be usual in the same circumstances.

It should be noted that a person is well- intentioned to contract when there is no negligence. Negligence, as the balance and commitment of vigilance and foresight, is there a breach of the objective criterion of good faith, representing objective ill-will. The average man's behaviour is therefore considered core.[19]

Kuwaiti law will look primarily at the objective standard and uses the subjective standard mainly in clauses such as The Civil Code Article 159. The objective criterion can be applied in cases where the commitment cannot be assessed subjectively. If the subject of the obligation is the obligation to achieve a result, then the criterion that must be applied is the objective standard. However, the two are interlinked, because a person is expected to behave in a reasonable manner, as part of society, as well as in accordance with his own knowledge and belief or honour. Questions of evidence are also important as a side issues here as it is difficult for a person to claim convincingly that he did not realise that something was breaching the moral

17. Fátima Hanifa, 'The Will of the Contractor and Restrictedness' (Master Thesis, Faculty of Law and Political Science, 2018) 27

18. Abdul Halim Abdul Latif Konya, In Good Faith and Its Impact on Behavior In Islamic Jurisprudence And Civil Law, House Publications University, Alexandria 2004, 309

19. Omar, n6, 13

code of society when it was obvious to any reasonable person.

If a person violates the law, as the violation in itself of the provisions of the law does not need to know the direction of the person's will, due to the fact that the values of society are considered a definite consort, the person is obliged to adhere to a certain behaviour.[20]

Based on the foregoing, it is not possible to confine ourselves to the personal standard without the objective criterion or the objective criterion without the personal criterion for extracting goodwill , since they are complementary , as the personal standard is related to the internal conditions of the person and it is difficult to extract goodwill from it , and therefore the judge resort to external conditions to extract it.

Consequently, the sense of intention is measured by an objective criterion and a personal criterion, as these two criteria flow into one source, which is not to harm the other contractor.[21]

Morality, good faith and honour in specific contract domains

A common area of law that requires a specific duty of honour and good faith is that of insurance. The very nature of an insurance contract is based on harm and the need for the 'stronger' party to protect the 'weaker' party when harm has happened. It therefore would be even more unacceptable than normal for the law to allow one party to act wrongly in this situation, than in a normal one. Exploitation and abuse of position would cause even more harm.

As a trading country, in Kuwaiti law, this is seen in particular in the area of maritime insurance law. Under Kuwait Commercial Maritime Law, 1980 (hereby referred to as Commercial Maritime Law), Act 28 the law mentions several provisions that are in the interest of the insured or the insurer. Importantly at the end of Article 285, the law states that the "entire insurance premium must be made from the benefit of the insured in good faith.

It is worth noting that in the text of the article, the phrase came that the believer in good faith made his right to the full instalment, but in his own articles the moral responsibility gave a clear role as they stated the article that in case of settling the damage, the insured must declare the existence of other insurance contracts and not be His request is unacceptable.

20. Abdul Halim Abdul Latif Konya, In Good Faith and Its Impact on Behaviour In Islamic Jurisprudence And Civil Law, House Publications University, Alexandria 2004, 305
21. Omar, n6, 15

Also, if fraud is proven, each contract is voidable at the request of the insured. Here the legislator has imposed moral responsibility in three aspects, namely not to cheat and permit while settling the damage with other contracts and ultimately the full insurance premium is due for the believer in good faith.

Similarly, Commercial Maritime Law, Article 279 protects bona fide third parties from the contract and the third party from the contract, who has no guilt in the contract itself, and requires protection. Article 105 also provides certain protection as per the requirements of good will.

Commercial Law also views good faith between traders as a key aspect of legal relations. Is it obvious that a mercantile country needs deals to function effectively? Based on its customs and traditions, honour is a core part of trading relations. If that were ignored, the system would collapse. Litigation is not the best recourse even in modern times and certainly would have been extremely difficult in former times. As such, the need for honour in dealing is codified into the law, to try and further this cultural understanding.

This is shown under Kuwait Commercial Code (hereby referred to as Commercial Code), Law 68, 1980, Article 59, where the legislator wanted to protect the merchants, the commercial relationship, and the ethics among the merchants. It therefore states that it is forbidden for the trader to give his testimony the proper course if it is contrary to the truth. Otherwise, the other merchant may return to him the damage he has suffered.

Article 227 of the Commercial Code shows that the legislator also took into account the rights of others in good faith. Specific application to brokers can be seen in Article 312. This article is a great example of ethics is the profession of brokerage, as it is not permissible for a broker to act other than well-intentioned to work for the benefit of another contractor who has not brokered him.

Based on French law, Islamic principles and cultural understanding, the need for a contract to be founded on honour and integrity is a core principle in Kuwaiti law. Despite not being explicitly included for all parts of the contract's life, it is part of the 'essentials' of a contract and therefore is incorporated as part of the lifeblood of that contract. Having no overriding legal definition is not problematic: the concept is readily understood, not only in theory but also, importantly, in practice. The presence of bad faith is easy to detect even if the definition of good faith is not so easy to pin down. Using primarily

an objective, society-based approach, allows the principle of honour to be used as a societal value, rather than a personal moral code. Specific moral obligations in certain contractual domains reinforces the general requirement, rather than subtracting from it.

Honourable Dealing and Moral Obligation In English Law

Introduction

Civil law legal systems such as France and Kuwait expressly recognise the concept of moral obligations, good faith and fair/honourable dealing. Even common law countries such as the US and Canada have incorporated the principles, to a large extent. Moreover, International and EU law have also readily accepted the need for such fundamental underlying tenets.

However, in English law, there is no overriding principle of good faith. This, on the face of it, seems rather shocking. Parties, in theory, can contract freely, even if dishonourably and dishonestly. The courts and the government, in principle, do not interfere or impose restrictions. This is justified by the argument of contractual autonomy and commercial certainty. Yet, as Dorfman argues, "social expectations of fairness permeate far into legal and economic relations. Law, society and economy all share a part in regulating contractual fairness".[22] As a result, however, the English have implemented a ragbag of piecemeal solutions to specific problems, recognising certain relationships that need to be protected but allowing general contractual parties to do as they please. This seems morally dubious. Despite the fact that English common law does seem recently to be gradually inching towards a greater acceptance of the concept of good faith, the English law lacks a clear, coherent, and fair approach. This begs the question of what sort of society is the law trying to create and protect.

Morality and the Law – Are they two sides to one coin?

An important question when looking at whether contract law should stipulate the need for honourable dealing is whether all law is based on an accepted idea of morality, whether that is an intrinsic part of law, in order for it be called law. If a 'law' does not have this moral core it can only be a rule, or a regulation, not law.

22. Rosalee S Dorfman, 'The Regulation of Fairness and Duty of Good Faith in English Contract Law: A Relational Contract Theory Assessment', The New Jurist, 13 October 2015, 91

Historically, the proponents of this belief are generally called 'natural law' advocates, who believe that Natural law is determined by nature (based on God, creation, evolution, or random chance), creating a universally applicable legal system, that is based on natural rights and an inherent morality as recognised by all humans as part of intrinsic human nature. Although open to interpretation, it is generally accepted that Aristotle is one of the earliest proponents, with his Rhetoric arguing for a universal, common law, that is independent of specific covenants.[23] In this way, law has a moral, common base, no matter what is contracted. Without this moral core, it is not law, but simply a rule or a regulation. The train of advocates of this conceptual approach to law has passed through the centuries, arriving at John Finnis who is probably the most visible proponent today.[24]

The opposite view is that of legal positivism, which proposed the thesis that whether law exists or not, and the actual content of that law, are questions of fact, not merits and are not connected. The English jurist John Austin (1790–1859) wrote:

"The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[25]

Bentham[26] and, more recently, Hart and Raz[27] are famous philosophers who argue in favour of this approach. Contract law in England incorporates more of this jurisprudential philosophy aiming more to provide rules for commercial efficiency, rather than fundamental rights.

The 'Immorality' of English Contract Law

The basic principle that moral dealings and good faith do not form any basis of English contract is confirmed in many cases. In Interfoto Picture Library,[28] Bingham LI acknowledged that "English law has, characteristically,

23. John Finnis, Natural Law & Natural Rights, (2nd Ed., (1st Ed. 1980), OUP, 2011
24. Ibid
25. John Austin, The Province of Jurisprudence Determined, (Ed. W. Rumble, 1st pub. 1832), Cambridge University Press, 1995, 157
26. Xiaobo Zhai & Michael Quinn (Eds), Bentham's Theory of Law and Public Opinion, Cambridge University Press, 2014
27. H.L.A. Hart, (including Joseph Raz as contributor) The Concept of Law, (3rd Ed. Clarendon, 2012)
28. Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6, [1989] QB 433, see British and Irish Legal Information Institute, 'England and Wales Court of Appeal (Civil

committed itself to no such overriding principle" as that of good faith. In Timeload Ltd v British Telecommunications Plc,[29] Lord Bingham MR wrote that English law is characterised by "eschewing any broad principle of good faith in the field of contract". Even judges who have shown some inclination to embrace a concept of good faith, usually as an implied term, have had to acknowledge, albeit reluctantly, that it is not "a duty implied by law", see Leggatt J in Yam Seng Pte Ltd v International Trade Corp Ltd,[30] and therefore a very difficult assertion to justify. As Carter & Courtney argue in the Cambridge Law Journal,[31] the "analysis used to support implication on the basis of shared norms is flawed". As will be shown below, although there is a move in English towards the idea that honest and fair dealings should form an integral part of a contract, as an implied term, this is not the actual traditional basis of the law. With English law contract being largely based on precedent, rather than statute, it also means that it is very difficult to change. Each case is fact specific and it would be hard for the Supreme Court to completely reverse all the previous rulings, illustrated above, and 'create' a new good faith requirement for all contracts. The piecemeal approach for certain specified situations (employment contracts, consumer contracts etc) is a far easier solution. But this does not get to the heart of the problem.

Justification for the Lack of Good Faith

English law has a strong historical basis in the concept of autonomy. Two people, with legal capacity (namely of adult age, sound mind and free will) should be allowed to engage in any (legal) activity that they wish. It is not for the court to step in and dictate their actions. If a person wishes to sell his/her property at a gross undervalue, it is his/her right as it is his/her property. If you are the owner, this means that all rights vest in you, the legal owner, even

Decision) Decisions' <www.bailii.org/ew/cases/EWCA/Civ/1987/6.html> accessed 24th August 2020

29. Timeload Ltd v British Telecommunications Investors Compensation Scheme Ltd. v West Bromwich Building Society (1998) I WLR 896, 912 see Scribed Inc. <www.scribd.com/document/209294332/Timeload-Limited-v-British-Telecommunications-Plc>

30. Yam Seng PTE Limited v International Trade Corp Limited, [2013] EWHC 111 (QB). Leggatt J, as para 131, said that he had "no problem implying such a duty [of good faith] in any ordinary commercial contract based on the presumed intention of the parties", see British and Irish Legal Information Institute, 'England and Wales High Court (Queen's Bench Division) Decisions', <www.bailii.org/ew/cases/EWHC/QB/2013/111.html> accessed 24th August 2029.

31. J.W. Carter and Wayne Courtney (2016) 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?', The Cambridge Law Journal, 75 (3) 608

the right to sell it at the wrong price. Equally, a person may trust someone incorrectly. This will be a learning experience. But we all make mistakes, errors, and – as intelligent adults – it is our 'right' to make a mistake. The law is not there to look over our shoulders, at every step of our lives. Rather, as autonomous adults, we must take responsibility for our own actions, in order to be stronger and better people. This, therefore, is the argument of contractual autonomy.

This backs up the jurisprudential theorists who are proponents of free market and individualism. Raz writes that the purpose of the law is to "to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practise".[32] Indeed, even other areas of the law which have not traditional embraced individual free will, have moved that way, as seen in the recent acceptance of pre-nuptial agreements where Lord Philips found this argument convincing, stating that there must be a 'respect for individual autonomy' and that otherwise it was 'paternalistic and patronising'.[33] Charles J has endorsed this, claiming that in regards of pre-nuptials, there is now a 'new respect' for individual autonomy.[34] In this way, other areas of the law are moving more towards the English contractual basis of refusing to acknowledge moral principles as overriding implied terms.

The other justification for not having an explicit moral basis to English contract law is that of contractual certainty. Lord Ackner believed that implying any concept of good faith meant the court would have to engage with a discussion moral standards which is nebulous, unclear and highly subjective.[35]

Historical Context

One of the reasons for this lack of moral obligations in English contract law is that the history of Great Britain is based very much on a class system. There is a very strong tradition of 'gentleman's agreement' in the English aristocracy. A 'gentleman's agreement' is based 100% on honour – it is seen in the phrase «dictum meum pactum», namely 'my word is my bond'. It has

32. Joseph Raz, 'Promises in Morality and Law' (1982) 95 Harv. L. Rev. 916, 933

33. Radmacher v Granatino [2010] UKSC 42

34. V v V (Prenuptial Agreement) [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, para 36

35. Walford V Miles: HL 1992 [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174, [1992] ANZ Conv R 207

been reported to have been used as far back as 1500 when “”O kingis word shuld be o kingis bonde”,[36] and is even seen in a commercial context, as it is the motto of the London Stock Exchange, the centre of financial complex contracts, from back in 1801, where a deal was a deal, based on a handshake and a moral duty to fulfil a promise, not a written contract.

Because of this, the honesty and integrity of most people’s agreements (most gentlemen’s, that is) was never called into question. It was not necessary to imply a term of good faith, it simply was a given. Contracts, as such, were a different and less important area.

In contractual terms, this problem of ‘gentlemen’s agreements’ can be seen either as simply a gratuitous promise, hence no offer and acceptance and consideration. Or as a problem of no intention to create legal relations because gentlemen were not forming an agreement that was intended to have legal consequences.

The issue of gentleman’s agreements has, therefore, continued to permeate the field of honour in contract law, even though the social class system and the use of contracts in commercial now presents a very different picture, namely one that is no longer appropriate for laws based on old-fashioned notions of gentlemen’s agreements.

‘Immoral’ English Law: Is there any salvation?

The English contract law system has, however, not ignored morality altogether. As opposed to a wide-sweeping umbrella principle of good faith, English law has accepted the need for moral dealings in certain specific circumstances. These exceptions to the lack of good faith are primarily shown in contracts which reflect an imbalance in power between the two parties. The law tries to protect the weaker party, putting a duty on the stronger party to act in a principled and moral manner. This has been passed by statute in certain areas such as landlord-tenant and consumer protection. Certain other areas demand ‘absolute good faith’, such as insurance contracts. Even common law contract law accepts certain situations where honourable dealing is required. However, again, the problem here is that these are all effectively exceptions to the general principle of no good faith. In this way, the general implied term

36. Luke Taylor, ‘My Word is My Bond’, Lateral Alliances (Business Consultancy Blog), 6th November 2018, < www.lateral-alliances.co.uk/my-word-is-my-bond>, accessed: 28th May 2020

argument is undermined because there would be no need for these exceptions if there were an implied term of honourable dealing in all contracts. Yet it is this term that is needed if contract law in England and Wales is to be truly an 'honourable agreement'.

The Need for Moral Behaviour:

1. Utmost Good Faith

Certain contractual relationships in English law are, in fact, the exact opposite of the general position. The concept of good faith is already recognised in areas such as insurance law which recognises insurance contracts as being an exceptional group of 'the utmost good faith', or 'uberrimae fidei', originating from the case of Carter v Boehm.[37] This requirements of utmost good faith in can be seen in disclosures in shipping contracts under the Marine Insurance Act 1906: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".[38] The general duty of good faith is also seen in the fact there is a positive duty to disclose all material information, and not to make any material misrepresentations. However, these requirements of good faith are specific to the domain of insurance contracts and not applicable in general.

2. Express Term

Although moral duties are not implied terms of a contract in general, under the principle of contractual free will, it is obvious that parties are free to add a 'good faith' clause if they so wish. However, because of the initial reluctance to accept the principle, this means that the wording of any express clause must be totally clear and undisputed. There is no exact wording required and no specific formalities that need to be followed, but it must still be completely clear and obvious that the parties intended a duty of good faith, fairness and honour to apply. In the recent case of Fujitsu Services Ltd v IBM United Kingdom Ltd, the courts held that the term 'have regard to' various principles that could have covered honourable dealing was not sufficient to be interpreted as a requirement of honourable dealing: 'having regard' was not clear and unambiguous that those principles must be followed, simply that they must

37. Carter v Boehm ([1766] 3 Burr 1905.

38. UK Marine Insurance Act 1906 (17)

be considered.[39]

It also must be clear if the express term covers the whole contract or simply certain obligations within it. And what those obligations are and how they should be performed. The problem is that, as English law does not accept an overriding principle of good faith, there is no clear, legal definition of good faith and therefore even an express clause that covers good faith (which is allowed) will be very difficult to uphold and apply correctly as the court will have little authority of which to base their contractual interpretation of the term 'good faith'. Because of this, any express clause is likely to be interpreted very narrowly.

This can be seen in cases such as Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust where the contract clause stated:

"The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract."[40]

The court held that this did not impose a duty to act honourably for the whole of the contract but just in light of the actions required in the second half of the clause. This is very narrow. However, arguably even worse, the Court of Appeal also held that where there is a discretionary duty within the contract, it is not subject to an implied term that this power must not be exercised in "an arbitrary, capricious or irrational manner".[41] Although other cases may previously have held differently, that was – in the view of Lord Justice Jackson – because in the other contracts such a clause was 'intrinsic' to the nature of the contract. As this was, in his opinion, not the case here, as the contract made sense without the need for banning arbitrary and capriciousness, therefore it did not need to be implied in.

Similarly, in another case in 2013, TSG Building Services plc v South Anglia Housing Ltd, a clause in the contract stated that the parties must work together in the 'spirit of trust, fairness and mutual co-operation' and also

39. Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752
40. Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 2020
41. Ibid, para 93

required the parties to act 'reasonably'.[42] This would seem an excellent basis for any contractual relationship. However, again, the obligations under this clause were interpreted in a very restrictive manner, being held not to extend, for instance, to a party who exercised an unqualified right in the agreement to terminate the contract.

3. Relationships with an Imbalance of Power

Over the past 50 years or so, English law has increasingly accepted that, in contract law, certain parties are in an inherently weaker position vis-à-vis the other part and therefore need protection. As such, the UK Parliament has passed a growing amount of legislation to cover specific contractual relationships to impose a duty of fair play and moral dealings to prevent the stronger party taking advantage of their inherently more advantageous position. This is also echoed in EU law. Equally, other contracts need the element of trust to be emphasised officially, because of the nature of the relationship, and this has been recognised in common law.

In Employment Law, it is now recognised that there is an implied covenant of good faith and fair dealing. This actually goes both ways. In English law, it is usually expressed as "the duty to maintain mutual trust and confidence". The employer's duty towards their employee requires them to treat that employee fairly. The employer must honour the terms of the contract and not breach any understanding that formed part of the agreement, even if not the actual contract. 'Mutual trust and confidence' implies a duty on the part of an employer not, "without reasonable and proper cause", to "conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties".[43] Although 'mutual' means a two-way process, in practice the element of moral obligations is usually imposed upon the employer because it is the employee who often relies on it for a claim of constructive dismissal and, also, in the case of a breach of contract, it is the employer who is more likely to be able to rely on an express term because it is employers who typically draft and are responsible for the actual contents of the employment contract. As such, the implied term is largely there to assist the employee. However, it has been used in the converse situation too, when an employee has acted in a way deemed to breach the 'mutual

42. TSG Building Services Plc v South Anglia Housing Limited [2013] EWHC 1151 (TCC) [42]

43. Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84, EAT.

trust' obligation. A further moral obligation which is implied specifically into employment contracts is the duty of fidelity. This requires employees to act in the best interests of their employer or, at least, not act against the employer's interests.

Similarly, contracts that count as consumer contracts also include a sense of moral obligation, to encourage or force businesses to deal ethically with its customers and not exploit their position of greater power. The UK Consumer Rights Act 2015, Section 62 (4) states that "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer". Similar instances of Parliamentary intervention to protect consumers from immoral or unconscionable dealings, with an emphasis explicitly on good faith or extortionate bargaining positions, can be seen in the UK Unfair Consumer Contract Regulations 1999, the UK Consumer Credit Act 1974, the UK Consumer Protection from Unfair Trading Regulations 2008 and more. Legislation such as these explicitly recognises the importance of good faith and links it directly to the need to help correct the imbalance of power between business and consumers.

4. General Contract Law Statutes

As well as specific areas of law that have incorporated the concept of honour and moral duty, Parliament has also passed certain specific laws to allow a certain degree of good faith to be implied into specific contracts.

The main statute here is the UK Unfair Contract Terms Act 1977, Article 2(1) and 2(2) (UCTA). As opposed to consumer law, the UCTA applies only to liability arising in the course of a business, as such the duty owed towards other businesses. The general principle underlying the act is to prevent businesses from unfairly excluding liability. As such, a company cannot ever exclude liability for death or personal injury caused by negligence. Other injury caused by negligence can only be excluded if it satisfies the test of 'reasonableness'. This is based on the necessity for fairness and reasonableness, which is akin to moral duty and honourable dealing, if not identical. Equally, attempts to limit liability with exemption clauses for breach of strict contractual obligations will be void, which applies in particular – once again – to consumers as it would be unfair of businesses to try and impose an exemption clause. However, the concept of 'reasonableness' is not

precise and will depend on the contractual relationship.

The UCTA therefore, does not provide comprehensive protection against all unfair terms. This is a rather piecemeal approach. The result is that because it only provides specific instances of unfair terms, as opposed to a general clause, certain things such as penalty clauses, for instance, are outside the act's remit.

5. Honour and Morality under Common Law

Despite there being no overriding principle of good faith in English contract law, which is very much a common law area of law, rather than a codified one, there are certain areas where certain standards of behaviour are expected and imposed.

Misrepresentation/Duress/Innominate Terms/Specific performance/Estoppel/ Penalty Clauses

Although two adults of sane mind and free will can – in theory - contract in any manner they see fit, there are various areas of common law where principles of fairness and good behaviour have been incorporated.

A party to a contract cannot misrepresent the item or the services to be provided. A misrepresentation is defined as a statement of material fact that is false or misleading and induces the other party to enter the contract. As such, a person who misleads another person into signing a contract, even unwittingly, runs the risk that the contract will be voided or damages will be owed.

The English courts' reluctance to accept exclusion clauses, and their narrow interpretation of them, also show an area of the law where the idea of moral dealings in recognised. The UCTA obviously took this one step further, in codifying it, but the common law approach has also remained very restrictive, to prevent abuse of exemption and exclusion clauses by one party, nearly always the stronger party.

The concept of duress is obviously also a principle of contract law that incorporated behavioural standards. Indeed, even the argument of autonomy falls down. Two parties are not 'free will' agents if one is under pressure or being extorted or coerced. The contract is void. Duress, therefore, is a vitiating factor precisely because the will was not free but forced.

The doctrine of promissory estoppel in English contract law also reveals a

'fairness' principle, based on equity and conscience. Estoppel refuses to allow a party to insist on his strict legal rights if that party had previously promised the other not to do so and the other party had relied on that person's promise to his own detriment. In this manner, the courts can enforce promises which otherwise are not enforceable for lack of legal intention or consideration. Holding a person to their word obviously reflects morality and honour, with key criterion being that it has to be inequitable to do otherwise, as shown in Société Italo-Belge v Palm.[44]

The introduction of the category of innominate terms in a contract, as opposed to simple conditions and warranties, was also to give the courts more flexibility and allow them greater power to remedy injustices. This was introduced in Hong Kong Fir Shipping v Kawasaki Kisen Kaisha.[45] The historical reason behind the introduction of innominate terms was to counter seemingly unfair outcomes in cases such as Arcos v Ranaason.[46] In this case, there was contract for the sale of wooden staves, used for making barrels. The contract prescribed that the staves has to be 1/2 inch in thickness. Some of the staves delivered were very slightly wider. However, they were fine in terms of quality and were still perfectly serviceable for making barrels, their purpose. The Court of Appeal held that the buyer was entitled to reject the goods as they breached the contract. However, the rejection was only because the price of wood had fallen, and it was now possible to buy them cheaper from a different source. Changing the law from stipulating that terms must be qualified at the start as conditions (voidable contracts) and warranties (non-voidable but damages owed) to innominate terms where the consequence of the breach is used to determine whether it is a condition, or a warranty therefore allows the court to not endorse unethical behaviour such as this. Only if the breach has caused a substantial loss of the whole benefit of the contract to the innocent party can a contract now be repudiated. To claim anything else would be an abuse of position by the innocent party.

Further examples of moral views underpinning English contract law can be seen in the courts insistence than specific performance of a contract, for instance, cannot be ordered as a remedy where it would cause unfairness to the performing party.

44. Société Italo-Belge v Palm Oils The Post Chaser [1982] 1 All ER 19
45. Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26, Court of Appeal
46. Arcos v Ranaason [1933] AC 470 House of Lords

Penalty clauses also are not allowed under English contract law. Liquidated damages clauses, on the other hand, are. Again, the principle is that compensation is owed for a contractual breach to put the parties in the position they would have been in if the contract has been performed as agreed. Quantifying that damage in advance adds clarity and certainty. But to insist on extra payment, as a 'punishment', especially if that payment is out of all proportion to the loss suffered, is not moral. Distinguishing between a valid liquidated damages clause and an invalid penalty clause is a question of degree but it is based on good faith and honour: effectively, it means that the distinction rests on whether the attempt to fix damages was a 'genuine', honest attempt to quantify the potential loss or whether it was a way for one party to put unfair pressure on the other and profit from their breach. This is based on the House of Lords in the Dunlop Pneumatic case,[47] where Lord Dunedin held that a penalty clause was one where:

"if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach".

Unconscionable Dealing

Following on from the quote above, a principle very closely related to that of good faith is that of unconscionability. Indeed, this is more based on the importance of moral obligations than good faith, as it is linked to person's very conscience, their knowledge of right and wrong. Unconscionability is an equitable concept, seen in many areas of the law, which may prove to be the way forward in English contract law, where good faith has floundered.

However, yet again, it is not proving easy. The principle of unconscionable bargaining has been readily accepted in other English common law countries. If there is a gross imbalance of power in the contractual positions and this is abused, then the courts will intervene. According to Atiyah, the doctrine of unconscionability "describe[s] situations in which it is believed that, although no duress or fraud took place, one contracting party took advantage of or exploited the other".[48] It is based very much in the court of Equity and, as such, can be used in equity to void or alter a contract.

47. Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] UKHL 1

48. P. S. Atiyah, 'Unfair Contracts' in Stephen A. Smith (eds), Atiyah's Introduction to the Law of Contract (6th edn, Clarendon Press, Oxford 2009), 300.

In Australia, for instance, in Commercial Bank of Australia v Amadio (1983),[49] Mason J was clear that relief can be granted on the basis on unconscionability if one party "makes an unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or in placed in some special situation of disadvantage". Equally, the US incorporates the concept very clearly in the American Uniform Commercial Code (UCC) Article 2-302(1) which uses the term 'unconscionable' four times in one clause, to ram home the point. As Sir Anthony Mason says: 'Equitable doctrines based on the concept of unconscionable conduct have played a prominent part in recent years in shaping modern contract law. The concept has made an important contribution towards breaking down the more rigid rules of the common law.'[50]

However, despite having spawned the idea in other jurisdictions, the principle has not been truly accepted in English law. Sir Nicolas Browne-Wilkinson stated that "[unconscionable conduct] is not by itself sufficient to found liability".[51] This again confirms the fact that good faith as a concept is not a fundamental English contractual law precept, and unconscionability cannot be used as a substitute.

However, it should be noted that, little by little, the concept is finding some acceptance, even in English law. It first reared its head over a century ago in Fry v Lane,[52] where it was held that "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of Equity will set aside the transaction." However, the principle then fell into disuse, as shown in 1974, when Lord Diplock stated that "Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally".[53]

However, recently a number of cases have led the way in reviving the old equitable principle as applied to contract law. In Cresswell v Potter,[54] the

49. Commercial Bank of Australia v Amadio (1983), 151 CLR 447
50. A Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27(1) Anglo-American Law Review, 1, 16.
51. Sir Nicolas Wilkinson, Presidential Address of the President of the Holdsworth Club (Holdsworth Club, University of Birmingham, 1991), 7
52. Fry v Lane (1888) 40 Ch D 312
53. Macaulay v Schroeder Publishing Co Ltd [1974] 1 W.L.R. 1308 (H.L.), 1315-1316
54. Cresswell v Potter [1978] 1 WLR 255

principle in Fry v Lane was extended. A wife left her husband and, without realising all financial implications, agreed to exchange her share in the family home for being released from her mortgage liability. The problem was that she had thereby swapped a valuable asset against a far less valuable asset. Although the principles of contractual freedom and personal autonomy would approve of this, Megarry J held that 'a member of the lower income group less highly educated' was equivalent to the requirements of 'poor and ignorant'. Equally, in Boustany v Piggott,[55] as regards an unconscionable contract, the Board held that 'It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience'. As such, the Privy Council set aside a lease renewal, which had been on very unfavourable terms, based on the fact that the claimant was "somewhat slow" and under pressure while his usual adviser was away.

Hanbury and Martin's Modern Equity thereby lay out the rules of where a moral obligation to behave and contract in an honourable fashion will be imposed as:

"a serious disadvantage on the part of the donor; an undervalue in the gift or transaction, and; the need for independent advice".[56]

It can be seen that this definition includes both substantive and procedural unfairness as part of the requirements.

An Alternative Way Forward

Rather than following the broader concept of unconscionability, an alternative method via which moral obligations are seemingly being accepted, slowly, into English common law is via the idea of 'relationship' transactions in commercial law.

This was shown recently, in a case that has received an extremely large amount of analysis and comment, namely Yam Seng v Int. Trade Corp.[57] The case concerned a distribution agreement for Manchester United branded

55. Boustany v Piggott [1995] 69 P and CR 298

56. Jamie Glister and James Lee, Hanbury & Martin: Modern Equity (18th ed., Sweet & Maxwell 2008), para 26-014.

57. Yam Seng v Int. Trade Corp n49

toiletries whereby ITC had granted specific distribution rights to Yam Seng, principally in Asia. After the relationship broke down, Yam Seng terminated the contract and claimed breach of contract and misrepresentation due, in part, to a breach of an implied term of good faith as ITC had provided false information and also allowing third parties to also sell in the area designated for Yam Seng, and at a lower price.

Leggatt J was confident that English law's traditional reluctance to accept good faith did not prevent him implying a term of honesty:

"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."[58]

As he said, an implied term is one that is so obvious is goes without saying, and surely the assumption of honesty would satisfy that definition in an agreement between two commercial parties. This is a welcome acceptance of some moral core standard at the heart of English contract law.

However, Leggatt J was very much focused on the 'relational' aspect of the contract. This can be defined as a "contract that involves not merely an exchange, but also a relationship between the contracting parties".[59] This ties in with the traditional concept of honour between two contracting parties. However, it begs a question as to why honour should not apply to anonymous, electronic contracts, for instance.

The question that remains is whether the interpretation in Yam Seng will be followed and, if so, who will count as 'relational' parties. Although it is still a little too early to say, the initial caselaw suggests not only that English courts may be more willing to accept honesty as an implied term but that the relational scope will also be extended.[60]

In conclusion, the traditional, historical basis of English contract law is the view of Chitty, namely that "the parties were to be the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it".[61] It is not the job of the law to impose

58. Ibid

59. MA Eisenberg, 'Relational Contracts' in Good Faith and Fault in Contract Law, OUP, 1995

60. John Flint, 'Shifting Attitudes to the Duty of Good Faith', The Law Society Gazette, 22nd October 2019

61. Joseph Chitty, Chitty on Contracts: General Principles, Volume 1 (30th edn, Sweet and Maxwell 2008) 21

standards, especially when those are unclear and are based on a paternalistic approach of assuming that the state knows best. However, pressure from EU and other jurisdictions has seen a move towards more acceptance of some element of a doctrine that enforces moral norms.

Good faith, however, is problematic. The legal principle of unconscionability would, if used slightly more broadly, allow an equitable approach to imposing a certain degree of morality into English contract law. This might be more keeping with English legal traditions and culture than the rather more civil jurisdiction principle of good faith. However, it should be noted that there are many areas where moral behaviour is expected and demanded, despite no actual implied term of good faith being incorporated into the contract. Equally, Justice Leggatt's acceptance of morality as a foundation for contract law in Yam Seng is to be welcomed: as he says, "[a]s a matter of construction it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance"[62].

Comparison between English Law and Kuwaiti Civil Law

From the initial presentation above, it can therefore be seen that the principle of moral obligation within the contractual setting has a completely different basis in Kuwaiti law as opposed to English law. This difference is not necessarily one of a codified system as against a non-codified: after all, there is no intrinsic reason for good faith to be in one and not the other. Rather it is a reflection of the legal system as a whole, its traditions, its history, its jurisprudential principles and its practical applications. This chapter, therefore, will try and look at the differences in more detail and analyse the reasons for these differences and how they affect the law in practice.

Morality, Honourable Dealing, Good Faith and Conscionability

Linguistic Gymnastics

One of the first points to make is that there are many different descriptions of what is essentially the same principle, the duty to act correctly. This applies to both Kuwait and England. The argument, for instance, as to whether English law accepts good faith as an implied term or not can be bogged down

62. Yam Seng v Int. Trade Corp, n49

in the mire by historical English antipathy to 'good faith' as a common law principle. And, yet, the idea of honourable dealing or, indeed, conscionability can be more readily accepted. As such, English law is rather hampered by the decision of which actual term to use.

Kuwait has a more embracing acceptance of moral obligations in Civil Law, one that is less tied to one particular term. As previously shown, the Kuwait Civil Code Article 193(2) states that when a contract is unclear, the courts must focus on the 'totality of its tenor' and 'be guided by the nature of dealing and current customs and the good faith and honourable dealing which must be satisfied by the parties'. The Arabic words 'hosn alniya' and 'sharaf altaamol'[63] are translated as 'good faith' and 'honourable dealing'. This is immediately broader than 'good faith' alone. Indeed, the Kuwaiti principle in Article 193(2) is deliberately and expressly attempting to be as broad as possible and not limit itself to precise legal terms. To interpret an ambiguous contract, the judge must look at in its 'totality', which includes custom, dealing practice, the moral basis of agreements, a person's honour. Even custom and trading norms include moral obligations because that is part of custom and how trade has always been concluded throughout history. As such, the idea of honour is included in s.193(2) in all four of the terms that are in the English translation. This is similar to the statement of Domat[64], in the 17th century, and part of the foundation of French law that was the basis of the legal education of Al Sanhuri, when Domat referred to the natural law of "good faith, fidelity, sincerity", thereby giving the concept a very broad base. Articles 195 and 197 add to this force, again incorporating the broadest interpretation possible of the moral nature of contractual duties. Article 195 says that all contracts must be viewed in terms of generally accepted custom, justice, the specific circumstances and nature of the dealing, and the 'requirements of good faith and honourable dealing'. Article 197 adds the requirement of honour for contractual performance too. Thus, the Kuwaiti Code deliberately encompasses more than that found in those who attempt to give a strict definition to 'good faith' alone.

63. The Arabic words are حسن النية (good faith) and شرف التعامل (honourable dealing).
64. J. Domat, Traité des Lois, 1689, (Ed J. Remy, Paris 1835, Ch. XI, De la Nature et de L'Esprit des Lois, et de Leurs Différentes Espèces, n°1), cited in B. Jaluot, op. cit. n°125, 38

On the other hand, the refusal to allow good faith in English law seems rooted in a perverse refusal to take the term seriously, shying away from giving it a large moral scope, preferring instead to almost downplay the idea as a non-legal, mere social convention. In the Interfoto case, Lord Justice Bingham described good faith as being best understood by everyday colloquialisms such as "playing fair", "coming clean" or "putting one's cards face upwards on the table".[65] This approach of 'it's just not cricket' rather backs up the argument made earlier that honour is not readily accepted in English contract law because it was simply not needed as an explicit term in gentlemen's agreements.

It is for this reason that it has been suggested in the chapter above that the idea of unconscionability may be more fitting as a legal principle in English law, rather than good faith. The equitable root is particularly appropriate, and in terms of comparative law, unconscionability overlaps better with Kuwaiti's broad legal principles of morality and honourable dealing.

As demonstrated earlier in this article, in Kuwaiti law the most obvious direct comparison with the English interpretation of unconscionability can be seen in the Kuwait Civil Code Article 159. The English law concept is based on not allowing the strong contractual party to abuse the vulnerability of the weaker party. There is a very strong sense of 'fair play' in this principle.[66] However, as detailed before, the concept has been easily incorporated into US and Australian law, to name but two, but only to a lesser extent in English law. Protection from 'undue influence' can be seen in various areas of the English law, such as mortgage lending,[67] but unconscionability, as a reason to set aside a contract, is still rare.

However, Kuwaiti law has a similar but far more explicit emphasis on inequality of bargaining power. Article 159 emphasises that a contract can be voided where one party exploits his position of moral authority over the other, taking advantage of weakness. The Explanatory Memorandum on Article 159 states that "exploitation" means any "means of controlling, and exploiting a weakness in, another person which vitiates consent". The imbalance of power is therefore integral to the idea of honourable dealing – it is never acceptable for the stronger party to abuse the weaker party.

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65. Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd, n47
66. Portman Building Society v Dusangh [2000] 2 All ER (Comm) 221
67. Royal Bank of Scotland v Etridge (AP) [2001]

However, as with common law unconscionability, an imbalance of power is not enough in itself or else the majority of contracts would be voidable. It is obvious that any person who buys a product from a multinational retailer, leases a flat from a rich landlord or is employed as a barrister by a large café chain will be automatically in a weaker position. Indeed, this is the reason that English law has taken a piecemeal approach in terms of statutory law, in order to offer protection. However, both unconscionability and Article 159 are not based purely on this imbalance of power but on the abuse or exploitation of that position. It is this which is dishonourable, not the actual imbalance itself.

Where to set the bar for what counts as exploitation, though, is not clear. Mrs. Justice Rose highlighted this in 2016 in England,[68] when she wrote that there must be (1) impropriety (something which 'shocks the conscience' of the court), (2) an unfair advantage taken of a party in a seriously disadvantaged position, (3) morally culpable behaviour and (4) a result which is truly oppressive, not just harsh or unfortunate. This sets the bar very high, thus underlining the point that English law is still very reluctant to accept morality and honour as a requirement for a valid contract and "have rejected such generalisations" in order to protect contractual certainty.[69]

In Kuwait, the principle of Article 159 is readily accepted to prevent exploitation. However, in practice it is often used inappropriately. There has to be an imbalance between the parties, outside of normal relations. The Kuwaiti Supreme Court in 2000,[70] for instance, held that a wife had not exploited her husband's 'great love' for her in encouraging him to transfer a house to her. In a life-encouraging way, the Court of Cassation held that any normal married relationship involves love between the two parties, this is not an irrational weakness and does not create an imbalance. In this way, Kuwaiti law too does not readily accept arguments of exploitation as a reason to overrule contractual autonomy.

Kuwaiti Law: A More Coherent Approach

Because the law in Kuwait readily adopts the idea of good faith as integral to all contracts, as an implied term, that covers all aspects of a contract's life, accepted over history, there is obviously less need in Kuwait for the

68. The Libyan Investment Authority v Goldman Sachs International [2016] EWHC 2530 (Ch)
69. Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514 at 519. Lord Hoffmann
70. Kuwait Supreme Court Civil No 225 Year 2000

piecemeal approach that England has adopted.

In insurance law, for instance, Kuwaiti law has no explicit requirement of utmost good faith. The Kuwait Law of Companies and Insurance Agencies, No. 24, 1961 makes no mention of good faith. However, it was announced in January 2020 that a new insurance law is due to pass soon, and it remains to be seen if utmost good faith, in disclosure for instance, will be incorporated there. Equally, it should be noted that the Civil Code, in its more general form, does refer to insurance, as per Articles 791 and Article 792. Civil Code Article 791 states that "1. A contract of insurance capable of revoked for the benefit of the insured, if silent insured for an order or made a false statement, this would have changed the subject of danger, or had less importance in the eyes of the believer". If the truth becomes known, before the danger, or after verification, there are various options regarding annulment of contract, etc. In this way, the insured has the right to revoke the insurance contract if it did not affect the good or bad faith believer.

In this way, there is an element of moral obligation, the duty to tell the truth, incorporated into the contract but not in the form of 'utmost good faith' as in insurance law in England. This, however, is completely understandable for a system which has moral dealings as a general principle of law and therefore does not need to specify it as an added requirement in exceptional circumstances. This also ties in with French law, the root of most of Kuwaiti law, which also does not accept the need for such a principle of utmost good faith because the general duty is already there, is overriding and therefore sufficient.

However, Kuwait law does mention general good faith at various points in maritime insurance law, for instance, in the Commercial Maritime Law, n39 (285) Article 285 where it states that "the entire insurance premium is a right from the insured in good faith". Similar clauses can be found in Articles 279 and 105.[71] Although this is not couched in terms of 'utmost' good faith, it is important that the duty has been underlined.

In this way, it is similar again to France rather than England: there is no duty of utmost good faith as a standalone duty, but the general duty is traditionally considered to be a core element in insurance, more so arguably than in general contracts, and hence is almost elevated to that of 'utmost good faith', simply

71. Ibid, (279), (105)

by interpretation rather than law. This is backed up by the French Supreme Court which stated that "the duty of loyalty, which is the cornerstone of all contracts, is even more essential for insurance contracts, both pre-contractually and post-contractually, when the coverage is triggered".[72] Insurance contracts are therefore a subset of all contracts, based on honour as all contracts are, but with an 'even more essential' need for moral obligations to form part. The acceptance of utmost good faith for insurance contracts in English law comes back to the argument of equity versus common law: the one area where English law accepts the need for good faith, without any question, is in fiduciary duties. This will cover certain contractual relationship but also apply to many other areas of law (trusteeship, corporate directorships etc). However, although highly commercial, the fundamental idea of insurance is close to that of a fiduciary relationship. Indeed, some argue that there is a direct fiduciary relationship between the two parties, although scholars such as Barker et al disagree.[73] Maybe a better position is to argue that "an insurance contract also gives rise to a quasi-fiduciary relationship between the parties".[74] Either way, the special, trust- based nature of an insurance contract, where one party depends on the other to set him right if misfortune happens, demands that it be treated differently in a system that does not recognise honour in general, such as the English system.

This lack of precise inclusion of honour and good faith in Kuwaiti law, again due to there being no explicit need, is also seen in employment law, consumer law and most other areas. Whereas England has had to add piecemeal additions, to fill the gap, Kuwait does not have the same need because the overarching duty to contract morally and honourably is already there. In this way, the important area then to consider is how moral obligations are included in contractual dealings in Kuwait, in the different stages of a contract's life, and whether this is replicated in English law via different methods or whether the lack of a requirement of honour has any effect of contractual efficacy, or on society as a whole.

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72. P. Sargos,' L'Obligation De Loyauté De L'assureur Et De L'assuré', (1997) 4 RGDA, 968;

Assunta Di Lorenzo (Ed.), The Duty of Utmost Good Faith IBA Insurance Committee Substantive Project, 2014

73. William T. Barker et al, 'Is an Insurer a Fiduciary to Its Insureds?', (1989) 25/1 Tort Insurance Law Journal

74. Peoples v Utd. Serv's Auto. Ass'n 2019 WL No 96931-1, 6336407

However, it is interesting to see that despite the lack of explicit references to honour and morality in the most sector-specific areas of the law in Kuwait, there are a plethora of clauses that cover it in general Civil law, in addition to the main articles previously mentioned. As shown in chapter 1, the need for parties to be in good faith in order to have their full range of contractual rights is shown in Articles 189, 213, 266 and more. Furthermore, the focus on differentiating between the well-intentioned person and the ill-intentioned person is critical in Kuwaiti law and also explicitly referred to. Article 267 specifically lays down different rules of restitution to be applied dependent on the intention of the party. Well-intentioned is defined as not knowing the fault, or "not able to know about it, if he had taken care of what the circumstances required of the ordinary person", as per Article 213. Kuwait's demand for honour and good intention as part of the key components in Civil law therefore overlap both with what in English law would be generally considered to be more tortious principles (the need to act as the reasonable man) and principles of criminal law: the need to look at good or bad intention is more akin to mens rea than normal common law rules of Civil law.

Honour and Moral Obligations Throughout the Term of a Contract

Kuwait not only acknowledges the need for honourable dealing and good faith as an essential part of the contract in general but, if using a broadbrush approach, it is also required at each specific stage of the contract's life. This obviously contrasts with the English law position where the principle is not accepted in general and therefore, obviously, cannot also be imposed at stages.

As detailed in chapter 1, Kuwaiti law requires good faith in various areas of a contract's life. However, it should be noted that it is not a specific element in the pre-contractual phase, during negotiation. This may be because the contract has not actually come into existence at this point and other, more general requirements of honour and good faith are sufficient without needing it to be set out as a standalone. Interestingly, this was also the case in the French Civil Code but this was changed very recently in the reformed French Civil Code 2016 Article 1104 which now stipulates that contracts must be 'negotiated, formed and performed in good faith'', as opposed to the original Code Napoléon 1804, which only required the duty in the performance phase. This extension of scope of good faith and morality to the pre-contractual

stage was a very important element in the French reforms, showing the move internationally, as also backed up by UNIDROIT rules, towards a far more expansive approach to the need for good faith.

However, as has been noted, Kuwait Civil Code Article 152 does incorporate conscionability into the pre-contractual phase, in a similar way to the English law's rules on misrepresentation. If one party provides misleading information about the contract and its circumstances, or fails to mention something material, the contract is voidable, because there has been a violation of an obligation of honesty or openness. Kuwaiti law's specific recognition of silence as a form of misrepresentation runs counter to that of England which is based more on the premise of 'caveat emptor' (see Keates v Cadogan).[75] In this way, the English approach is more based to protect the trade certainty, putting the onus on each arty to take their own precautions, whereas Kuwaiti law refuses to allow a party to deliberately fail to inform the other party of a key fact, and then claim the benefit.

Unlike English law, Kuwaiti law also emphasises the honesty of the party in the categories of misrepresentation: if they innocently misrepresent the contract, and a reasonable personable would not have thought differently, they are not liable under Article 152, even if the contract was, in fact, wrongly portrayed. This contrasts with the English law under which misrepresentation can void a contract whether it is innocent, negligent or fraudulent. The English emphasis is on the contractual party who has been deceived – it does not care the intention behind the deceit, only making a distinction between the three categories in terms of the remedy available. Kuwaiti law, on the other hand, will not hold the 'deceiver' liable if he had no way of knowing about the deceit. In this way, the loss is attributed in different ways in the two legal systems.

It remains to be seen whether any reforms in the Kuwaiti Code will follow this lead by the French law or whether the flexible approach of interpretation by Kuwaiti law in general, and the ready acceptance of the need for good honour, will be sufficient. However, it obviously contrasts quite dramatically with the ongoing English reluctance.

However, the need for honourable dealing has been very clearly shown in Kuwaiti law during the performance of a contract, as seen in the Civil Code,

75. Keates v Earl of Cadogan (1851) 20 LJCP 7

as analysed above. The sweeping requirement under Article 197 ensures that the contract is performed in line with the terms of the contract and so that it complies with the need for good faith and honourable dealing. This is based very much on the law's French roots but also on the cultural and traditional understandings in Kuwaiti social history and under Shari'a law. Islamic values of honesty, fairness, truthfulness, morality and honour are recognised in the Arabic term, Huson Alniyah, and it is this which gives the cultural context to contractual duties in Kuwait. It should be remembered that, as a trading country, oral agreements were very much the norm and therefore honour and fairness needed to be implied to prevent abuse and exploitation. Social pressure would force traders to follow these rules.

Similarly, honour and morality as requirements of a valid contract in Kuwaiti law when considering the termination of that contract are also seen. It is interesting to note that the 2016 French reforms did not specifically include the need for good faith in the termination phase, extending it only to the negotiation and formation phase. However, it is not disputed that, in France, "the court can refuse to order termination where the remedy is sought in bad faith"[76] or is claimed in a way that "can be characterised as disloyal speculation".[77] Similar examples have been shown in Kuwaiti law.

However, the English approach is different. Without the implied term of good faith in any part of the contract's life, the caselaw fluctuates, without a clear linear underlying principle. Unlike the Kuwaiti Code, which does not cover negotiation and formation, English law's principle of misrepresentation as potentially voiding a contract applies to the pre-contract stage. Deliberately, negligently or innocently misleading someone is not acceptable under English law. However, the intention behind the contract is broadly irrelevant. Equally, the need to perform in good faith is not implied. One reason may be the inquisitorial nature of Civil law as opposed to the adversarial nature of common law. Indeed, Lord Ackner's famous quote, claiming that a proposed implied term to negotiate in good faith would be "inherently repugnant to the adversarial position of the parties" might back that up.[78]

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76. Solène Rowan, 'The New French Law of Contract', 2017, International & Comparative Law Quarterly, 7

77. Y v Y, Civ (3) 29 April 1987 RTD civ 1987.536 note J Mestre; Civ (3) 3 June 1992, GP 1992.II.656 note J-P Barbier

78. Walford V Miles, n54

It would be interesting to see if litigation figures for contractual breaches reflected this difference and, if so, in what way but official figures are not easy to access and are not necessarily broken down by area.

Commercial Law and 'Relational' Agreements

Given the move in English law following the highly important Yam Seng case, it is interesting to compare the situation in commercial law. As shown in chapter 1, the Kuwaiti code readily and explicitly accepts the need for good faith and honourable dealing in commercial law. Kuwait Commercial Code Article 59 refers to the importance of truth, good intention, good behaviour and so forth, between merchants. It is obvious for a trading country that two parties must trade in good faith, based on trust and cooperation. A normal merchant relationship is exactly the sort of relationship that Leggatt J was referring to when he decided, controversially, to include honesty as an implied term into any contract where two parties were directly dealing with each other. The business importance of this is also recognised when the court, a year later, stated that to do otherwise would 'strike at the heart of the trust which is vital to any long-term commercial relationship'.[79]

However, with the growth of electronic and online contracts it does not necessarily make sense for any country to make a distinction. Surely there is no reason why an online sales company is 'allowed' to be immoral but a company with whom one deals face to face is not?

Conclusion

The position of morality and honourable dealing in the Kuwaiti Civil Code and as regards contracts in particular, as opposed to that in English law, revolves around the question of morality in society in general. If society's morals are based strongly on religion, as historically most are, then it is obvious that the need to respect morality is based on the religious authority. Historically, a person will not breach the morals laid down by religious leaders because they fear the consequences: the threat of hell for sinners is an age-old tool to instil good behaviour.

However, as morality was passed through to the Civil laws, the threat is not the same. There is no fear of the displeasure of the deity if one breaches

79. Bristol Groundschool Limited v Intelligent Data Capture Limited [2014] EWHC 2145 (Ch)

'honourable dealing' in Article 195, say. Judgement day and eternal damnation are hardly the same as having to pay damages. In this way, the power of morality in the Civil Code has been lessened. It sets the bar lower because it stipulates what the penalty is, thereby equating morality with money. People, therefore, can quantify in monetary terms the importance of the morality. And, effectively, are allowed to 'buy themselves out' of their moral commitment. As a result, it could be argued that society in Kuwait has less respect for the moral component of the contract, thereby diminishing the moral component of society as a whole.

This compares with the alternative approach taken in English law whereby good conscience and honour are not implied into a contract. Whether this is because, historically, the honour of a gentleman was traditionally assumed, and therefore no implied term was needed because that would impugn the status of the gentleman, or because – the reverse – that gentlemen did not need to engage in contracts, dealing instead on their word, and therefore contracts were left for the mercantile classes who were assumed not to work on honourable dealing rules but on the need for commercial certainty, it is not sure. However, the result was that good faith did not figure in English law and yet both the legal system and moral system of society was strong and effective. As the legal system is now moving, as shown above, towards more acceptance of moral obligations in contractual dealings, in line with other common law countries and international law, it will be interesting to see if, in fact, this has the opposite effect to that desired and legal dealings actually become less, not more, honourable.

What does seem coherent between the two systems, however, is that 'good faith' as a term is divisive. It is obvious that terms such as this have to be interpreted, there is no binding definition. Good faith, in common law, has been described as 'an intangible and abstract quality with no technical meaning'.80 However, the scope of these abstract ideas underlying the term do seem to be more widespread than previously thought. Kuwaiti Civil law uses 'good faith' from French law but has different articles and judicial interpretations that include honour, truth, customary dealing, good will, honesty, openness, fairness, integrity and many more. English law has an aversion to the term 'good faith' but seemingly is more than happy to incorporate the requirement

80. Henry Campbell Black, Black's Law Dictionary, (6th Ed), West, St. Paul Minnesota, 1990, 693

in specific areas, in a more piecemeal approach, and to deny abuse of position via a wider concept of conscionability. The move to accept honourable dealing is more relational contracts also mirrors the Kuwaiti approach where the relationship between the two parties is integral to the concept, as shown by the respective lack of law covering electronic contracts. This, however, is something that may change, in both countries, as modern technology forces the hand of the legal system, and society sees no need to distinguish between personal and impersonal contracts. In short, the laws in England are designed to fit a faster rhythm of dealing and commerce, with a higher emphasis on flexibility. The common law system endorses this approach. In Kuwait, however, the system is less flexible from the practitioners' point of view, partly because the law is codified. Moreover, the wide discretionary power of the judges makes the law lack clarity, using broad and theoretical terms that do not have solid definitions, making it difficult for people who access the court to have a reliable idea of the potential outcome. However, the emphasis on morals, honour and good faith in Kuwaiti Civil law shows a more international approach, being more in line with both Civil law and non-UK common law countries, as well as international law itself. Indeed, it would be welcomed if Kuwaiti law moved to strengthen even further its codification of honour and morality. Modern civilization needs more moral norms, not less. Rather, it is English law that is the outlier. It will be interesting to see it the gradual move more towards the acceptance of good conscience as part of a contract will be confirmed by future English courts or whether they will continue to tread their own path.

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