

Bargaining and Reliance in New European Contract Law

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Abstract

A decade after the House of Lords declared the notion of an agreement to negotiate a contract in good faith to be 'wholly unworkable in practice' the Californian Appeals court affirmed the validity of just such a 'contract', opening up the possibility of significant reliance damages arising out of future failed business ventures. The case of Copeland v Baskin-Robbins, USA has major implications for pre-closing negotiations in the State of California, and the US generally, but what, if anything, does it mean for the European Commission's ongoing 'Common Frame of Reference' strategy aimed at removing problematic divergences and inconsistencies between European contract laws? Commercial bargaining, incomplete contracts and the spectre of precontractual reliance remain a significant, if largely neglected, challenge for emergent EC contract rules, yet does Copeland provide a lead on how best to police the formation of international commercial agreements or merely represent a further weakening of party autonomy for those seeking to drive the hardest bargain? In this paper the author explores the world of almost contract, the 'contract' to bargain in good faith and looks beyond the current resistance of the English common law to sketch the parameters of a new EC reliance doctrine.

Keywords. Agreement to Negotiate a Contract, Precontractual Reliance, Reliance Damages

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1. Introduction*

Precontractual reliance and the protection of reasonable commercial expectation remains a significant, if largely neglected, challenge for emergent EC contract rules. In contrast to the US, where precontractual investment in negotiations and the efficacy of legal default rules has received sustained scholarly treatment, in Europe a modern clamour for codification has largely sidelined broader practical and doctrinal considerations surrounding the harmonisation debate. This misplaced fixation on codification has further downplayed the mechanics of commercial contracting in particular and overlooked the importance of contract drafting. Perhaps the most convincing argument in favour of the convergence thesis remains that in a legally and linguistically diverse Europe a common bedrock of agreed rules may gradually yield enhanced legal certainty and predictability for business actors. However, a lack of empirical enquiry has characterised the work of the European institutions to date in promoting the assumed need for new principles of general application. This quest for 'coherence' has further blurred the need for such enquiry and diverted attention from the real law in action. Whilst evidence of problematic divergences remains at best patchy, the case of *Copeland v Baskin Robbins, USA*¹ does highlight one discrete difficulty that typically arises in commercial contracting even where parties share a common language and legal culture.²

The decision of the Californian Court of Appeals in *Copeland* raises a number of pertinent questions for European legal practice, and particularly for those academics and practitioners currently preparing the European Commission's 'Common Frame of Reference' on European contract law.³ The case is symptomatic of wider problems arising in international commerce through the use of letters of intent, memoranda of understanding and other non-binding, if persuasive documentation in the course of commercial deal-making and ought reasonably to be

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¹ 96 Cal.App.4th 1251 (2002). 117 Cal. Rptr. 2d 875. The case has thus far failed to attract attention in mainstream European scholarship.

² For a particularly instructive analysis of legal harmonisation and its impact on both language and wider culture, see B. DE WITTE (2004). See also Proceedings of the PriME Conference on *Private Law and the Many Cultures of Europe*, Helsinki, August, 2006. Though commonly overlooked the language used in negotiations is evidently of major concern to commercial actors keen to gain an edge and may have a significant bearing on any agreed outcomes in cross-border trade. Whilst a raft of academic contributions analysing the harmonisation of European private laws have typically reinforced the importance of safeguarding national legal cultures and peculiarities, few have considered the impact of language on commercial drafting and negotiations generally. There are however glimmers of new thinking in relation to the critical importance of contract drafting, see F. GRIFFITH DAWSON & S. STYLLIS, (2007).

³ Political sensitivity to the potential adverse impact on the internal market of diversity in Member States' contract laws has prompted the European institutions to finance research on what has rather cryptically been termed a 'Common Frame of Reference' (CFR). It is anticipated that the Common Frame will comprise general principles complete with commentary, model rules and/or definitions of abstract legal terminology. For a fuller picture of the European Commission's ongoing 'coherence' initiative see: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

concentrating the minds of those most directly involved in seeking to eradicate problematic divergences between national European contract laws.

2. Just Banana Ripple or a European Banana Skin?

The background to the *Copeland* dispute concerned the prolonged negotiation of a contingency agreement whereby the appellant, Mr. Kevin Copeland, had sought to purchase an ice-cream manufacturing plant direct from Baskin-Robbins that was under threat of closure. Copeland was content to acquire the plant from the ice-cream giant provided that the company in return agreed to purchase a yearly quantity of ice-cream direct from the appellant. It was made clear to Baskin-Robbins from the outset that this 'co-packing' arrangement was critical to Copeland's interest in the plant. Baskin-Robbins duly prepared a letter of intent setting out the initial terms of the bargain which Copeland later signed and returned with a non-refundable deposit. It was agreed that the plant would be purchased at a cost of \$1.3 million in return for the supply of several million gallons of ice-cream over an initial three year period. So far, so good.⁴

Yet the parties continued to bargain. The ice-cream purchase price, product quality and control, the assumption of losses and other essentials remained on the table. After several months without agreement, Baskin-Robbins lost heart, broke off negotiations and returned the original deposit, stating that its parent company had:

"recently . . . made strategic decisions around the Baskin-Robbins business [and that] the proposed co-packing arrangement [is] out of alignment with our strategy . . . [as such] we will not be engaging in any further negotiations of a co-packing arrangement".

As the Appeals court would later observe, regrettably for Copeland at this point 'many millions of dollars in anticipated profits ... melted away like so much banana ripple ice cream on a hot summer day'. At First Instance the sole trader received an unsympathetic judicial ear. It was held that no contract existed between the parties as there was merely an agreement to agree that was unenforceable. The Second District Court of Appeal would later uphold this finding, acknowledging that the letter of intent language used by the parties was not of itself a binding expression of the entire transaction. Yet despite dismissing the appeal outright on the grounds that Copeland had earlier disavowed any reliance-based claim for damages, the court did avail of the opportunity to consider the distinction between an 'agreement to agree' which is

⁴ In May 1999, *Copeland* received a letter stating: "This letter details the terms which our Supply Chain executives have approved for subletting and sale of our Vernon manufacturing facility/equipment and a product supply agreement ... (1) Baskin Robbins will sell Vernon's ice cream manufacturing equipment . . . for \$ 1,300,000 cash ... (2) Baskin Robbins would agree, subject to a separate co-packing agreement and negotiated pricing, to provide a three year co-packing agreement for 3,000,000 gallons in year 1, 2,000,000 gallons in year 2 and 2,000,000 in year 3 ... If the above is acceptable please acknowledge by returning a copy of this letter with a non-refundable check for three thousand dollars. . . . We should be able to coordinate a closing [within] thirty days thereafter".

unenforceable and an 'agreement to negotiate in good faith' which could, in the eyes of the Court, 'be formed and breached like any other contract'.⁵

The Court of Appeals was not unmoved by the rather unfortunate situation in which Copeland now found himself and stressed above all the need to protect parties whose investment of 'time, money and effort' should not be 'wiped out by another party's foot-dragging or change of heart' or by their 'taking advantage of a vulnerable position'.⁶ Relying extensively upon the highly influential academic opinion of Professor E.A. Farnsworth, the appellate court rejected the public policy arguments advanced by counsel for Baskin-Robbins⁷ and, interpreting his analysis, the Court suggested that Farnsworth's criticisms of reliance-based claims were directed merely:

"... at the theory propounded by some European courts and legal scholars that, even absent a contractual agreement to negotiate, a general obligation of fair dealing arises out of the negotiations themselves".⁸

The Court stressed that an implied covenant of good faith and fair dealing would not apply throughout contract negotiations. Rather, in its view, such an implied covenant only arises if the parties have entered into an agreement to negotiate. To avoid an implied obligation of good faith and fair dealing, the letter of intent language used must therefore be carefully drafted, perhaps in such a manner as to expressly rule out any such commitment. Applying the Court's reasoning Copeland would have been successful in his appeal had his legal team not overlooked a reliance-based claim in his original pleading. Importantly, in seeking to protect the rights and entitlements of parties involved in negotiations, the Appellate Court argued that the doctrines of unjustified enrichment and promissory estoppel fail to provide a party with 'an adequate vehicle for relief' when its negotiating partner breaks off negotiations or bargains in bad faith. The Court reasoned that due to the length, complexity and expense of commercial negotiations, public policy favours safeguarding parties to a business negotiation from bad faith practices. The case

⁵ The court was moved to consider previous US case-law distinguishing an 'agreement to agree' from an agreement to negotiate in good faith. The Appeal court cited the leading case of *Channel Home Centers Home Centers Division of Grace Retail Corp. v. Grossman* 795 F. 2d. 291 (3d Cir. 1986). Baskin Robbins made forceful argument that a decision to follow the *Channel Home* ruling would in effect inject a doctrine of good faith and fair dealing into all commercial negotiations by the back door; that it would have a chilling impact on such negotiations generally, and would threaten investment in negotiations where the chances of success were slim.

⁶ A transcript of the Appeal Court's judgment is currently available via <http://caselaw.lp.findlaw.com/data2/california/statecases/b1498>.

⁷ It is noteworthy that it was Baskin-Robbins, and not Copeland, that sought to rely on E.A. FARNSWORTH (1987). In his article Farnsworth identifies three possible grounds for imposing liability for another party's reliance: under the doctrine of unjust enrichment, see *Pancratz Co. v Kloefkorn-Ballard Construction and Development*, 720 P.2d 906; for negligent misrepresentation, see Restatement (2nd) Torts, §§525,530 and *Markov v ABC Transfer & Storage Co.* 457 P.2d 535 (Wash.1969) and on the grounds of promissory estoppel.

⁸ As the court noted, such a general overriding duty of good faith and fair-dealing in negotiations under Californian law had previously been rejected by the Appeals Court in *Los Angeles Equestrian Center, Inc. v. City of Los Angeles* (1993) 17 Cal. App. 4th 432. A raft of other States, including the State of Massachusetts for instance, do not recognise an implied duty of good faith and fair dealing in negotiations absent a binding agreement expressly committing the parties to such an arrangement, see inter alia, *Lafayette Place Assocs. v Boston Redevelopment Authority*, 427 Mass 509, 517 (1998), *FDIC v LeBlanc*, 85 F.3d 815 (1996).

does therefore provide substantial authority under Californian contract law that where a contract to negotiate exists, pre-closing negotiations must be conducted in accordance with good faith and fair dealing and that a failure to do so may result in a successful claim for reliance damages.⁹

Importantly, to date the decision, far from generating widespread approval has instead been presented as a potential pitfall for business relying on Californian contract rules.¹⁰ Moreover, despite the distinction drawn, the analysis of the Court of Appeal would appear to fit relatively neatly with modern case law emanating from a number of European civil law jurisdictions. The decision may therefore be greeted most warmly by those civil lawyers promoting harmonisation and codification at Community level yet is unlikely to find favour with the commercial courts in England and Wales.¹¹ At the risk of caricaturing the law, it is broadly accepted that whilst civil law jurisdictions have a clear tradition of finding and upholding broad precontractual duties in negotiations under the doctrine of good faith, the English common law of contracts has typically considered their imposition a real risk to legal certainty and a potential cause of increased negotiation and/or litigation costs in a commercial context. Such a flexible, laissez-faire approach, it is argued, encourages open and free negotiations whilst discouraging 'self-seeking documents or utterances'.¹²

Importantly, however, this self-serving approach to precontractual negotiations in subsequent litigation has been heavily frowned upon by courts in the US and European civil law jurisdictions for complicating and prolonging litigation. For instance, in a recent commercial case involving an alleged verbal promise to contract, the Provincial court of Girona found that both parties made self-seeking statements, with one party arguing that there was a binding promise to contract, the other that there was a mere non-binding letter of intent, yet upon a 'simple reading' of both the context and the letter of intent, the Court determined that a specific promise to contract had indeed been made, sufficient to bind the parties in accordance with the requirements of Article 1.261 of the Spanish Civil code.¹³ What is apparent, however, in both US and European market settings is the weakness of the traditional rules on contract formation to do justice to modern business negotiations. This should come as no surprise given their emergence in the discrete contracting age of yesteryear. Nonetheless, the judicial starting point in seeking to regulate incomplete agreements invariably requires a search for sufficient evidence of assent. Isolating the exact moment of formation appears increasingly inefficient, and Schwartz and Scott attribute

⁹ The Appellate Court was quite categorical that an award of reliance damages would be appropriate for breach of an agreement to negotiate. As the terms of the proposed contract were at no time fully agreed, lost expectation costs would be unquantifiable and therefore unrecoverable. The Court was of the opinion, however, that a party's "out-of-pocket" costs arising out of the failed negotiations and possibly lost opportunity costs, should be recoverable.

¹⁰ See in particular, PERKINS COIE Update (2002) and I. RIVIN (2002).

¹¹ Under Dutch law, for example, a party who breaks off advanced negotiations is liable for expenses incurred by the other party, see W.J.P. WILS (1992). See also E. HONDIUS, E. (1991).

¹² Per MacDuff J in *Sykes v Pannell Kerr Foster*, unreported QBD, 30 March 2001.

¹³ See Sentencia de la Audiencia Provincial de Girona, 12.6.2004 (Secc. 2ª, AC 2004\1748).

much of the current legal ambiguity to the courts' lack of familiarity with handling contract incompleteness.¹⁴

What makes the *Copeland* case stand out in the context of a wider Europeanisation of contract law is of course the willingness of the Court of Appeals to openly discuss the competing policy arguments that colour judicial approaches to failed commercial negotiations. The US courts generally have also shown much greater awareness of the role of preliminary agreements and the realities behind their drafting. In *Feldman v Allegheny International*,¹⁵ for instance, the Seventh Circuit acknowledged the degree of commitment, time and expense involved in hammering out complex mergers via letters of intent and memoranda of understanding. In stark contrast, the lack of clarity and conviction in the higher English courts when considering both incomplete bargains and the impact of evidence from precontractual negotiations speaks volumes. Previously, in the leading case of *Investors Compensation Scheme v West Bromwich Building Society*, Lord Hoffman was satisfied to note that:

“The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them”.¹⁶

Lord Hoffman's 'restatement' on the modern interpretation of contracts fails to offer any real light as to when negotiations may have consequences in commercial contract disputes. This failure to delve deeper into the question of reliance, whilst upholding the exclusion of evidence arising from negotiations on the grounds of 'practical policy' is clearly unsatisfactory. What is clear is that the court can have regard to evidence of negotiations for the purposes of rectification. Such cases arise rarely, however, and only in the event that the parties have erred in the drafting of an agreement. Here, the aim is merely to bring the written contract into line with the actual intention of the parties. Moreover, in addition to this wider judicial non-policy, the law's development in relation to the narrower agreement to negotiate in good faith appears stunted by the problematic and one-dimensional template for business negotiations provided by the House of Lords in *Walford v Miles*.¹⁷

¹⁴ See A. SCHWARTZ & R.E. SCOTT (2005, p. 46).

¹⁵ 850 F. 2d 1217 (7th Cir., 1988).

¹⁶ [1998] 1 WLR 896.

¹⁷ [1992] A.C. 128; [1992] 2 WLR 174. The House of Lords approach has been followed by the Court of Appeal in *Phillips Petroleum Co. UK Ltd & Ors v Enron Europe Ltd* [1997] C.L.C 329. See, however, *Petromec Inc. v Petroleo Brasileiro SA Petrobas* (No. 3) [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 and the contrasting view of Longmore LJ in the Court of Appeal that courts should be slow to deem entirely without legal merit an express agreement to negotiate in good faith.

The by now war torn judgment of Lord Ackner in *Walford* provides binding authority that the agreement to negotiate in good faith is not recognisable under English law. However the decision has still been subjected to intense scrutiny and their Lordships apparent aim (to impose stability and legal certainty vis-à-vis commercial negotiations) would appear to have rebounded. The facts of the case have been well rehearsed in the literature. The dispute concerned a purported 'lock-out' agreement by which the parties had endeavoured to ensure a degree of exclusivity in negotiations. The would-be agreement provided that the defendants would not deal with any other third party, would in any event terminate negotiations entered into with any third party and would 'continue to negotiate in good faith'.¹⁸ As is oft-repeated this reference to a requirement to negotiate in good faith provoked the ire of the House of Lords. In his judgment, Lord Ackner held that a duty to negotiate was 'inherently repugnant to the adversarial position of the parties involved in the negotiations'¹⁹ and, just for good measure, added that it was 'unworkable in practice'.²⁰ Lord Ackner reasoned that each party to a negotiation is entitled to pursue his own self interest 'so long as he avoids making misrepresentations'.²¹

Despite the obvious protection afforded against misrepresentation, duress and other forms of unconscionable conduct under English law, Giliker and Brown suggest that the current legal ambiguity in practice affords parties an opportunity to act in bad faith.²² Of course Lord Nicholls has previously called, albeit extra judicially, for a greater admissibility of pre-contractual evidence at trial when deciding commercial contract disputes,²³ whilst McKendrick suggests that

¹⁸ For Lord Ackner there were a number of 'vital' questions concerning agreements to negotiate that appeared difficult to answer, including: 1. how is the vendor ever to know that he is entitled to withdraw from further negotiations? and 2. How is the court to police such an 'agreement'?

¹⁹ The transcript of the judgment at p.138F reads: 'A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party; it is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason'.

²⁰ Though the case has excited much comment, in many respects their Lordships were simply reiterating the view of Lord Denning M.R. in *Courtney v Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 that 'if the law does not recognise a contract to enter into a contract (when there is a fundamental term to be agreed) it seems to me it cannot recognise a contract to negotiate', at 301-2. Lord Denning rejected as not well founded dictum in *Hillas & Co. Ltd v Arcos Ltd* (1932) 147 L.T. 503, at 515 that such an agreement, provided it was supported by consideration, could be recognised in law.

²¹ *Supra*.

²² See respectively, P. GILIKER (2006), SECOLA (2004) and P. GILIKER (2003). The case for an expansion of tort law into preliminary dealings in US contract law was long ago explored by GILMORE (1985) and Gilmore's view that bad faith in contract negotiations be classified as a tort rhymes with the vision of the European Court of Justice in *Tacconi v Heinrich Wagner* C-334/00 [2002] ECR I-7357. This author concurs with Brown however, that 'the vagaries of the tortious duty of care are inappropriate as instruments with which to dissect the intricacies of commercial negotiations' in I. BROWN (1992, p. 357). Moreover, as Gardner warns, 'analysing relationship breakdowns in terms of fault is at best a tasteless, and generally inept, undertaking', see S. GARDNER (2006, p. 496).

²³ *My Kingdom for a Horse: The Meaning of Words* (2005) LQR 121.

the courts in England and Wales ought progressively to entertain a greater policing of the pre-contractual bargaining process.²⁴ Yet Giliker has been most forceful in proposing reform and, in particular, a greater role for tort. She suggests that the current English position takes no account of the protective regime established under EC consumer legislation and allows parties to abuse a stronger bargaining position.

The current English position evidently departs from an adversarial view of contract negotiations, characterised by parties robust defence of their own best interest, yet recent economic studies suggest that a contract law regime that imposes no liability in precontractual settings is sub-optimal, whilst an overly strict liability based approach is equally inefficient.²⁵ This analysis lends significant weight to the intermediate US position promoted in *Copeland* which allows courts to intervene only where one party has induced another into a firm belief that a contract to negotiate in good faith exists, or where the parties have themselves contractually agreed to at least attempt to amicably hammer out a deal. Moreover, a 2005 report of the International Association of Contract and Commercial Managers (IACCM) on business negotiation strategies suggests that the English law may currently be offering a view of negotiations that is detrimental to parties' broader commercial interests:

"... The word confrontation has gained an unfortunate connotation. It connotes an abrasive, aggressive interpersonal exchange. When solving problems in long-term relationships this is *never* a productive approach. It may have merit in crisis situations, or may even improve an individual party's outcomes in a short-term transactional relationship, but in most of what we face in our lives and professions it is a sucker's choice. A sucker's choice means that when we become aggressive we act on the implicit assumption that we must choose between a better outcome and a better relationship. This is a false trade-off. Our research shows it is possible to be at once very strong, assertive and effective – at the same time be respectful and considerate of others needs and views. The weak negotiator judges that you cannot do both and chooses strategies that sub-optimize what is possible".²⁶

Lord Ackner in *Walford* took a different view of business efficacy and the proper conduct of commercial actors in negotiations. In articulating his mono-ethic view of negotiations his Lordship advocated the benefits of an adversarial approach which affords parties the maximum freedom to negotiate and the option to threaten melt down 'in the hope that the opposite party may seek to reopen the negotiations by offering ... improved terms'.²⁷ It remains equally significant that the *Channel Home* decision that was so influential in *Copeland* was dismissed as 'unhelpful' by Lord Ackner, whilst other leading US decisions such as the highly influential

²⁴ E. MCKENDRICK (2005).

²⁵ See L. ARYE BEBCHUK & O. BEN-SHAHAR (2001).

²⁶ 2005 IACCM Report 'The Role of Confrontation in Contracting and Negotiation Processes'. Available via www.iaccm.com.

²⁷ *Supra*, at 181 F-G.

Tribune case (discussed below in part 3) were not raised in submissions. This ‘failing’ on the part of counsel arguably gave a slanted view of the general US position on contracts to negotiate.

3. Melting Away the Freedom to Negotiate?

The *Copeland* decision does nonetheless provide an alternative take on a complex theme. It can therefore assist debate as to whether or not such a general duty to negotiate in good faith is in the wider interest of commercial actors in a European market setting, and if the English law of contract should gradually yield to a seemingly more uniform transnational position. Indeed Gordley has recently queried whether a future House of Lords may not ‘consider the possibility that the rest of the world is right and that Lord Ackner was wrong’.²⁸ Of course, this argument in favour of enforcing the contract to bargain in good faith on the basis of majority international experience would appear to clash head-on with Michaels’ recent observations on the role of functional equivalence in comparative law.²⁹ He suggests that the analysis of similar solutions across legal systems may boost our general comparative knowledge and understanding but offers little guidance beyond that knowledge and warns that ‘equivalence functionalism provides surprisingly limited tools for [subsequent] evaluation’. Michaels seeks to explain this discrepancy on the basis that functional equivalence theory implies ‘equal value’ and therefore ‘fails to decipher superiority’.³⁰

There is certainly more than an element of truth in Michael’s argument. It further bears repeating that the orthodox view at times presents an unduly inflexible vision of the English law of contract. Without doubt the courts in England and Wales have placed primary emphasis on the need for certainty in contract formation and have felt much more comfortable approaching failed ventures and improper conduct in negotiations via specific remedial categories, such as misrepresentation, *quantum meruit*, estoppel and the recognition of implied terms. The courts look for evidence of a ‘concluded bargain ... which settles everything that is necessary and leaves nothing to be settled by the parties’³¹ yet the courts have also revealed an appreciation that ‘business men often record the most important agreements in crude and summary fashion’ and that ‘it is accordingly the duty of the court to construe such documents fairly and broadly without being too astute or subtle in finding defects’.³² The use of entire agreement clauses and non-reliance clauses has further provided a typically sensible English commercial drafting solution. However, in a similar vein to Bigwood, Collins has previously argued that by setting a

²⁸ J. GORDLEY (2005).

²⁹ R. MICHAELS (2006).

³⁰ At p.374. MICHAELS further notes that ‘it is impossible to isolate the function of a legal institution [and by extension a legal rule] ... and to measure [it] ... against some ideal function, for no such ideal function exists. In this strict sense, better-law theory is not compatible with functionalist comparative law.

³¹ Per VISCOUNT DUNEDIN in *May & Butcher v R* [1934] 2 KB 17, at p.21.

³² The courts may therefore construe a contract to implement the parties’ intentions, provided they do not go so far as to construct the agreement for them. See G.H. FRIDMAN (1960).

high standard of certainty for finalised contracts, in such a way as to exclude most informal agreements, it may still be possible via a generalised duty to better protect legitimate commercial expectation.³³

Collins and the Californian Appeals court would appear to be on much the same page in suggesting that the requirement that parties agree terms with sufficient clarity and precision to be enforced need not be sacrificed by a sufficiently coherent overarching protective duty that could in effect be triggered by the parties' own conduct. This call for a generalised duty appears in part to be prompted by dissatisfaction with the generally confused state of English law in this area. What is abundantly clear is that the stringent tests and rather cumbersome categorisations applied under English law to precontractual scenarios do grossly inflate the complexity of the law, lending weight to the case for a more generalised duty, or more appropriately a suitably coherent doctrine.

4. General Principles to the Rescue?

Importantly, Van Houtte has previously suggested that 'one of the great innovations of the UNIDROIT principles is that they provide standards for conducting negotiations'. Modern case law and arbitral awards relying on the Principles, or rather the absence thereof, embarrasses Van Houtte's assertion. In the last decade only one reported arbitral award - of the ICC Court of Arbitration in Paris - has had any real bearing on precontractual liability under the UNIDROIT Principles, and even then merely tangentially.³⁴ The ICC Tribunal was asked to determine whether the parties, having agreed to 'meet promptly and negotiate in good faith' a number of international supply and service contracts, were duly obliged to conclude negotiations in good faith.

The parties had failed to make an express choice of law but the contract had a close connection to the laws of England (which was also the seat of the arbitration), Saudi Arabia, Georgia, New York and New Jersey. Much of the negotiation phase of the deal had taken place in the US, and the Defendant urged the Tribunal to reject the application of English or Saudi law which are both decidedly cool on the notion of good faith in negotiations. Instead the Defendant stressed that such a duty would be enforceable under the laws of Georgia, New York and New Jersey. In the alternative the Defendant invited the Tribunal to rely on the UNIDROIT Principles, by virtue of which - in the eyes of the Defendant - the 'express commitment' of the parties to 'negotiate in good faith is enforceable'.³⁵

³³ H. COLLINS (2003, p. 329 et seq).

³⁴ Source: *Unilex case law reserve of the CISG convention and the Unidroit Principles*. A summary of the ICC award is accessible via <http://www.unilex.info/case>.

³⁵ Evidence was presented that the choice of applicable law was discussed, if only briefly, during negotiations in Georgia in 1993 but no firm decision either way was ultimately reached.

Relying on the fact that the parties had agreed a prior non-disclosure agreement which contained a specific choice of law clause in favour of 'the law of New York' the Tribunal had little difficulty in extending this express choice to the entire contract.³⁶ The ICC Tribunal further accepted on the evidence that the parties had indeed obligated themselves to meet promptly and negotiate in good faith and as such determined that 'the Parties could not have intended that the governing law of the contract would render this obligation unenforceable'. In seeking to do justice to the parties expressed 'wish', the Tribunal seized upon previous New York case law in order to flesh out the enforceability of a duty to negotiate in good faith under both New York state law and 'general principles of law'.

As in *Copeland*, the views of Farnsworth would play a significant role in deciding the outcome of the dispute. The Tribunal received submissions direct from Farnsworth and 'other learned American jurists' before ultimately outlining a highly contextualised procedural method for dealing with incomplete agreements. It was accepted that the binding nature of such preliminary dealings could only be determined via an examination of 'the circumstances surrounding the negotiations of the agreement, the conduct of the parties, and, of course, the terms of the agreement, including the number and significance of open terms'. It is notable that the Tribunal felt it necessary to consider the treatment of preliminary agreements when determining the duty to negotiate in good faith, and the Tribunal adopted enthusiastically the position of Judge Leval in *Teachers Ins. and Annuity Ass'n v. Tribune Co.*³⁷ that:

"Notwithstanding the importance of protecting negotiating parties from involuntary judicially imposed contracts, it is equally important that the courts enforce and preserve agreements that were intended as binding, despite a need for further documentation or negotiation. It is of course the aim of contract law to gratify, not to defeat, the expectations that arise out of intended contractual agreement, despite informality or the need for further proceedings between the parties".

Like a lower District Court, the Tribunal moved to further endorse Judge Leval's view of the duty to negotiate in good faith, which 'arises often implicitly'. The arbitration panel accepted that the

³⁶ 'We do consider highly relevant, however, the fact that the Non-Disclosure Agreement, which was signed by the parties ... contains a choice of law clause in favour of the law of New York, including the statement that "the parties are familiar with the principles of New York Commercial Law, and desire and agree that the law of New York shall apply in any dispute arising with respect to this Agreement.", at para. 5 of the Award. The Tribunal was similarly persuaded by the fact that one of the Parties appeared to be a corporation organised under the laws of the State of New York.

³⁷ 670 F. Supp. 491 (S.D.N.Y, 1987). (the case being referred to by the panel as the 'Tribune case'). The Tribune case itself differentiated between two types of preliminary agreement. In the first type the parties are considered to have reached 'complete agreement (including agreement on the binding nature of their commitment) on all issues requiring negotiation. All that remains to be done is for the parties to carry that agreement forward into practice'. The second type of preliminary agreement is, according to Judge Leval, one that 'expresses mutual commitment to a contract on agreed major terms, while recognising the existence of open terms that remain to be negotiated. Although the existence of open terms generally suggests that a binding agreement has not been reached, that is not necessarily so. For the parties can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate in good faith and to reach final agreement within the scope that has been settled in the preliminary agreement', at 497.

obligation does not guarantee that a final contract will necessarily materialise – as the parties may simply lose interest as circumstances change – but does require a legitimate attempt to reach a deal. Crucially, the panel endorsed the decision in *Tribune* that the obligation does ‘bar a party from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement’. The ICC panel found such reasoning ‘compelling and appropriate’ and further endorsed Professor Farnsworth’s ‘sound interpretation of the pertinent articles’ of the UNIDROIT principles. In the event, Farnsworth promoted his consistent view that: Plainly, although the Principles impose a duty of good faith on negotiating parties quite apart from the agreement, it would be inconsistent with the Principles to hold an agreement to negotiate to be unenforceable.³⁸

Yet despite the endorsement of the UNIDROIT Principles and the view of the ICC arbitrators that ‘international arbitrators are fully justified to turn to general principles of law’, this case concerns not the role of the Principles as such, but rather the role of New York state law. Advocates of the UNIDROIT Principles will argue that the case reveals how the Principles accord with wider international practice but that view is open to an alternative interpretation. The high degree of uncertainty as to the applicable law – with four competing legal systems connected to the case – revealed a truly opportune occasion when retreat to ‘general principles of international law’ ought reasonably to have afforded the panel with an appropriate, less costly remedy. The decision dramatically highlights the absence of meaningful case law applicable to preliminary agreements and precontractual duties under the UNIDROIT Principles themselves. Rather alarmingly, unless New York State law, or similar domestic case law decisions affirming broad duties to negotiate in good faith, are to become a proxy surrogate for the Principles, it is clear that the UNIDROIT Principles will continue to offer greater uncertainty than coherence in seeking to regulate international commercial negotiations and incomplete bargains. Far from an independent source of ready-made commercial rules, the ICC decision reveals greater support for the view that the interpretation of the UNIDROIT Principles is ever dependent upon domestic court decisions.³⁹

Of course such a state of dependency will not trouble those of Schödermeier’s persuasion. He suggests that, ‘... there is trust in international practice, but it is controlled and verified according

³⁸ The Tribunal added that ‘... the undertaking to negotiate in good faith ... would thus be valid, binding and enforceable under general principles of law as reflected in the UNIDROIT Principles’. This orthodox view that where parties have agreed to negotiate in good faith, then the parties should be held to such a commitment is a typically Farnsworthian analysis (See also E.A. FARNSWORTH (1987) “There is no adequate reason to refuse to give effect to the explicit intention of the parties to an agreement to negotiate”). The freedom to ‘contract’ argument is not clinching however, given the uncertainty attached to the duration of any such ‘contractual’ commitment. It is equally problematic under the UNIDROIT Principles as the Principles are not exactly comprehensive as to what constitutes good faith during negotiations.

³⁹ This view is not supported by M. SUCHANKOVA (1997) who argues that the Principles provide ‘clear and accessible rules which assure predictability for those that refer to them’. Curiously, she similarly acknowledges that ‘judges and arbitrators have reasons to hesitate before applying them’. A fact borne out by the ICC Arbitral award examined above. See also J. PAULSSON (1990, p. 96) who argued at that time that the degree of divergence across national systems prevents a satisfactory arrival at ‘normes transnationales sur le comportement précontractuel’.

to our own fundamental legal values. Domestic laws can hardly be denied this influence'.⁴⁰ Similarly, Klaus Peter Berger, who acknowledges that the UNIDROIT Principles and other soft law initiatives are mere 'comparative snapshots' sees this domestic dependence as an opportunity rather than an obstacle for the development of national rules, and recommends that domestic judges and international arbitrators should consistently strive toward the 'internationally useful' interpretation of contract in the light of 'transnational commercial law'.⁴¹ Berger argues that, 'In transborder trade and commerce this will be a solution which is sensible under the economic circumstances of the case' and adds controversially that, 'if the parties have included a choice of law clause in their contract it can be assumed that they will accept a certain margin of possible decisions based on this law'. Why any such assumption can be reached is not revealed, however Berger is convinced that within his 'natural margin' a judge or arbitrator may endeavour to find an 'internationally useful method of construction' which finds a solution that accounts for 'the particularities of international trade and the economic interests of the parties'. On a first reading there is a certain attraction underlying Berger's would-be 'new global law via renewed domestic law' approach, yet it is at best a defence of the role of soft law principles in domestic courts. It is by no means a recipe for enhanced legal certainty and predictability in the practical application of those soft law Principles.

Where the UNIDROIT Principles appear equally imprecise and therefore problematic is in relation to the calculation of reliance damages. Much of the current imprecision may in part be due to an attempt to reach a mid-point between traditional common and civil law positions. The Principles do make clear that damages for breach of precontractual duties are to be assessed on the basis of 'loss caused', and aim to recompense parties' out-of-pocket expenses and any lost opportunity or loss of a chance to contract with a third party.⁴² However, it is equally notable that the Principles remain silent about the contractual or tortious foundation of liability, the implication being that good faith alone will provide the procedural sticking plaster. Criticism can therefore be levied at the Principles dependence upon the breadth and vagueness of good faith in trying to regulate in turn precontractual information, loyalty and general protective duties. With the CFR now conceded, and the research strategy proceeding to the apparent satisfaction of Clapham Omnibus commuters, can an appropriate uniform approach to incomplete agreements

⁴⁰ M. SCHÖDERMEIER (1989).

⁴¹ K.P. BERGER (2002).

⁴² Article 2.16 UPICC further enshrines a broad duty of confidentiality. Any improper use or disclosure of confidential information may result in an award in damages. Berger has recently added that, 'Even in purely domestic cases, German doctrine looks at the approach of 'modern lawmakers' such as the Lando Commission and the UNIDROIT Working Group. For example, it is an open question in German legal doctrine whether pre-contractual liability in case of breach of a duty of confidentiality involves a duty to pay compensation based on the benefit received by the party in breach'. He concurs with Canaris that, in order to resolve this question German doctrine should look at Art. 2.16 of the UPICC for guidance. Citing CANARIS in J. BASEDOW, J. (ed) (2000) he agrees that 'the step [to accept a duty to pay compensation based on the benefit received] would find strong support in Art. 2.16(2) UPICC. This would increase substantially the weight of this argument and would tip the balance in favour of such an approach, given that German legal doctrine is undecided and open on this issue. This would apply in particular if Art. 2.16 (2) UPICC is grounded on a broad comparative basis and does not result from a more or less isolated idea of its drafters'. See also, G. FORBIN (1998).

and the question of reliance be forged? The remit of the CFR would appear to prevent it. Equally, such a development will require a move beyond 'comparative snapshots' and general clauses.

5. *Bargaining and Reliance Revisited*

Despite Gordley's suggestion of apparent international uniformity in this area, English contract law is not alone, as evidenced by a growing concern expressed in US, Australian and European civil law opinion at the prevailing theoretical disorder caused by failed bargains and the spectre of reliance. In addition to a suitable judicial method for handling such partial contracts, the need to 'relocate' precontractual liability from somewhere between the shadowlands of contract and tort is a universal challenge. Those compiling the CFR are doubtless sensitive to the need to ensure that such claims occupy a satisfactory place in any wider Community law of obligations, despite the limitations imposed by the scope of the Common Frame research program. Echebarría Sáenz has discussed the need for a 'tertium genus' or third legal doctrine lying somewhere between contractual and extra-contractual liability in order to better explain and rationalise judicial interference in bargaining;⁴³ and particularly illustrative of this enduring concern is the recent doctrinal 'handbags' between Randy E. Barnett and Charles Knapp over the reliance interest in the US, and the use and abuse of promissory estoppel under section 90.

Knapp suggests that those of Barnett's persuasion are simply 'academic Felix Ungers', whose 'compulsive [doctrinal] tidiness' and desire for 'doctrinal purity' and 'neat ordering' effectively blinds their vision to the 'uses to which lawyering Oscar Madisons of the real world may put [doctrines such as section 90 in practice].⁴⁴ However, Barnett is right not to be indifferent about the distinction – a distinction that seeks to preserve the doctrine of freedom of contract – for it is not merely a question energising doctrinal nutcases and that smacks of a 'first-year-law-school mentality'.⁴⁵ Barnett is correct in highlighting the need for doctrinal clarity and consistency, particularly in removing the question of reliance from the contract/tort divide. Barnett has since retaliated by warning that there is a danger for private litigants if the 'loaded gun' of section 90 is left 'lying casually around for some judicial Oscar Madison to pick up and misuse'.⁴⁶ Whilst Grant Gilmore was a rather lousy fortune-teller and the doctrinal wall that separates contract from tort law in the US has not collapsed, it has been badly dented. What is odd, however, is that

⁴³ ECHEBARRIA SAENZ (1995, p. 226 et seq). (who is also critical of the dependence in Spanish legal theory on the 'breadth' of the good faith doctrine in trying to regulate a raft of varying precontractual duties).

⁴⁴ C. KNAPP (1998). KNAPP is not enthused by the contract/tort debate in relation to promissory estoppel. He suggests that 'people make promises, people break promises, other people get hurt. Is this tort? Is this contract? As KARL LLEWELLYN once pungently remarked, "What the hell", at 1244.

⁴⁵ *Supra*, at 1211.

⁴⁶ R.E. BARNETT (2001). And see previously R.E. BARNETT (1996). Importantly, the impact of reliance concerns on legal taxonomies has been more widely addressed in the US than in Europe. See, *inter alia*, R. COOTER (1985); R. CRASWELL (1996). Of course, Friedmann rejects much of the terminology used in relation to reliance claims and is praiseworthy of the English approach ('In American legal literature the use of the unfortunate term 'expectation' interest persists. However, in other jurisdictions there are some signs that the more appropriate terminology that speaks of the 'performance interest' is gaining ground'). See D. FRIEDMANN (2001).

Barnett has rather uncritically passed over Holmes' observation that promissory estoppel is an equitable form of relief that 'sits on its own bottom'⁴⁷ – an analysis that has gained most ground in the Australian courts and that appears to provide a more satisfactory and less problematic basis for justifying reliance claims in the wider law of obligations. As is highlighted below, recent developments do expose the fact that Knapp's entertaining, if rather lame academic cheap-shots are plainly wrong and Barnett is right to worry about the correct location of reliance claims, simply because the terminology and taxonomy questions have proved just as problematic, if not more so, in practice than arriving at a satisfactory justification for the instrumentalist goal of protecting reliance.

Intriguingly, added to this mix, in late 2006 McFarlane – relying heavily on recent US and Australian doctrine – makes a rather bold statement in arguing that English law, '... in the doctrine of proprietary estoppel ... possesses a tool uniquely well-qualified to deal with the problem of pre-contractual reliance'.⁴⁸ McFarlane neatly identifies the three primary problems caused by the current English law approach as 'coverage' (the law may on occasion fail to provide a claim to deserving parties), 'clarity' (judicial decisions lack transparency and predictability) and 'coherence'. In fairness to McFarlane, his analysis does not seek to engage with the wider harmonisation debate, however such a welcome reforming attitude does still appear somewhat shortsighted in the context of European integration.

Whilst the use of estoppel to explain the basis of recovery for precontractual reliance under English law has been floated previously,⁴⁹ it would still face a number of obstacles in a European context, as well as under current English law. The promotion of a Community estoppel remedy, whether promissory as in the US or equitable as in Australia, would likely give rise to adjustment problems for all European jurisdictions. Even the very term 'estoppel' itself would not transplant easily beyond common law systems, and it would be perhaps unwise to inflict on civil lawyers the same discomfort with the meaning and applicability of good faith that arises in common law circles – even if an estoppel approach could win support on the grounds that it is transnational in spirit. Being rooted in equity, estoppel does have an advantage in that it conjures up similar equitable concerns to those raised in civil law systems via good faith. Indeed, Hesselink has encouraged the view that the 'content' of modern good faith doctrines 'could be regarded as a new *ius honorarium* or as civil law's equity'.⁵⁰ However, plumping for a proprietary estoppel

⁴⁷ E. HOLMES (1996). What is notable in the last decade of debate in the US is that, bar the work of Farnsworth and Knapp, discussion of reliance and promissory estoppel has typically occurred outside of the leading US journals. It is only relatively recently, and mainly via law and economics scholarship, that the arguments are returning to the contract mainstream.

⁴⁸ B. MCFARLANE, (2006).

⁴⁹ See GOFF & JONES (1998, p. 673) (promoting equitable estoppel as the basis for a restitutionary claim and noting that 'The restitutionary claim conceals a claim for reliance loss, where no claim for damages for breach of contract can lie').

⁵⁰ See M. HESSELINK (2004, p. 493). Though a little dated, Hesselink cites Maitland on Equity (1949) who suggests that common lawyers: '... ought to think of equity as a supplementary law ... you ought to take the many equitable modifications of the law of contract, not as part of equity, but as a part, and a very important part, of our modern English law of contract', at p.21.

approach for English law is at the very least terminologically awkward when considered against the backdrop of Europeanisation.

The primary advantage offered by an alternative, new European detrimental reliance doctrine would be that it would be terminology-neutral and could perhaps be better tailored – through appropriate drafting and application – in order to be much tighter in its scope than the open-ended notions of both good faith and fair dealing and estoppel – doctrines that have been further weakened both by their complexity and over-usage. The term estoppel has always been the source of much confusion under English law and would doubtless prove contentious in new European private law. Moreover, whilst the Australian law of estoppel has undergone a wholesale, if still incomplete, transformation, this new direction has not been assimilated, let alone adequately analysed. In part, the complexity of the Australian doctrine and its rather confused application in relation to contract bargains means that it is not easily covered within standard works on either contract, equity or property law. Instead fractures of the doctrine appear and are treated rather loosely and haphazardly. Moreover, the scope of the Australian equitable estoppel doctrine is itself unsettled and remains still very much contested. As a newly emergent doctrine it remains ‘in a state of flux’.⁵¹

A new Community reliance doctrine should nonetheless aim to learn from and build on recent Australian experience whilst avoiding in its future application the ‘doctrinal Crazy Glue’ of promissory estoppel, as operated previously in the US.⁵² Johnston has previously argued that the common law rules regarding contract formation are ‘so formalistic that parties will often reasonably rely on a promise and yet not receive any remedy at all because they relied before a contract had been legally created’.⁵³ He suggests that this is ‘the problem addressed by the doctrine of promissory estoppel and section 90 of the Restatement’. Certainly this is the problem that the rule seeks to address – it just does so in a problematic manner, given the sheer breadth of section 90.⁵⁴ Nonetheless, Johnston’s argument holds – the aim of the courts is essentially to protect detrimental reliance. Applying a similar world-view to Johnson, the aim of a new EC reliance doctrine should be ‘merely’ to validate limited incursion into private bargaining, principally in order to restore reliance expenditure to A in situations where A has acted to his detriment on a reasonably held belief or view, inspired by or attributable to B, that a contract

⁵¹ Per Kirby P in *PS Chellaram & Co. Ltd v China Ocean Shipping Co Ltd* (1991) 1 Lloyd’s Rep 493, at p.502.

⁵² Per Knapp, who whilst advocating reliance damages notes that previously ‘... expressions of commitment, which under the bargain theory could usually be freely repudiated for lack of consideration, became binding obligations with the doctrinal Crazy Glue of promissory estoppel’, *supra* at 1223.

⁵³ J.S. JOHNSTON (2004).

⁵⁴ Linzer who was tasked with preparing much of the Commentary on Section 90 has since revealed that he based his observations almost exclusively on the ‘fact-specific’ *Hoffman v Red Owl* case and acknowledges today that the case had less to do with reliance on a promise than ‘reliance on a relationship’, a bargaining relationship that simply progressively unravelled over time, see P. LINZER (2001, p. 719).

would materialise. That detriment, as Pratt observes, consists ‘in the costs incurred by the reliant party that are rendered ineffectual by the desertion of the assumption that led to the reliance’.⁵⁵

It must be accepted that there is a risk of failure built into all negotiations. As such, limiting recovery to out-of-pocket expenses under a new EC contract law would not only respond well to the real law in action but would encourage parties to better allocate the risks of failure between them. Saunders who has similarly explored the degree of deep judicial confusion surrounding incomplete agreements in the US adopts the same position. He notes a number of sound reasons for limiting bad-faith breach in negotiations to out-of-pocket expenses, including above all the relative ease of calculating any such loss.⁵⁶

6. Taking Walford v Miles Seriously – Contracts to Bargain (in Good Faith) and the Sustainability of the English Position

Although in *Walford* Lord Ackner gave short shrift to the then US approach, key lessons can be drawn from both recent Californian and European civil law experience which might be suitable for a future European contract law? The primary legal objection to the contract to bargain under English law relates to the fact that pure reliance on a promise would fail as a substitute for consideration. This argument is made most forcefully by Norisada, Poole and Furmston in rejecting the notion.⁵⁷ The spectre of reliance has also been seen as a threat to the liberal negotiation of commercial contracts. However, as Brown notes, ‘whilst it cannot be said that a majority of legal systems have wholeheartedly adopted the contract to negotiate in good faith, many have an awareness of the problems engendered by such undertakings and do not consider good faith doctrines to be alien to commercial law’.⁵⁸ A raft of recent US court decisions which have sought to protect precontractual reliance have been founded upon an ‘implied offer’. As Brown notes, ‘extrapolating from this idea and using conventional contract terminology, it may be possible to evaluate the extent of the parties’ resolution and commitment to securing a completed contract’.⁵⁹ As negotiations will vary dramatically from exploratory beginnings to the gradual culmination in a firm offer, an implied offer may lack sufficient precision to constitute an actual offer but it may still ‘induce substantial reliance in the other party that is worthy of protection’:

“... it may be that the offer need not be definitive, provided that it provokes the reliance at the outset, attention then shifting and focusing upon the extent of the reliance. Levels of determination and earnestness vary in contracts to negotiate but the parties’ negotiations can

⁵⁵ M.G. PRATT (2000).

⁵⁶ J. SAUNDERS (2006).

⁵⁷ See M. FURMSTON, T. NORISADA, T. & J. POOLE (2001).

⁵⁸ *Supra*, at p.394-5.

⁵⁹ At p.365.

have reached such an advanced stage that an implied offer exists as a clear manifestation of intent such that only minor technicalities or the formal execution of a document are envisaged as preceding the offeree's actual acceptance".

It is further suggested that parties' reliance will be at its peak immediately prior to the contract's completion. Perversely, as Buckley observes, it is typically at this point in negotiations when negotiating may be at its most adversarial and antagonistic as the parties endeavour to grind out the best possible deal.⁶⁰ Brown considers that a failure to proceed with a largely complete agreement should be construed as a clear breach of the contract to negotiate contrary to good faith and submits that 'this deployment of reliance achieves the objective mentioned earlier, that is to devise notions of good faith which function in adversarial bargaining and harmonise with the laissez-faire axioms of contract'. It is indeed arguable that this level of commitment was reached in *Walford* as there were no longer any remaining disputed terms and nothing substantive left to agree. Brown correctly identifies that 'within the principle of good faith negotiations it is consequently implicit that reasonable reliance has its counterpart in acceptable risk':

"A plaintiff must establish that he has crossed the threshold of risk to the extent that his reliance upon the defendant's acts or representations is justifiable. Good faith thus defined utilises the recognisable legal tools of promise, inducement, risk and reliance. Moreover, this analysis accords with a (modified) theory of freedom of contract in that it allows for a consideration of self-reliance".

Brown argues that whereas tort law reconfigured could play a similar role, he suggests that good faith 'as an implied term' presents itself as a more appropriate tool that could be 'tied to the particular obligations created by the negotiations'. Such an approach it is argued:

"... shuns an ethereal moral principle premised upon fair dealing or honesty in commercial negotiations for it is the fear and suspicion of vacuous delineations of good faith or unconscionability which lead to their complete rejection. In estoppel, fiduciary obligations and economic duress, for example, English law has shown its ability to proscribe unfairness in commercial dealings. In establishing a duty of good faith in pre-contractual negotiations, its future task must be to take an objectively-defined middle-ground between the polar regimes of indefinable unconscionability and untenable deceit. A scheme for enforcing the subsidiary contract to negotiate may therefore be envisaged".

A middle-ground position clearly promoted in *Copeland*. This author shares the view of Brown that it is indeed regrettable that the House of Lords saw fit to confirm that a contract to negotiate is 'a thing writ in water'. Brown rightly observes that the common law possesses 'sufficient ingenuity to recognise novel claims and adapt settled rules in order to ascertain or imply contractual liability, some recent cases showing a judicial inclination to investigate new avenues

⁶⁰ See R.P. BUCKLEY (2001).

of thought”.⁶¹ To date, lower courts have been required to follow *Walford* faithfully, merely tweaking the decision at the corners. It is nonetheless surprising how little impact the subsequent decision in *Allied Maples Group Limited v Simmons & Simmons*,⁶² has had on the question of interpretation of negotiations in the English courts. Perhaps, the case has been undervalued as it related to a case in negligence against a solicitor. *Allied* sued for the loss of a chance to negotiate a protective clause into a contract, following their solicitor’s negligent advice during the drafting process (*Allied* were advised to delete a specific warranty that subsequently proved necessary). It was argued and accepted on appeal that *Allied* would merely have to show a substantial chance that it would have been successful in negotiating protection. Crucially, Hobhouse L.J. observed that:

“Where parties are engaged in negotiations on the detailed terms of a commercial deal upon which they are both agreed in principle and from which both are expecting to gain, it is in no way unrealistic to conclude that meaningful negotiations are possible within the framework of the deal when a difficulty of this kind arises ... Negotiations may depend upon the will of the parties and neither party was under any obligation at that stage to agree anything. But it is unrealistic to treat the outcome of further negotiation between commercial parties as arbitrary and wholly unpredictable. Those with experience of commercial negotiation are able, with a reasonable degree of accuracy, to form a view of what can be achieved by such negotiation”.

That said, cases such as *Copeland* and *Walford* are marginal cases that arise at the extremes. These head-ache cases are not an easy fit within the classical rules of contract, nor easily resolved with satisfaction on the grounds of equity and/or good faith. For this reason, the inclusion of a broad, generalised principle of good faith applicable to negotiations under the CFR should be resisted. Introducing such a *principio-norma* as a further legal ‘catch-all’ would not remove the current confused array of rules and remedies applying to the precontractual regime, nor would it provide any greater consistency for dealing with hard cases. To those systems for whom the doctrine is supposedly ‘repugnant’, it would contribute little more than confusion and ‘irritation’. The old piecemeal forms of protection would not easily give way to this new principle of good faith in negotiations, leaving a deeply cluttered European commercial contract law whilst weakening much of the consistency and rigidity that English contract law has prized so dearly. What is required is less practical and doctrinal complexity and, by contrast with what we have at present, the operation of a detrimental reliance doctrine that is limited to recovery of parties’ out-of-pocket expenses.

It can of course be argued that judicial decisions concerning preliminary agreements and resultant reliance are so varied that they simply defy capture. Argument in favour of enforcing the contract to bargain is further open to criticism from those such as Michaels. This author may well be ‘guilty’ of a form of applicative functional equivalence yet the logic for upholding an express bargain to negotiate (and indeed the ‘workability’ of the notion in practice, even in

⁶¹ *Supra*.

⁶² [1995] 1 W.L.R. 1602.

English legal practice) flows both from comparative analysis and practical experience. With civil courts in England and Wales increasingly promoting the advantages of ADR and mediation, particularly post-*Dunnet v Railtrack*⁶³, Lord Ackner's opposition to anything other than adversarial bargaining offers a shortsighted view of commercial negotiations that ignores alternative constructive styles of bargaining - a feature of modern business that at other times and in other settings, the courts of England and Wales have clearly had little difficulty upholding.

Despite Lord Ackner's well-worn dicta in *Walford*, the case of *AT&T v Saudi Cable*⁶⁴ reveals that English lawyers have little practical difficulty policing an agreement to negotiate in good faith. The arbitration panel in London was able to determine that a party failed to negotiate properly and punish that failure with an award in damages. Support for the contract to bargain, despite lending much needed certainty to the English law of contract post-*Walford*, can further be defended as a reinforcement of parties' bargaining freedom. Even where parties fail to express a definitive time-period for further negotiations in 'good faith', the gap-filling approach promoted in the Spanish civil courts is justifiable where parties have indicated a preference for a less adversarial style of negotiations and should be followed by the courts in England and Wales, and in any new agreed EC contract law.⁶⁵

As for the question of 'superiority', few comparative law (or indeed law and economics) studies have been undertaken in Europe to test the validity and/or utility of differing approaches to precontractual liability across jurisdictions, much less the 'superior' regime. Of the small number of economic studies that have addressed the optimal level of interference in contract bargaining, the majority have been US based.⁶⁶ However, as well as glimmers of new thinking in relation to the critical importance of contract drafting, there are increasing signs of new European law and economics scholarship considering the uniformity goal.⁶⁷ Further analysis may ultimately prove modest but such research allied to empirical enquiry must become the fuel of harmonisation.

Finally, beyond the narrower contract to bargain, a modern, coherent doctrine aimed at protecting reliance investment appears equally necessary in emerging European markets. It is submitted that a detrimental reliance doctrine, geared towards a 'light' regulation of commercial bargaining, may provide a suitable alternative to the existing national patchwork of rules and

⁶³ [2002] 2 All ER 850. (In which Railtrack Plc were heavily penalised in costs by the Court of Appeal for refusing to consider mediation, despite the parties being locked in 'without prejudice' negotiations). See also the Australian decision in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 where parties were obliged to maintain an 'open-mind' in further negotiations, and to properly consider proposals, even if they were not compelled to find a definitive agreement.

⁶⁴ [2000] 2 All E.R. (Comm) 625.

⁶⁵ The Spanish Supreme Court has recently considered Lord Ackner's uncertainty problem 'solved'. In an earlier judgment of 5 October 1996 the Court made reference to Article 1.118(2) of the Civil code. Despite the infelicities in its drafting, the provision does provide a sensible gap filling option in allowing a court to determine a time period for further negotiations as that which *would most likely have been agreed* by the parties, having regard to the type of contract under negotiation.

⁶⁶ Including most recently, B. MEDINA & O. Grosskopf (2006).

⁶⁷ J. ALFARO ÁGUILA-REAL (2007), and more concretely, F. GÓMEZ POMAR (2007) (who advocates a minimum regulation of B2B contracts at Community level) Both articles are accessible via Indret.com.

confused concepts. As evidenced by the work of the *Network for Uniform Terminology for European Private Law*, in addition to taxonomy, terminology remains critical. From the perspective of pure legal phraseology, a detrimental reliance doctrine is infinitely superior to the cumbersome and outdated common law 'estoppel' and 'quantum meruit' doctrines and the civil law's 'culpa en contrahendo', even if a constrained detrimental reliance doctrine may provide relief in many of the same ways that the current doctrines operate today. McFarlane has promoted a new 'proprietary estoppel' doctrine for the English law, however it seems preferable to work more universally towards an agreed European doctrine and in this regard 'detrimental reliance' presents itself as an attractive counter-proposal, again even if many of the doctrine's characteristics will overlap neatly with McFarlane's approach.

7. Conclusions

This call for a new Community reliance doctrine may appear at odds with broader trends in the US, and an identifiable judicial retreat from promissory estoppel relief. Macaulay's article in 1991 on *The Reliance Interest and the World Outside the Law Schools' Doors*⁶⁸ has not been as influential as many of his other contributions but would appear to mark the point of retreat from broad reliance claims in the US courts, particularly following the golden age of reliance from *Red Owl* through to the landmark *Texaco Inc* judgment. Though virtually impossible to gauge, it would certainly be worth exploring the extent to which familiarity in US business circles with the threat of reliance damages has gradually rendered the promissory estoppel doctrine both less contentious and much less necessary in practice. Commercial actors in the US are also arguably confronted with significantly less obstacles when agreeing on negotiation positions and general drafting and, as such, sunk costs are likely to be proportionality higher in cross border negotiations in Europe by comparison.

Though the tension between freedom of contract and detrimental reliance will endure - as if it could ever not, provided a clear demarcation line remains between an enforceable bargain and a busted deal, the integrity of European contract law should remain. In England and Wales, 'restitution lawyers have been meticulous in ensuring that the law of contract is not undermined by restitutionary recovery'.⁶⁹ A similar care and circumspection will be necessary at Community level to avoid a Gilmorean 'death' of European contract law before it even took shape. Arguably, a single coherent doctrine applicable to both procedural and substantive expectations, and suitably fashioned on the basis of international experience, could gradually provide the necessary consistency.

Recent US court decisions such as *Copeland* reveal high uncertainty and strong divergence in the treatment of incomplete agreements across State lines, particularly as to when parties can safely retreat from negotiations. The willingness in the US to temper the severity of the rules on

⁶⁸ As Friedman observes, *supra*, the main thrust of modern US law has been in the very opposite direction, notwithstanding the terminological impact of Fuller and Perdue's *The Reliance Interest*.

⁶⁹ See D. NOLAN (1996, p. 605).

formation with theories of reliance means that an evaluation of good faith is largely a prerequisite. On both sides of the Atlantic, however, the courts appear ill-equipped generally to deal with reliance based claims flowing from failed negotiations and partial agreements. As an area of contracting practice the world of failed deals has nonetheless been hopelessly under-examined in European scholarship. The lack of enforcement of existing rules on precontractual liability in the US and European civil courts further betrays a degree of judicial discontent and pinpoints a clear lack of synchronisation between decomposing academic law ‘on the books’ and the realities of the court room.

Beyond immediate substantive (consumer) contract law considerations at Community level, for those intent on fostering greater uniformity in the field of precontractual liability, and who seek to nudge the English courts towards a seemingly more transnational view, removing Lord Hoffman’s procedural obstacle to evidence of negotiations is arguably a necessary first step. In 2006, the Court of Appeal in *Proforce Recruit Ltd v The Rugby Group Ltd* stressed that ‘although the *Investors* principles have been applied or quoted in countless High Court and Court of Appeal cases, the principles are not always consistent with the reasonable expectations of the contractual parties’.⁷⁰ There can be little doubt that the breadth of the exclusionary rule will on occasion disguise real evidence of bad faith in negotiations. Arguably, through the careful use of case management, particularly summary judgment as in the US and sanctions in costs, it ought to be possible to maintain sufficient order for the current rule to be gradually relaxed, even if the high cost of commercial litigation in England continues to cast a long shadow. With European business dominated by little people, such as Copeland, and less so by giants such as Baskin Robbins, the economic case for law reform and greater uniformity merits particular scrutiny under the CFR. Whether it can receive such attention only the next phase of the Common Frame project can reveal.

8. References

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