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**Collected works from Members of Aston Law School**

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**Commercial Law**

**A Critical Look at Promises to Negotiate in Good Faith**

**Arooj Tussadiq**

**Introduction**

Good faith can be defined as adherence to reasonable commercial standards of fair dealing and faithfulness to the agreed common purpose of a contract as well as the reasonable expectations of the commercial parties.[[1]](#footnote-1) English law does not impose a general obligation on commercial parties to contract – or perform their obligations – in good faith.[[2]](#footnote-2) Nevertheless, some areas of law have developed a good faith obligation i.e. the law of misrepresentation.[[3]](#footnote-3) It is, however, increasingly common for parties to agree to negotiate in good faith in order to agree a particular outcome or renegotiate the terms of their contract in the future. However, case law shows that English courts have not universally welcomed such agreements due to their inconsistency with commercial certainty.[[4]](#footnote-4) Thus, the validity of promises to negotiate in good faith is dependent in part on contextual interpretation by courts.[[5]](#footnote-5)

This essay will argue that the law needs to develop to give explicit legal effect to express promises to negotiate in good faith instead of relying on the context of a case to decide whether such terms should be upheld. In doing so, the essay will first shed light on the merits of express promises to negotiate in good faith in English law before exploring the law’s development in position. It will then portray that such promises conflict with commercial certainty due to vagueness and subjectivity. Subsequently, the essay will seek to justify that express promises to negotiate in good faith are consistent with freedom of contract and party autonomy as they give effect to parties’ initial agreement.

**The Importance of Promises to Negotiate in Good Faith**

Contract law provides a framework for commercial dealings by allocating risks and responsibilities amongst commercial parties. The function of a contract is to plan, facilitate, and enforce contractual agreements.[[6]](#footnote-6) However, due to the unpredictable commercial environment, parties fail to retain the planning element when entering long-term contracts. Notwithstanding the length and complexity of contracts, it is impractical to provide for every contingency that might arise during the term of a commercial relationship. When the parties draft a very detailed contract in an attempt to cover every possible situation, the contract becomes less flexible. An example of such a struggle can be identified in relational contracts which can include joint venture agreements, franchise agreements, and long-term distributorship agreements.[[7]](#footnote-7) In such contracts, situations can occur where commercial parties need to (re)negotiate the terms of their contract.

In the absence of a general good faith obligation in English law, one party cannot force the other to negotiate in good faith. Consequently, parties incorporate express terms into contracts requiring them to renegotiate contractual terms in good faith in the event circumstances of their contractual relationship change. Parties might want to renegotiate in the event there is an economic change e.g. a recession;[[8]](#footnote-8) or negotiate to agree the cost of something in the event the need to do so arises in the future, after performance of their obligations has commenced.[[9]](#footnote-9) In this context, it might be beneficial for the parties to leave the situation to be dealt with as and when it arises, perhaps because negotiating to agree every possible eventuality might be time-consuming or impractical. Moreover, long-term contracts require a high level of trust, loyalty, and cooperation from parties to the contract. And it has been said that ‘[p]romises to negotiate in good faith promote loyalty to the contract by precluding parties from engaging in dishonest, uncooperative, opportunistic or irrational behaviour that would undermine their commitment to the contractual relationship’.[[10]](#footnote-10)

As we have seen, therefore, promises to negotiate help the parties to prepare for the future and overcome problems of the kind set out. Furthermore, a good-faith negotiation can assist when a dispute arises, because parties can seek to resolve it through friendly negotiations before going to court. This saves time, keeps the matter confidential, and avoids the need to go through expensive litigation. If their negotiations are unsuccessful, the parties can turn to an arbitrator who is experienced in commercial matters.[[11]](#footnote-11)

**The Development of English law’s Position on Good-Faith Negotiations**

In *Courtney & Fairbairn*,[[12]](#footnote-12)Lord Denning held that agreements to negotiate are unenforceable as they are uncertain due to the difficulty of calculating loss/damages. He further stated that promises to negotiate are unenforceable because they are, in effect, agreements to agree. This decision was followed in *Walford v Miles.*[[13]](#footnote-13) The House of Lords there held that promises to negotiate in good faith are unenforceable due to their inherent uncertainty. Lord Ackner stated that promises to negotiate are too subjective.[[14]](#footnote-14) This was further illustrated by *Barbudev v Eurocom Cable Management Bulgaria EOOD*.[[15]](#footnote-15) The decision in *Walford v Miles* was subsequently followed in later cases.[[16]](#footnote-16) Nonetheless, recent developments depict English law departing from the traditional approach.[[17]](#footnote-17)

In *Petromec Inc v Petroleo Brasileiro SA Petrobras (No.3)*,[[18]](#footnote-18) Longmore LJ opposed Lord Ackner’s decision in *Walford* and held that the courts must give effect to a term which parties deliberately incorporated into their contract.[[19]](#footnote-19) This is consistent with party autonomy and fulfilling the reasonable expectations of commercial parties, so they must be upheld.[[20]](#footnote-20) *Petromec* is a significant development in the law as it endorses the enforceability of express promises to negotiate in good faith. However, it did leave the law in a dubious position as it conflicts with *Walford v Miles*. In *Jet2.com Ltd v Blackpool Airport Ltd*,[[21]](#footnote-21) Longmore LJ decided that best endeavours are enforceable provided the object of the clause is clear and there are sufficient criteria to identify good faith in the particular context.

The position of express promises changed again in *Shaker v Vistajet*.[[22]](#footnote-22) There, Teare J held that express clauses requiring good faith negotiations are vague.[[23]](#footnote-23) However, Teare J’s decision is controversial because it should not have been too difficult to uphold the clause in *Shaker* since a good-faith negotiation clause was upheld in *Petromec*. Nevertheless, Teare J stated that he did not disagree with the decision in *Petromec*;[[24]](#footnote-24) it was just that the facts of the two cases were different. In *Emirates Trading*,[[25]](#footnote-25) Teare J decided that promises to negotiate are enforceable. Then, in *Astor Management AG v Atalaya Mining Plc[[26]](#footnote-26)* – which concerned a promise to use reasonable endeavours – Leggatt J disagreed with some of Andrews J’s analysis *Dany Lions Ltd v Bristol Cars Ltd*[[27]](#footnote-27) (which held promises to negotiate are unenforceable) and suggested promises to negotiate should be enforceable generally; observing that the role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy.[[28]](#footnote-28)

**Objections to Enforceability of Express Promises to Negotiate in Good Faith: Good Faith and Certainty**

English commercial law aims to achieve certainty as parties rely on precedents to plan for their commercial relationship: ‘The primary function of commercial law…is to accommodate the legitimate practices and expectations of the business community in relation to their commercial dealings’.[[29]](#footnote-29) However, upholding express promises to negotiate in good faith conflicts with commercial certainty. In *Walford v Miles*, Lord Ackner held that agreements to negotiate in good faith are uncertain as they are too subjective. Subjectivity develops when the courts have to decide what good faith is in a particular context; whether the negotiations have taken place; if so, whether they have taken place in good faith; whether the event triggering the negotiations (e.g. a change in circumstance) has occurred in accordance with the parties’ contract; and what would be the outcome of the negotiations, relevant to the measurement of loss. This uncertainty could be avoided to some extent if all the essential terms have been included in the contract;[[30]](#footnote-30) the aim of the contract and negotiation is clear; and the courts know exactly what the promise involves. Express promises must be clear and explicit in identifying what is to be renegotiated and in what circumstances.[[31]](#footnote-31) This will make it easier to interpret the contract and its term(s) relevant to the negotiation.

As it is impossible to provide for every situation in the contract, parties use broad terms such as ‘reasonable’ and ‘fair’, allowing themselves to be flexible when commercial circumstances change. This causes uncertainty as English courts generally take the position that broad terms are vague/ambiguous and should not be enforced.[[32]](#footnote-32) Furthermore, the difficulty of predicting the outcome of negotiations, the difficulty of proof of breach, and the difficulty of estimating damages also makes a negotiation clause uncertain. However, the fact it might be difficult to prove these elements in some cases is not a reason to suggest the clause lacks real content and should be unenforceable.[[33]](#footnote-33) The clauses require the parties to take part in honest negotiations. Breach of their obligation might occur if they refuse to engage in negotiations; or, if they do negotiate, they do so without sincerity. This should not be too difficult to assess. Although it is difficult to calculate loss, still possible for the courts to decide an appropriate remedy.

**Resolving the Uncertainties**

Lord Hoffmann suggested that courts can use a contextual approach to resolve uncertainties in meaning.[[34]](#footnote-34) Difficulties associated with the ambiguity of a term and assessing loss can also be resolved by using a contextual approach. The context of a case may include the factual background of a case and business common sense.[[35]](#footnote-35) Where a term has two meanings, the courts will interpret it in a manner which is consistent with commercial expectations due to the respect for freedom of contract.[[36]](#footnote-36) Courts must be willing to adopt a more flexible approach as ther flexibility of the law is as important as certainty.[[37]](#footnote-37) They can also resolve the issue of subjectivity by deciding the parties’ intentions. If it is impossible to predict any damages, the courts can still award nominal damages. It is also possible to work out wasted expenditure which might be used to award damages. Some good faith clauses – such as that in *Emirates Trading ­–* require the parties to use arbitration in the event their negotiation does not lead to an agreement. Arbitrators are familiar with commercial environments and can make a commercially-sound decision.[[38]](#footnote-38)

**Good Faith and Intention to be Bound**

The law desires giving legal effect to commercial contracts given that contracting parties can show that they intended to be bound by the contract. Hence, where the parties expressly provided that they wished to enter an agreement to negotiate in good faith, they should be upheld by the courts. This derives from freedom of contract which means that the parties are free to enter arrangements to set out the terms of their commercial relationship. The fact that the parties have added something into the contract is a compelling reason to conclude that they intended that provision to have legal force.[[39]](#footnote-39) So, it is not the courts’ role to rewrite the contract, but their role is to enforce what is written in the contract.[[40]](#footnote-40) This principle applies even when the courts believe that upholding the term would lead to uncertainty. By giving effect to express promises, the courts uphold party autonomy and freedom of contract. If the object of a term of a contract is clear and is free from any ambiguity, they courts must uphold it.[[41]](#footnote-41) The courts should not interfere with parties’ contracts and must focus on what had been agreed at the time of the contract.

One reason why express promises to negotiate in good faith might seem unenforceable is that they do not promise a binding *agreement*. The courts have regarded them as agreements to *agree* and therefore of no legal content. However, the intention of the parties was simply to enter the process of negotiation and not to conclude an agreement.[[42]](#footnote-42) Though parties were not under an obligation to agree anything, the outcome of the negotiations is not absolutely unpredictable.

**Conclusion**

Though the law appears to be departing from the decision in *Walford v Miles* as seen in *Petromec* and subsequent cases, the current position on express promises to negotiate in good faith is unsatisfactory. The courts have discretion to embrace or reject promises to negotiate in good faith through contractual interpretation. However, this also causes uncertainty as the parties do not know whether their contract will be upheld by the courts. The main threat to the enforceability of such promises is judicial interpretation, so it is important that the parties draft their contracts in an accurate and unambiguous manner. If the courts render the terms unenforceable, these promises do not have any effect. Promises to negotiate in good faith must be upheld as their merits outweigh their potential problems.

**Post-Brexit, Would the CISG be a Useful Addition to English Sale of Goods Law Specifically Regarding Contractual Interpretation and Contractual Continuity?**

**Mohammed Ilyas Anwar**

**Introduction**

Since the mid-eighteenth century, lawmakers across the world have strived for a consistent and universal form of international trade law, based on common sense and common legal principles.[[43]](#footnote-43) These efforts have been re-envisioned in the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).[[44]](#footnote-44) While the United Kingdom Department of Trade and Industry has issued two consultation papers (in 1989 and 1997) on the subject of the UK entering the CISG and despite major UK trading partners being signatories,[[45]](#footnote-45) the UK is yet to take any formal steps to adopt the CISG.

This begs the question of whether, in light of Brexit, would the UK wish to re-strengthen its global trade platform by joining its allies as a CISG signatory? This article will critically consider whether the CISG would be a useful addition/replacement for English sale of goods law, specifically regarding contractual interpretation and remedies. First, it will consider the difference in approaches to contractual interpretation, between English law and the CISG, with a focus on the English parol evidence rule and why it should be replaced with Article 8(3) CISG.[[46]](#footnote-46)

The second and third sections will focus on the aftermath of contractual interpretation, remedies, specifically specific performance and *Nachfrist*, a remedy of additional time which gives defaulting parties time to cure their performance.[[47]](#footnote-47) Due to the increased time, money, and effort that is invested into international trade,[[48]](#footnote-48) contractual continuity has become desirable in modern sales contracts,[[49]](#footnote-49) making these two remedies of particular importance.

It will be argued that Article 8(3) CISG should replace England’s parol evidence rule,[[50]](#footnote-50) but regarding the remedies of specific performance and *Nachfrist*, English law should retain its current rules as the CISG would fail to bring material change.

**Contractual interpretation**

The focus of this section will be why the parol evidence rule should be replaced by Article 8(3) of the CISG. First, to consider why change is needed, English law favours commercial certainty, over justice/fairness which,[[51]](#footnote-51) in part, has led to the development of the parol evidence rule. The parol evidence rule ‘prohibits parties in litigation from introducing extrinsic evidence of prior or contemporaneous agreements, negotiations, or representations to modify, supplement, or contradict a written contract.’[[52]](#footnote-52) Its purpose is to bring certainty to contracting parties in knowing that the court will interpret their contract in confinement of the written document,[[53]](#footnote-53) contrasting Article 8(3)’s approach.

The parol evidence rule’s certainty, however, comes at the expense of justice.[[54]](#footnote-54) This was seen in *Hitchings v Northern Leather*[[55]](#footnote-55) which concerned an oral agreement, and contemporaneous promissory note, that the defendant would not be bound to pay for goods if they were not to sample, which they were not. Subsequently, payment was demanded which the defendant refused to pay. Due to the parol evidence rule, the court held that the promissory note and oral agreement could not be relied upon, meaning the defendant was liable to pay.[[56]](#footnote-56) This case demonstrates the injustice of the parol evidence rule as it essentially allowed a party to induce a contract via misrepresentation and when the innocent party sought to rely on the mutually agreed oral term, it was struck out using the parol evidence rule. The parol evidence rule thus causes the courts to omit consideration of agreements and circumstances that are imperative to the interpretation of agreements. Parties can thus be held to a contract that is different from what they understood and agreed, causing injustice and uncertainty,[[57]](#footnote-57) as seen in *Hitchings*.[[58]](#footnote-58) Therefore, ‘to the extent that the rule [parol evidence rule] operates to bar proof of such agreements, it frustrates the true intentions of the parties.’[[59]](#footnote-59)

The parol evidence rule’s injustices led to the creation of exceptions to make it more equitable.[[60]](#footnote-60) However, these exceptions have meant that the parol evidence rule can easily be circumvented such as where an oral agreement runs parallel to a written contract[[61]](#footnote-61) or where an agreement is partly written and partly oral.[[62]](#footnote-62) Therefore practically, due to the informality of a lot of agreements,[[63]](#footnote-63) the parol evidence rule has been reduced to a relatively stringent rule.[[64]](#footnote-64) It only really applies to express contractual terms, creating uncertainty as to whether it remains a general rule in English law and its place in the courts’ general approach to contractual interpretation.[[65]](#footnote-65)

Entire agreement clauses also make the purpose of the parol evidence rule redundant. If the parties wished to disqualify extrinsic evidence, they could expressly do so via an entire agreement clause. If the parties have not, it can be inferred that they are happy to have extrinsic evidence considered in litigation, allowing an equitable and more accurate interpretation of the contract, [[66]](#footnote-66) which would be permissible if Article 8(3) was adopted.

These factors suggest that a regime change by Article 8(3) CISG is needed.[[67]](#footnote-67) Contrary to the parol evidence rule, Article 8(3) allows ‘all relevant circumstances of the case including the negotiations, any practices the parties have…established between themselves, usages and any subsequent conduct of the parties,’[[68]](#footnote-68) to be used in objectively determining the parties intentions.

When compared to the parol evidence rule, Article 8(3)’s wider contractual interpretation would be beneficial as it better reflects the parties’ intentions. Contracts are not created and do not exist in a ‘vacuum’; they are influenced by negotiations, drafts, oral agreements, and circumstances.[[69]](#footnote-69) Whilst the parol evidence rule ignores ‘that the parties may, in previous negotiations, have agreed on terminology,’[[70]](#footnote-70) or that the circumstances in which a contract was negotiated may significantly alter its meaning, contrasting the English approach, the CISG would take these factors into consideration. The CISG allows extrinsic evidence to be used to interpret contracts, allowing the court to more precisely infer the parties’ intentions. Whilst this discretion may bring uncertainty as to how the courts will interpret contracts, this is outweighed by the courts upholding the parties actual intentions which, holistically, the parol evidence rule intends, but fails to do, as written contracts may omit provisions and factors which reflect the parties true intentions.

Whilst there is a fear that Article 8(3) would remove contractual certainty and that the courts may ‘re-write’ contracts, which is denounced in English law,[[71]](#footnote-71) this is avoided by Article 6 CISG allowing parties to avoid/disapply Article 8(3).[[72]](#footnote-72) Article 6 thus allows entire agreement clauses to be effective.[[73]](#footnote-73) However, to be effective, the parties must expressly state that they seek to disapply Article 8(3) and that both parties, with full knowledge, agree that extrinsic evidence cannot be presented in court and both parties consent to the contractual document constituting the whole agreement.[[74]](#footnote-74)

The onerous obligation, of a more detailed entire agreement clause, would arguably be positive. It ensures that the parties are happy to exclude extrinsic evidence by requiring more to achieve this, as opposed to English law where it is a default and the parties have no choice to determine otherwise. If adopted, the CISG would thus expand party autonomy,[[75]](#footnote-75) via contractual interpretation, furthering an integral principle of English law.[[76]](#footnote-76)

Article 8(3) would make an effective replacement to the parol evidence rule as it would allow the parties’ true intentions to be upheld, which the parol evidence rule fails to do. Due to Article 6, English commercial parties would not be too hesitant to adopt Article 8(3) as they have the choice of strict contractual interpretation, allowing for their desired commercial certainty.

**Remedies**

Contractual interpretation often proceeds a breach of contract. The courts then have to grant a remedy which is considered in the next section, specifically specific performance and *Nachfrist*. These two remedies are of particular importance due to the significance of commercial continuity as expressed by Bridge.[[77]](#footnote-77) Both specific performance and *Nachfrist* are predicated on the idea that the parties should fulfil their contractual obligations as agreed, furthering commercial certainty as the parties are inclined to perform their contracted obligations, making a breach of contract less likely.[[78]](#footnote-78)

**Specific performance**

With the sale of goods becoming increasingly transactional and complex, its associated transaction costs are increasing, causing contractual continuity to become increasingly attractive. From the perspective of both a buyer and seller, it would be an inconvenience that, after time, money and effort had been invested into a contract, one of the parties defaults. Not only would this cause direct losses, which can be compensated by damages, but also indirect losses which damages may not cover. This has meant that specific performance, a remedy to compel a defaulting party to perform their obligation(s),[[79]](#footnote-79) under both the CISG and Sale of Goods Act 1979 (SGA), has become increasingly important.[[80]](#footnote-80)

Under English law, specific performance is set out in S52(1) SGA,[[81]](#footnote-81) and is ‘granted in limited circumstances.’[[82]](#footnote-82) Specific performance is only granted for ‘specific or ascertained goods,’[[83]](#footnote-83) goods that are ‘identified and agreed on at the time a contract of sale is made’[[84]](#footnote-84) or goods ‘identified in accordance with the agreement after the time a contract of sale is made.’[[85]](#footnote-85)

However, the scope of application of specific performance brings uncertainty as it is at the courts’ discretion to determine whether to grant the remedy. This uncertainty means a ‘plaintiff… has no means of knowing whether the remedy will be granted even if successful on the merits of the case.’[[86]](#footnote-86) This uncertainty is prevalent when comparing *Re Wait*[[87]](#footnote-87) and *Sky Petroleum*.[[88]](#footnote-88) *Re Wait* concerned the sale of wheat which formed part of a bulk,[[89]](#footnote-89) and *Sky Petroleum* concerned the sale of unseparated petroleum.[[90]](#footnote-90) In principle, both goods constituted unascertained goods,[[91]](#footnote-91) however, in *Sky Petroleum* the court granted specific performance but not in *Re Wait*, evidencing the courts’ inconsistency.[[92]](#footnote-92)

Whilst the facts of *Sky Petroleum* were unique, as the seller was the sole available supplier of petroleum at the time, the court failed to address its authority regarding s52, *Re Wait,* and its ability to grant specific performance in unique circumstances. This left uncertainty as to whether the quasi-equitable approach taken by the courts in *Sky Petroleum*, to determine that the unseparated petroleum was ascertained, was unique or could the courts repeat this. Subsequent courts have also dismissed *Sky Petroleum*, further making the law on what constitutes an ascertained good, and thus the scope of specific performance, uncertain.[[93]](#footnote-93) This uncertainty increases time and money spent by commercial parties on litigation, as they have no other method of definitively determining whether a good is ascertained. Throughout litigation, the courts’ inconsistency means that the parties cannot be certain as to how the court will decide, further impeding commercial certainty.

Due to this uncertainty, English law may benefit if s52 was replaced by Article 46 CISG, which sets out the remedy of specific performance for a buyer.[[94]](#footnote-94) Whilst Article 62 establishes specific performance for a seller,[[95]](#footnote-95) the focus will be on Article 46, which is used more in practice.

Immediately, Article 46 would eliminate the main uncertainty from s52 concerning the classification of goods.[[96]](#footnote-96) Under Article 46, there is no requirement that goods be ascertained,[[97]](#footnote-97) discarding the uncertainty evidenced by *Sky Petroleum*.[[98]](#footnote-98) This creates certainty for commercial parties in knowing that the courts will, unless a remedy that is inconsistent with specific performance is pursued,[[99]](#footnote-99) grant them specific performance.[[100]](#footnote-100) This would reduce litigation as the parties would know that the courts would grant specific performance and could themselves enforce this.

The CISG also has the benefit of granting the discretion to pursue specific performance to the buyers, without the need to resort to the courts, contrasting the SGA where the discretion is to the courts to grant the remedy.[[101]](#footnote-101) Thus, if Article 46 replaced s52 it would likely increase the instances in which specific performance is awarded, as damages are the courts’ primary remedy in English law.[[102]](#footnote-102) This would enforce contractual continuity and reduce time and money spent on litigation. Despite these benefits, Article 46 has a catch - Article 28.[[103]](#footnote-103)

Under Article 28, a court is ‘not bound to enter a judgement for specific performance unless the court would do so under its own laws.’[[104]](#footnote-104) If adopted, this would mean that when an English court would decide whether to grant specific performance, it could decide using s52,[[105]](#footnote-105) bringing with it the same uncertainty considered for the English remedy above, undermining the purpose of a regime change. Whilst there is an argument that as Article 28 is discretionary it would not create an obligation for English courts to follow domestic law,[[106]](#footnote-106) this would be wishful thinking. The English courts continue to show a reluctance to increase the scope of specific performance and would thus unlikely divert from the traditional s52 approach if the CISG was adopted.[[107]](#footnote-107)

Thus, due to Article 28, if the CISG was adopted, the English courts would likely follow the same narrow and uncertain rules it currently uses, undermining the inclination for Article 46’s adoption.

**Nachfrist**

Regarding the fundamental ‘philosophy of contractual continuance’ underlining the CISG,[[108]](#footnote-108) where specific performance is unsuitable, the remedy of additional time (Nachfrist) could be granted. Like specific performance, Nachfrist seeks contractual continuity, ‘the additional time gives the defaulting party time to cure its performance.’[[109]](#footnote-109) Whilst English law lacks a direct Nachfrist counterpart, an ‘innocent party’ can waive its strict right and grant the defaulting party extra time for the breach of a timing obligation, which is similar to Nachfrist.[[110]](#footnote-110)

When considering whether Nachfrist should replace the corresponding English remedy, the inclination for change must first be considered. The main issue with the English remedy of granting extra time is the uncertainty from the use of the term ‘reasonable.’[[111]](#footnote-111) This refers to the period in which a defaulting party must perform their obligations after the ‘notice to bring matters to a head’ is served.[[112]](#footnote-112) Once this ‘reasonable period’ has elapsed, an innocent party can avoid the contract. Whilst ‘remedial flexibility’ is needed to adjudicate the unique cases before the courts, the use of the term ‘reasonable’ brings great uncertainty for commercial parties.[[113]](#footnote-113) Due to its subjectivity, one cannot confidently say that a period is reasonable. Commercial parties therefore have to spend time and money on litigation for the courts to determine this.

Litigation could also delay the parties’ ability to trade. An ‘innocent party’ not only has to wait until a period that they believe is reasonable to pass, but also for a court date and hearing. This could cause a significant delay to the parties, particularly small businesses’ trading activities, harming their market standing and profitability for which damages may not compensate.

Litigation would also adversely affect the parties’ relationship. In court, the parties would be opposing each other, and a court’s decision would mean there is a ‘winner.’ This is an unfavourable notion for companies working together, especially in long-term supply contracts. It can create animosity between the parties, causing a break down in their commercial relationship.

Due to this, the consideration of the CISG’s Nachfrist as a replacement for the English remedy of granting extra time would be beneficial. Articles 47 and 63 of the CISG set out the buyer and seller’s remedy of Nachfrist respectively.[[114]](#footnote-114) If an ‘innocent party’ seeks to repudiate a contract after a delay in performance, they must know what passage of time constitutes a fundamental breach.[[115]](#footnote-115) A benefit of the CISG is that where an ‘innocent party’ is unsure whether a passage of time constitutes a fundamental breach, they can grant a Nachfrist period.[[116]](#footnote-116) At the end of this set period, a failure to perform, or a notice that the defaulting party will not perform, would constitute a fundamental breach, allowing the contract to be avoided,[[117]](#footnote-117) even if the breach would not otherwise be fundamental.[[118]](#footnote-118) This creates certainty as it establishes a date at which the contract can be avoided if performance is not forthcoming.[[119]](#footnote-119)

Whilst bringing certainty, the Nachfrist period itself creates uncertainty as it must be ‘reasonable,’ a term which, like the English system, the CISG fails to define.[[120]](#footnote-120) This uncertainty is exemplified in CLOUT case No.136 which concerned a seller’s failure to deliver printing-presses punctually.[[121]](#footnote-121) The buyer granted a Nachfrist of 2 weeks but after 7 weeks of non-delivery avoided the contract. The court held that 2 weeks was too short, but 7 weeks was reasonable but failed to explain why. Evidently, the courts’ discretion creates uncertainty as even where an ‘innocent party,’ who is likely to be well versed in the trade, has granted a period that objectively and subjectively seems reasonable, the courts may, as in case No.136, hold otherwise. Akin to English law, an innocent party would thus have to litigate to find out whether an elapsed period is reasonable, increasing uncertainty and litigation costs.

This uncertainty undermines the viability of the CISG as a replacement/addition to English law. Due to the need for ‘remedial flexibility,’[[122]](#footnote-122) both regimes evidence the same inherent issues from the use of the flexible, but uncertain, term of reasonable. This uncertainty undermines the inclination for the adoption of the CISG as the same issues as under English law would simply be re-established by the CISG.

**Conclusion**

To conclude, English law should adopt Article 8(3) of the CISG to replace the parol evidence rule.[[123]](#footnote-123) Whilst bringing uncertainty, this is outweighed by the courts upholding the parties’ true intentions which can be deduced using extrinsic evidence. Despite the hard-line approach taken by the courts today,[[124]](#footnote-124) the courts have shown an attraction to an Article 8(3) like approach via their endeavours in commercial common sense regarding contractual interpretation.[[125]](#footnote-125) Article 8(3) could solidify this desire.

The CISG’s remedies of specific performance and Nachfrist would fail to bring material benefits to English sales of goods law. Regarding specific performance, this is due to the compromises made to get signatories,[[126]](#footnote-126) seen by Article 28, and regarding Nachfrist, due to the similarities of the CISG and English law. If adopted, the CISG would simply re-establish the existing pitfalls in English law, undermining the purpose of its adoption. However, despite its pitfalls, post-Brexit, would England consider adopting the CISG to re-strengthen its global platform?

The UK is one of the last ‘powerhouse’ economies that is not a CISG signatory, but with its place on the global market set to take a hit, could the harmonisation that underpins the CISG be beneficial?[[127]](#footnote-127) It would help strengthen trade, and with most of Europe signed up to the CISG, it could reduce the effects of the UK leaving the single market.

Regarding the remedies of Nachfrist and specific performance, whilst the adoption of the CISG would bring no material benefit to these remedies, the adoption of the CISG would create no material deficit. Thus, the adoption of the CISG, whilst possibly causing regression with precedent and some uncertainty, may be beneficial for England with the regression in precedence being a small price to pay for greater global commercial success.

**A comparative piece concerning the CISG and English Commercial Law with reference to the topics of formation of contract, good faith and remedies: are the provisions posed by the CISG a worthwhile addition to English Commercial Law?**

**Alisha Somani**

**Introduction**

The purpose of the United Nations Convention on Contracts for the International Sale of Goods ‘is to provide a modern, uniform and fair regime for contracts.’[[128]](#footnote-128) Furthermore, ‘the adoption of the CISG increases the predictability of the law applicable to the contract…thus simplifying the resolution of disputes.’[[129]](#footnote-129) The CISG has been adopted by two-thirds of the global economy which indicates its part success in the harmonisation of international law. However, the United Kingdom (UK) has demonstrated a clear reluctance in adopting the CISG and does not perceive ratification as a legislative priority. The predominant issue is that the UK does not want to undermine the core principles of English law which refer to the importance of predictability, legal certainty, and party autonomy. It is apparent that implementing the CISG could threaten the robust position of English commercial law. However, do the benefits of the CISG outweigh the potential destabilisation of English law?

This article will critically compare the CISG and English commercial law with reference to the three distinct stages of commercial contracts. Firstly, the formation of the contract will be addressed regarding valid acceptance and irrevocable offers. This will be followed by the performance of the contract focusing on the element of good faith. Last, the article will address breach of contract concerning the topic of remedies. The conclusion will establish that the CISG is not a useful addition to English Law as adopting it would threaten the principle of legal certainty. However, it is recommended that English commercial law refer to the CISG as an example to learn from.

**CISG Provisions on Formation of Contract in Comparison to English Law**

When addressing the formation of the contract there are a few similarities between the CISG and English law. Primarily, according to Article 11, the CISG has no specific requirements of formality regarding the formation of the contract.[[130]](#footnote-130) In contrast to civil law jurisdictions, this format is similar to English law as there is no obligation for a contract to be evidenced in writing.[[131]](#footnote-131) Under both the CISG and English law it is possible to form a contract verbally or by conduct.[[132]](#footnote-132) Moreover, both the CISG and the Sale of Goods Act require offer and acceptance to form an agreement.[[133]](#footnote-133) They equally view acceptance as a mirror image of the offer.[[134]](#footnote-134) Furthermore, both provisions address the notion of an invitation to treat.[[135]](#footnote-135) These similarities demonstrate the ineffectiveness of implementing the CISG as it provides no additional benefit to English law.

**Addressing the Difference Concerning Valid Communication of Acceptance**

Though parallels are present there are still disparities amongst the provisions. The CISG departs from the Sales of Goods Act (SGA) in determining a valid communication of acceptance. According to Article 18(2) of the CISG ‘an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror, referred to as the receipt rule.’[[136]](#footnote-136) Whereas, under common law, an offer is considered accepted once a letter of acceptance is properly addressed and stamped which is referred to as the dispatch rule.[[137]](#footnote-137) This conflict between receipt and dispatch theory ‘complicated the United Nations Commission on International Trade Law’s work on uniform formation rules.’[[138]](#footnote-138) The dispatch rule applies regardless of whether the letter is received by the offeror indicating that English law somewhat disproportionately protects the offeree. This is concerning as it disregards any consideration for the offeror.

A further difficulty with the dispatch rule concerns the possibility to retract a postal acceptance before it arrives. The concept of retraction remains highly ambiguous given the lack of English authority on this matter.[[139]](#footnote-139) Alongside this, will the dispatch rule remain relevant in the digital age? It has been said that ‘the logical conclusion would be that e-mail acceptances do benefit from the postal rule and email may be the last bastion for the application of such rule.’[[140]](#footnote-140)

Consequently, implying legislation reform may be necessary for the near future, particularly regarding instantaneous communication. The question to address is whether these existing aspects of uncertainty regarding valid acceptance could benefit from the CISG’s involvement? As the international convention is in accordance with civil law tradition the two provisions adopt distinctly conflicting positions.[[141]](#footnote-141) Despite this, it would be useful to implement the CISG as doing so would abolish the dispatch rule entirely. This is beneficial as it would eliminate ambiguity for commercial parties.

**Tackling the Difference Regarding Irrevocable Offers**

An additional disparity between the CISG and English Commercial Law concerns the idea of irrevocable offers. Firstly, an offeror is free to revoke an offer at any time before acceptance.[[142]](#footnote-142) This is akin to the position under common law.[[143]](#footnote-143) Article 16(2) of the CISG indicates that an offer cannot be revoked if it states it is irrevocable or if it was reasonable for the offeree to rely on the offer as irrevocable.[[144]](#footnote-144) According to the CISG, an irrevocable offer can be evident by the offeror stating a fixed time for acceptance meaning that within that time the offer cannot be revoked.[[145]](#footnote-145) Whereas under English Law if an offer indicates a fixed time for acceptance, the offeror may revoke this offer at any time during this period unless consideration has occurred.[[146]](#footnote-146)

In English law, consideration is significant when referring to unilateral contracts. Within unilateral contracts acceptance is established once the performance has begun and consideration occurs when the requested action is completed.[[147]](#footnote-147) The question to address is whether the offeror can revoke the offer once the performance has begun? According to the case of *Dahlia*, unilateral offers cannot be revoked once the performance has begun for one of two reasons; an express offer to pay on the performance of the act or an implied offer not to revoke once the performance has begun.[[148]](#footnote-148) The CISG fails to distinguish between bilateral and unilateral contracts and also disregards the notion of consideration outwardly overlooking this substantial aspect of commercial law. This potentially indicates the CISG’s lack of breadth. Therefore, it does not adopt a position on whether an offeror can revoke after the performance has begun. The CISG’s ignorance of identifying a position results in much uncertainty therefore enforcing the thorough stance of English commercial law.

**Is the CISG’s approach to formation of contract a useful addition to English law?**

Overall, many aspects of the formation of contract regarding both the CISG and English Law are parallel. In regard to the differences, English law is in fact comprehensively advanced particularly within the area of irrevocable offers. The CISG would not provide any additional benefit to English Law here. However, English Law’s stance on the retraction of postal acceptance is ambiguous and requires further development. Therefore, the CISG could be a useful addition to English Law as it would abolish the dispatch rule in turn closing the gap between civil and common law jurisdictions. This would prevent English law from disproportionately protecting the offeree as well as provide certainty to contracting commercial parties.

**CISG Provisions on Good Faith in Comparison to English Law**

Article 7 of the CISG does not impose a positive duty of good faith but instead adopts a general principle. Therefore, it imposes broad good faith obligations. The vagueness of Article 7 alludes to the ineffectiveness of the CISG’s position regarding good faith. The convention must be interpreted in line with the observance of good faith which is a compromise given that civil and common law jurisdictions adopt dividing stances.[[149]](#footnote-149) This approach seems to introduce an element of uncertainty by leaving unanswered questions regarding the role of good faith within the CISG. The pivotal question to address is how the CISG defines this principle? The term ‘good faith’ is ambiguous and means ‘different things to different people in different moods at different times and in different places.’[[150]](#footnote-150) Therefore, imposing a general principle of good faith can be complex as no standardised definition is provided for parties to refer to. However, if the CISG incorporated its own definition of good faith it would provide further clarity for both judges and commercial parties. Article 7 of the CISG ‘would ultimately endanger uniformity as national courts would be influenced by their own legal and social traditions.’[[151]](#footnote-151) This reaffirms the difficulty of uniform application with reference to international principles. How does this general principle of good faith differ from the approach adopted by English commercial law?

English law adopts an incremental approach as it fails to recognise an overarching requirement for contracting parties to act in good faith.[[152]](#footnote-152) Instead English law exhibits ‘pockets’ of good faith by adopting ‘piecemeal solutions.’[[153]](#footnote-153) It has been noted that ‘given that good faith is impossible to define, it seems likely that introducing good faith into commercial contracts without further precision will lead to undesirable uncertainty and litigation.’[[154]](#footnote-154) Furthermore, ‘the absence of good faith is often perceived to increase commercial certainty and the respect afforded to freedom of contract, which is highly desirable for many commercial actors.’[[155]](#footnote-155) This somewhat provides a competitive advantage as international parties are likely to apply English commercial law considering the benefit of party autonomy; though English law lacks an overriding principle in certain circumstances it accepts the notion of good faith. [[156]](#footnote-156) English law distinguishes terms to act in good faith using three classifications: express promises to act in good faith; express promises to negotiate in good faith; and implied duties of good faith. All of which hold inconsistencies in case law resulting in uncertainty.[[157]](#footnote-157) Occasionally, as courts are awarded significant discretion, they deny the enforceability of good faith clauses which undermines the principle of party autonomy.[[158]](#footnote-158)

Ratifying the CISG would be disadvantageous to England. Instead, English Law should use the CISG as a foundation to construct an overarching national principle of good faith. When doing so English law should also look to include a definition of good faith which would reduce undesirable uncertainties and provide further clarity to both judges and commercial parties. Imposing such a principle will encourage judges to frequently enforce commercial parties’ good faith clauses in turn maintaining party autonomy and reducing legal uncertainty.

**CISG Remedies Regarding Breach of Contract in Comparison to English Law**

Both the CISG and the SGA adopt damages and equitable remedies when resolving breach of contract. Alongside this, both provisions have a similar concept of avoidance as parties are discouraged from walking away unless the breach is fundamental.[[159]](#footnote-159)

**Specific Performance**

There are several potential remedies for breach of contract, one of which is specific performance. Under English law, ‘the equitable remedy of specific performance is limited in its application and reserved for extraordinary circumstances.’[[160]](#footnote-160) Whereas ‘the Convention implements specific performance as its primary remedy and provides aggrieved purchasers with a right to require performance of the seller.’[[161]](#footnote-161) Though both legislations incorporate the use of specific performance, the CISG utilises the remedy much more. There are also certain disparities amongst the provisions regarding the remedy itself.

Firstly, under English law, the goods involved must be specific, ascertained, or otherwise identified under the contract.[[162]](#footnote-162) This deduces that ‘the English position reserves performance for exceptional circumstances where goods are unique[[163]](#footnote-163) and not merely limited or inconvenient to reacquire.’[[164]](#footnote-164) Subsequently, the scope is exceedingly narrow, and courts are awarded too much discretion regarding the uniqueness of goods resulting in inconsistency and uncertainty throughout case law.[[165]](#footnote-165) Perhaps a test should be created to determine unique goods? However, the mere fact that ascertained goods are involved provides no guarantee that the court will exercise its discretion and order specific performance.[[166]](#footnote-166) The most frequent reason for this lack of assurance is due to businesses requiring constant supervision by the courts.[[167]](#footnote-167) Whereas the convention has no requirement under Articles 46 or 62 that the goods be ascertained.

Another prominent difference between the two provisions concerns who is entitled to the remedy. The SGA section 52(1) makes no reference to buyer or seller, but instead refers to ‘plaintiff’ and ‘defendant.’[[168]](#footnote-168) Based on this ambiguity, ‘some have argued that in theory, a seller can sue for specific performance,  while others state categorically that only the buyer has a right to seek the remedy.’[[169]](#footnote-169) In practice under the SGA, it is rare for sellers to be awarded specific performance. However, it is conceivable in some circumstances.[[170]](#footnote-170) On the contrary, under the CISG as well as the buyer’s rights to require performance, there is also a parallel provision for the seller.[[171]](#footnote-171) Subsequently, even though both legislations allow the buyer and seller to claim specific performance, the narrow nature of the SGA is concerning as it fails to explicitly protect the needs of the seller.

The final disparity is the difference between section 52(1) and Article 46 regarding the emphasis on who may pursue the remedy. Commentators have noted that ‘specific performance under the SGA is a remedy granted by the court; yet under the CISG, it is the option of the buyer to require specific performance, without any requirement of resorting to a court.’[[172]](#footnote-172) Perhaps if English parties were able to pursue the remedy themselves it would prevent its exclusive use in exceptional circumstances in turn allowing for leniency. Given that the predominant reason courts refrain from awarding specific performance concerns the element of supervision, adopting the CISG’s approach will allow parties to act independently without requiring the need of court. Therefore, implying that the CISG could be a useful addition to English law.

**Conclusion of CISG remedies**

Ultimately the CISG provides a desirable and efficient set of rules for governing modern-day commercial transactions than that of the SGA. Therefore, we can perhaps suggest that English law should categorically absorb certain CISG mechanisms. Consequently, regarding remedies, the CISG has proved to be a useful addition to English law. However, Article 28 states that the court is ‘not bound to require that performance unless the court would do so under its own national law.’[[173]](#footnote-173) Though this escape clause may seem useful from the perspective of English courts it not only undermines the uniformity of the CISG but also alludes to the uselessness of ratification. However, English law should refer to the CISG as a basis to reform their discretionary approach to remedies. For instance, English law should widen its application of specific performance in turn encouraging the completion of commercial contracts and limiting the discretionary nature of the courts. Alongside this, English law should also specify the seller’s entitlement to sue for specific performance and stipulate that buyers can pursue the remedy without any requirement of resorting to court.

**Conclusion**

In conclusion, the CISG fails to offer a useful addition to English law. However, it does provide a satisfactory model for English parliament to refer to when creating new pieces of legislation. From start to finish of the contracting process there are certain elements of English law that require modification therefore analysing the CISG has provided an insight into the areas of English law that require improvement. Although the CISG has advantageous concepts, particularly regarding the formation of contracts and remedies it would be far too complex to ratify or adopt the convention as a whole. English law should instead follow the CISG model and adopt certain superior aspects of it.

For instance, within the formation of contracts, English law’s ambiguous approach on the retraction of postal acceptance requires improvement. Thus, English Law should follow the CISG’s stance and abolish the complex dispatch rule. In tun this would reduce legal uncertainty and harmonise the approach of valid acceptance across common and civil law jurisdictions.

Furthermore, English Law should use the CISG as a foundation to construct an overarching principle of good faith. When doing so English law should include a definition of good faith which would reduce complexities and provide further clarity to both judges and commercial parties. Imposing such a principle will encourage judges to frequently enforce commercial parties’ good faith clauses.

It would also be substantially beneficial for England to follow the CISG’s approach in utilising the remedy of specific performance. England’s limited use of specific performance is disadvantageous and should instead be modified. The SGA should remove the requirement of ascertained goods and instead allow for all goods to be considered under the remedy of specific performance. This would limit judicial discretion and remove the uncertain, complex nature of determining unique goods.

Implementing the above modifications in reference to the CISG would prove beneficial to English commercial law. Particularly as ratifying it would undermine the supremacy and certainty of the English legal system as well as diminish England’s commercial competitive advantage. The issue of Brexit could result in further inclination to adopt the CISG as implementing international trading regulations would make it simpler for contracting commercial parties. However, UK sovereignty fundamentally incited Brexit so the UK would be unwilling to compromise its supremacy in order to incorporate a convention.[[174]](#footnote-174)

**Legal System**

**What does ‘Judicial Diversity’ Really Mean?**

**Halimah Begum**

This article will assess the concept of ‘judicial diversity’ and what the concept means, and also the impact it has. It will also explore how diverse the English judiciary is. This crucial concept has an impact on a number of key elements relating to a fairer and balanced legal system, including access to justice, the treatment one may receive once within the legal system, and also career pathways for aspiring members of the legal profession.

To have a diverse judiciary means to have a judiciary that is representative of all sections of society. A diverse judiciary would be made up of judges from different backgrounds who also have the relevant qualifications and experience. The discussion on the experience of judges brings up controversy regarding the age of the leading judges. Typically, in the legal field those with more experience tend be more senior, because naturally they have been in the field longer.

The judiciary is responsible for interpreting and applying the law. A judiciary is needed to ensure fairness and order amongst citizens. Reliability is ensured with the judiciary because of the qualities needed for judicial office, including: intellectual capacity; personal qualities; an ability to understand and deal fairly; authority and communication skills; and leadership and management skills.[[175]](#footnote-175) It is vital that the judiciary is as diverse as possible as this will aid the judiciary’s reliability. Reliability leads to increased public faith and confidence in the judicial system’s ability to achieve justice.

The issue of the lack of judicial diversity is something that can be pinned back to the early stages of one’s career, with the background of an individual playing a key role. This is evident in the fact that a lot of judges are ‘white, male barristers drawn from a small number of commercial chambers in London’.[[176]](#footnote-176) Barristers joining such elite chambers as pupils have found themselves on a ‘golden road’ to ‘judicial office’,[[177]](#footnote-177) many of whom are of a privileged education and are middle- or upper-class. Those who are not of such background do not get access to said ‘golden road’,[[178]](#footnote-178) which in turn minimises their chances of becoming a judge. The further implications of this are that we do not have a judiciary from all walks of life, but rather one that is simply representative of mostly the upper-class. Unsurprisingly, most of the population of the country is not upper class. This means that our current judiciary is mostly made-up of individuals from mainly one sector of the population, which is not the predominant sector of the country.

Furthermore, the lack of representation in the judiciary, particularly concerning social class, is an issue that can even extend beyond the scope of the early stages of one’s legal career. Students from such backgrounds face great difficulty in becoming judges, and rarely do. This is because finding individuals with a background in law from low-income families is difficult given that many are not making the decision to attend university to begin with.[[179]](#footnote-179) Students from such backgrounds are rarely given the encouragement to apply for higher education, whether that be from their family or peers.[[180]](#footnote-180) This is one of the many barriers facing students from working class families.

To get into university, students must have a good academic record, at a minimum. However, many students from working class families sometimes do not achieve high grades. This means that they may not get into university, therefore they are unable to get onto the path of becoming a lawyer, let alone a judge. This also links back to the lack of encouragement they may receive from their families, which in turn does not give them an incentive to work harder at school. Furthermore, students from this background sometimes have difficulty in affording materials to support and enhance their studies like laptops and textbooks, which students from higher income families can afford.[[181]](#footnote-181)

If and when the barriers of getting students from low-income families into university are crossed, prospective judges face yet another dilemma. Judges tend to have studied at elite Russel Group universities in the UK, particularly The University of Oxford or The University of Cambridge. A study conducted by The University of Cambridge in 2007 found that out of the 77 judges who participated in the study, 35 were ‘Oxbridge’ graduates, and 40 of the 77 were privately educated.[[182]](#footnote-182)

Furthermore, ‘recruitment to law jobs, whether as barristers or solicitors, is left to the market. The market favours a small number of top universities.’ [[183]](#footnote-183) If one does not have the opportunities to excel, simply put, they will not excel. Thus, the likelihood of them reaching the highly prestigious career of being a judge, is unlikely. One recommendation to create opportunity would be to ‘update the eligibility criteria for lawyers who can submit applications for all judicial roles, to include chartered legal executives’.[[184]](#footnote-184)

The issues surrounding the lack of diversity in the judiciary regarding social class, can only be fixed with innovations to encourage and support working class students into higher education. It seems that the foundations of a weak education have a knock-on effect on the opportunities and the progress students will make, thus hindering them from high career prospects, such as holding judicial office. Students also need to be given the confidence to work towards a goal of becoming a judge; else they will never consider this career path. It is imperative that teachers encourage students of all backgrounds to pursue a career in law, should they wish to.

It is vital that judging is informed on the experiences of a variety of people.[[185]](#footnote-185) We must ensure we have ‘high quality judges, but without the imposition of barriers against talented legal practitioners from any section of society.’[[186]](#footnote-186) Additionally, ‘it is comparatively rare for all the judges who have heard the case to have reached the same conclusion, and even rarer for them to have done so for the same reasons.’[[187]](#footnote-187) Hence it is important we have a diverse judiciary to ensure that justice is being served effectively. This is because ‘different voices add variety and depth to all decision-making.’[[188]](#footnote-188) Ultimately, the most successful judiciary will be the one that is the most diverse.

There have been many attempts to increase diversity in the judiciary, which will be discussed below. Whether they have been successful or not is debateable. Undeniably, there is far more diversity in the present-day judiciary than there was a century ago. A governmental study found that as of 1 April 2020, 32% of court judges were women, compared to 24% of female court judges in 2014.[[189]](#footnote-189) This same study also found that in 2020, 8% of court judges were BAME, whilst this figure is shockingly low, it proves a 2% increase in BAME representation amongst the UK’s court judges since 2014.[[190]](#footnote-190)

The *Peach Report 2000*[[191]](#footnote-191) affirmed the need for judicial diversity and proposed effective methods of achieving this. It was further confirmed by The Report of the Advisory Panel on Judicial Diversity 2010 that there should be approaches to ensure ‘that lawyers from all backgrounds recognise early on in their career that becoming a judge could be a possibility for them.’[[192]](#footnote-192) In a discussion of the *Peach Report 2000*[[193]](#footnote-193) it was recommended that we ‘try to obtain a more representative Bench, reflecting society’[[194]](#footnote-194) and further added that ‘we tend to overlook discrimination on disability grounds’.[[195]](#footnote-195) However, it is also important to remember ‘the judicial appointments process must be capable of identifying the best candidates through fair and open procedures and it must reinforce the principle of judicial independence.’[[196]](#footnote-196) This makes judicial diversity hard to achieve because many of the best candidates come from universities of a high ranking alongside a privileged background to support their studies. Even so, many students from low-income backgrounds still get into universities like The University of Oxford, showing that you do not need to be of a privileged background to excel in your career. It was also noted that there is no ‘quick fix to moving towards a more diverse judiciary.’[[197]](#footnote-197)

The *Constitutional Reform Act 2005*[[198]](#footnote-198) states that selection must be based on merit and good character[[199]](#footnote-199) and there is an encouragement of diversity.[[200]](#footnote-200) This has been a significant Act in ensuring diversity is achieved and sets out a specific goal to award positions fairly. There has been great emphasis on the importance of merit, which is of course irrespective of any factors that may include someone’s identity.

Lastly, the *Crime and Courts Act 2013*[[201]](#footnote-201) also pays great attention to judicial diversity; ‘Part 2 contains provisions to facilitate greater diversity among judges.’[[202]](#footnote-202) However, the Act and its measures have been criticised as blunting potential to increase diversity.[[203]](#footnote-203) The Act also poses the question of whether merit is enough for the role of being a judge, and perhaps it is much more than being academically smart.[[204]](#footnote-204)

In conclusion, this essay has defined judicial diversity and laid out the various ways the current judiciary lacks diversity. Furthermore, this essay has outlined the attempts to promote and increase judicial diversity. Whilst the attempts to promote judicial diversity have been strong, their implementation is weak. This is because the evidence mentioned in this essay has shown that whilst our judiciary is increasingly becoming more diverse, the pace at which this is occurring is slow. Ultimately, a more diverse judiciary can, and will, lead to increased public confidence in the judiciary’s ability to achieve justice and fairness.

**Company Law**

**Recent developments in corporate liability**

***When is a parent liable for the acts of its subsidiary?***

**Tom Willey**

Corporate legal personality is a fundamental concept of commercial law and corporate liability. It provides that a company has a ‘distinct legal persona’[[205]](#footnote-205) from its shareholders and directors and can assume legal responsibilities and duties as a human or any other legal entity. This consequently enables some companies to have limited liability which protect shareholders and directors from any debts or liabilities and therefore encourages entrepreneurship and investment which promotes the growth of the economy.

One of the most common reasons for establishing a subsidiary is to limit a parent company’s liability for the operations that a subsidiary handle. As the subsidiary is a separate legal entity, if its corporate structure provides limited liability to shareholders (within the parent company) then the parent will usually be exempt from any debts or other liabilities incurred.

In some limited situations the courts, or statutory provisions, find it necessary to disregard a company’s separate legal personality and attribute liability to shareholders. With no specific legal doctrine to achieve this, previous rulings have constructed alternatives, such as ‘piercing’, ‘peeping behind’, and ‘lifting’ the corporate veil, all of which achieve a similar result.

Lord Sumption explained in *Prest*[[206]](#footnote-206) that piercing the corporate veil means to disregard the company’s separate legal personality and attribute liability to the shareholders. The Court held that piercing the corporate veil should only occur when the shareholders use corporate legal personality as a facility to evade a liability that they personally would have otherwise had.

We can understand peeping behind the corporate veil as looking beyond the rigidity of the structure for a specific purpose,[[207]](#footnote-207) such as requiring a parent company to prepare financial accounts for the group.[[208]](#footnote-208) Under European Union law, if they find a subsidiary to have infringed competition law, the European Commission can look towards the parent company to understand their involvement and whether they should bear any liability.[[209]](#footnote-209)

Seeming to follow the judgment of *Prest,*[[210]](#footnote-210) the Court in *Adams*[[211]](#footnote-211) held they would only lift the corporate veil under three circumstances. If statute allowed it, the company was a mere facade, or the subsidiary was acting as an agent for the parent.[[212]](#footnote-212) There appears to be some crossover between piercing and lifting the corporate veil. Whilst both result in effectively the same outcome, imposing liability on another legal entity, the terminology and limited principles is where they differ. Lord Neuberger summarised this issue when he claimed there is a ‘lack of any coherent principle in the application of the doctrine of “piercing the corporate veil”’.[[213]](#footnote-213)

Recent cases have seen tortious alternatives to the traditional piercing, or piercing alternatives, to impose liability. The judgments of *Lungowe v Vedanta,*[[214]](#footnote-214) and *Okpabi v Royal Dutch Shell*[[215]](#footnote-215) provide clarity for when a parent company can be found tortiously liable through the acts of its subsidiary, whilst protecting the underlying principle of corporate legal personality.

*Vedanta*[[216]](#footnote-216) and *Okpabi*[[217]](#footnote-217) share similarities factually and on points of law. Both concerned with multinational parent companies who were subject to negligence claims after their subsidiaries’ actions or omissions had led to environmental damage. The claims against the parent companies rose through the alleged excision of significant control over their subsidiaries’ actions, therefore resulting in their alleged individual negligence. This piece focuses on the several factors analysed in imposing tortious liability on parent companies, the issue of control, and the nature of a parent – subsidiary relationship, and group-wide policies or standards.

**Parent – Subsidiary Relationships**

To succeed in a tortious negligence claim, the claimant must prove the respondent owed them a duty of care, then breached this duty of care which subsequently caused them to suffer a loss.[[218]](#footnote-218) When novel categories of negligence are introduced, and a new duty of care is being pursued, the courts will adopt either the three-stage test, clarified in *Caparo,*[[219]](#footnote-219) or incrementally find a duty of care by analogy to one previously established.[[220]](#footnote-220)

The claimants in *Vedanta*[[221]](#footnote-221) sought to create, incrementally, a duty of care, attempting to structure their argument in line with four circumstances where a duty can occur for parent companies to employees in *Chandler v Cape*.[[222]](#footnote-222) *Chandler*[[223]](#footnote-223) confirmed the findings in *Littlewoods*[[224]](#footnote-224) which held that a defendant could owe a duty of care through the actions of a third party, if there is a special relationship between the defendant and the third party, such as a relationship of control or supervision. The findings applied to create four non-exhaustive circumstances where parent companies can owe a duty of care to a subsidiary’s employees.

Conversely, in *Okpabi*,[[225]](#footnote-225) the lower courts focused on the three-stage test of foreseeability, proximity, and whether it would be fair, just, and reasonable to impose a duty of care.[[226]](#footnote-226) However, when both cases reached the Supreme Court, it held that neither approach was correct as the parent/subsidiary relationship is not a novel category of negligence and therefore, the three-stage test or incremental findings are unnecessary.[[227]](#footnote-227) The Court simplified the situation to whether ‘A owes a duty of care to C in respect of the harmful activities of B’,[[228]](#footnote-228) which can be traced back to *Home Office v Dorset Yacht Co Ltd*.[[229]](#footnote-229)

Before reaching the Supreme Court, this issue was addressed by Sales LJ in *AAA v Unilever.*[[230]](#footnote-230) He found that ‘there is no special doctrine in the law of tort of legal responsibility [regarding parents and subsidiaries] … Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities.’[[231]](#footnote-231) Considering the Court of Appeal’s hearings of *Vedanta,*[[232]](#footnote-232) and *Okpabi,*[[233]](#footnote-233) these two cases demonstrate that there is no special relationship between parent companies and their subsidiaries in the tort of negligence.

The Chancellor had alluded to a special relationship by noting the unlikelihood of parent companies intending to assume responsibility and a duty of care for the operations of its subsidiaries.[[234]](#footnote-234) In voicing his concerns, he raises the point of whether parent companies should have higher standards that need to be met before imposing a duty of care to third parties through the acts of their subsidiaries. Evidence of group structures with many overseas subsidiaries would seem to support the Chancellor’s view. However, regardless of the finding that no special relationship exists, an intention to not assume responsibility does not negate the actual assumption of responsibility if the courts see evidence of this through a parent company’s actions.

Also, Sales LJ raised in his dissenting comments that it appears unjust for a smaller parent company to avoid liability, yet a larger one does on basis of their smaller size.[[235]](#footnote-235) If size did matter, it could prove difficult for the courts to apply a degree of certainty for corporations, unless using a quantitative figure to guide them, such as the number of subsidiaries.

**Control**

With clarification that there is no special relationship, the question is whether the parent company assumed responsibility of the subsidiary’s harmful activities, which would establish a duty of care towards the third parties. The Supreme Court in *Okpabi*[[236]](#footnote-236) noted that the lower courts may have inappropriately focused on control.[[237]](#footnote-237) The rationale behind this was that all majority shareholders effectively control their subsidiaries, as they have the option to take over the management and other actions which their shareholder rights grant them. Therefore, the Supreme Court understood the relevant question to be what extent the parent has taken over or shared the management of the harmful activity with the relevant subsidiary,[[238]](#footnote-238) as this deduces whether the parent company should be jointly responsible for any loss.

On the issue, the Supreme Court highlighted the distinction between passive investors (those who do not intervene in the company’s operations) and investors who carry out vertical reorganisation to operate effectively as a single commercial undertaking.[[239]](#footnote-239) If passive shareholders automatically owed a duty of care because of their relationship, this would undoubtedly affect investor behaviour and negate the protection of limited liability that many company structures provide for.

Subsequently, the Court also explained how a parent company can owe a duty of care through action and omission. If a parent company has de facto management of its subsidiaries’ activities and operations, then it is voluntarily assuming a duty of care.[[240]](#footnote-240) Equally, if a parent holds itself out to be controlling the subsidiary’s related activity, in published materials, even if it does not do so, its omission to not clarify this may constitute a public abdication of responsibility.[[241]](#footnote-241) This will reduce the possibility of a subsidiary assuming responsibility and denying the parent company was controlling the activities by claiming the drafting of materials was misinterpreted, or poorly drafted.

A duty of care arising through omissions could make it easier for future claimant to succeed in proving a duty of care. If a company can rebut claims of control evidenced in published materials, the claimant would likely require witness statements or other significant evidence, which may be scarce. Higher demands on evidence would likely prolong litigation and increase costs for claimants, which would favour the wealthier corporation.

**Group Policies and Standards**

The parent companies in *Vedanta*[[242]](#footnote-242) and *Okpabi*[[243]](#footnote-243) were alleged to have exercised a ‘very high level’[[244]](#footnote-244) of, and ‘significant’[[245]](#footnote-245) control over their respective subsidiaries (which we now understand as taking de facto management of the subsidiaries.) The claimants put forward several examples of evidence, of which, a significant point of discussion in *Okpabi*[[246]](#footnote-246) was the imposition of mandatory standards and policies. Essentially, the argument was that the parent company was controlling the subsidiary and its operations through these mandatory standards and policies; therefore, the parent company should be liable for any loss caused by the operations.[[247]](#footnote-247)

In *Okapbi*[[248]](#footnote-248)they considered whether mandatory standards and policies could, on their own, evidence a duty of care.[[249]](#footnote-249) The original understanding by Simon LJ was that ‘the issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary… such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.’[[250]](#footnote-250)

Simon LJ, and the Chancellor of the High Court, did not believe the group policies in the case presented to them highlighted evidence of control. However, they reached different reasons for doing so. The Chancellor believed that there would need to be evidence the subsidiary took on the group standards and policies.[[251]](#footnote-251) It has now been held that an omission to clarify this may constitute a public abdication of responsibility.[[252]](#footnote-252)

The Supreme Court considered Simon LJ’s approach, referencing the findings in *Vedanta*.[[253]](#footnote-253) Lord Briggs noted there is no limiting principle regarding liability on group policies.[[254]](#footnote-254) If a guideline contains systematic errors, which when implemented causes harm to a third party, then it seems logical for liability to lie with the party who enforced the imposition of the guidelines.

This approach has its merits as the policies are to conform with industry standards and best practices, which theoretically should harvest the optimal results for health and safety. If parent companies are required to follow industry standards imposed another organisation, then arguably a case should be made that the liability stems from there and they should be liable instead. However, it is not apparent whether that was the case here. If this were to happen, any modifications made to the standards would raise an issue - a combination of industry standards and best practises would create an issue for which policy caused the loss.

A concern regarding this issue is that risk-adverse parent companies may restrict the information they provide to subsidiaries, and no longer impose best practices to their corporate group to limit liability. This raises questions to whether this will affect corporations economically as the lack of collaboration slows innovation and reduces profits but may also increase the risk to third parties. In a worst-case scenario, strategies and policies regarding health and safety may be left to the subsidiaries to strategise and implement, even though a parent company with greater resources, information, and experience would be in a better position to do so. A hesitance to intervene could therefore result in a greater risk to employees and other third parties with an interest in the subsidiary’s activities.

**Conclusion**

The recent developments in corporate liability have ultimately clarified the circumstances where a parent company will be found tortiously liable through the actions of its subsidiaries. Significant cases in this area, *Vedanta*[[255]](#footnote-255) and *Okpabi*[[256]](#footnote-256) have confirmed the law in three issues which came before them.

The Supreme Court referred to *Dorset Yacht*[[257]](#footnote-257) to clarify that a parent/subsidiary relationship is not a novel category of tort.[[258]](#footnote-258) If a party intervenes or shares management of the relevant harmful activity, it will be found to owe a duty of care a third party.[[259]](#footnote-259) Considering this, claimants are not required to prove a duty of care should exist via the three-stage test or incrementally.[[260]](#footnote-260)

The issue of control was found to have been inappropriately focused on by the lower courts.[[261]](#footnote-261) Lord Hamblen stated that ‘control is just a starting point’.[[262]](#footnote-262) The real issue is where the parent company took over or shared the management of the subsidiary’s harmful activity.[[263]](#footnote-263) The majority shareholder of any subsidiary has control over it, in the sense that it can approve specific actions, such as the removal and election of directors, through the company’s constitution. Consequently, focusing on the intervention of the harmful activity is a greater indicator of liability.

Finally, the Supreme Court’s ruling on policies held that there is no limiting principle on group standards.[[264]](#footnote-264) If a parent company implements faulty group standards that cause harm to a third party, then they should bear responsibility for this.[[265]](#footnote-265) The clarification on these issues has appeared to simplify the requirements necessary to establish a duty of care. The general categorisation of a ‘third party’ can be said to have increased the scope of liability, especially when contrasting *Chandler*,[[266]](#footnote-266) where the Court of Appeal classified the respective third party, as employees of the subsidiary. This is likely to encourage claimants who have suffered loss through a subsidiary’s activities which the parent company has intervened in. Conversely, parent companies are expected to become more cautious in their management of subsidiaries, especially in the published materials they release, considering Lord Brigg’s findings requiring parent companies to act if the published materials imply a degree of control.[[267]](#footnote-267)

Corporate liability can be partially diminished by establishing subsidiaries, such as to isolate debt if a particular operation or project performs poorly. However, the developments demonstrate that incorporating a separate legal entity will not excuse a parent company from tortious liability when they are at least partially at fault, regardless of the number of subsidiaries, and the intention of the parent company.[[268]](#footnote-268)

The reaction to these developments will not be simple for corporations. On one hand, parent companies will be advised to ensure de facto separation of management, minimising liability for matters seen in some of the aforementioned cases, however, the lack of intervention could have economic and health and safety implications, both of which are unintended outcomes. To avoid these outcomes and ensure a level of certainty, parent companies will have preferred the Court to have delivered principles regarding group policies, but understandably the courts will not want to exclude potential claimants.

To conclude, whilst the clarification of the law has resulted in a clearer path for third parties who have suffered a loss, there are still questions of how companies will practically apply these findings. Parent companies will understand the limits of separate legal entities on liability, as genuine intervention will not excuse them from fault, however, without a greater volume of examples through case law, or legal principles clarifying the issue, they will be unclear about what will amount to an intervention of activities, likely causing further issues to arise.

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