Journal of Marketing and Consumer Research
ISSN 2422-8451 An International Peer-reviewed Journal
Vol.85, 2022

An Examination of the Concept of Good Faith in Consumer Contracts

Emmanuel Nimbe Olowokere (Corresponding author)
Department of Business Administration, the Federal University of Technology,
Akure, Ondo State, Nigeria
E-mail: enolowokere@futa.edu.ng

Abstract

'Good faith' is a concept that is recognized as one of the general principles of contract law in many legal systems around the world. It is a concept found within common and civil law traditions. In every legal system, Good faith has not just one but many meanings, as well as an unusual capacity to acquire expanded and altogether new meanings. Despite the numerous connotations of the concept of good faith, it has been given an essential role in consumer contract law. It is one of the tests that determine unfairness in consumer contract. The work examines good faith as an instrument that controls unfair terms in consumer contract in the German and English legal systems. The application of good faith in Germany and United Kingdom to consumer contract indicates that good faith in this context is not an artificial or technical concept. There is a dearth of academic scholarship that examines good faith as a criterion to test unfairness in consumer contract in Nigeria. The discourse would be of immense benefits to Nigeria jurisprudence in area of consumer protection.
Keywords: good faith, consumer contract, Germany, United Kingdom, Nigeria
DOI: 10.7176/JMCR/85-05
Publication date: April 28th 2022

Introduction

The quest to define 'good faith' has informed the 'locking of horns' by established contract law scholars in the past years (Allan, 1995). Robert (1968) has, indeed asserted that the concept is devoid of any precise definition. Good faith, deemed as a necessity in contractual relations, is a basic element, which is widely accepted and incorporated with many international agreements (for examples, UNIDROIT Art. 1.7, 2.15; CISG Art. 7(1); PECL Art. 2:301), besides the national legislation. The phrase good faith does not have a common definition. Because of its structure, it is used in a variety of contexts and its meaning varies depending on the context. Attempts have been made to define good faith by these notions: as unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness, honesty in fact (Troy, 1999). O'Connor (1980) describes good faith as "a fundamental principle deriving from *'pacta sunt servanda'*, and other legal rules, distinctively and directly related to honesty, fairness, reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules." Tetley defines good faith as "just and honest conduct, which should be expected of the parties in their dealings, one with another and even with the third parties, who may be implicated or subsequently involved. William Tetley opines that good faith requires each party to be fair and honest in negotiations and, once the agreement has been reached, that the parties also perform their respective obligations and enforce their rights honestly and fairly." Simon and Reinhard (2000) explain good faith by means of *'Treu and Glauben'* as *"treu* signifies faithfulness, loyalty, fidelity, reliability; *Glauben* means belief in the sense of faith hand reliance. The combination of *'Treu and Glauben'* suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interest of the other party, and it implies and comprises the protection of reasonable reliance." A "negative" definition (called the excluder concept of good faith) of good faith has been regarded as probably the easiest to describe. In other words, it is not defined by what it is, but by what it is not. In Robert Summers' view, good faith "takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit". Summers suggests that a duty of good faith excludes certain types of conduct from what is considered acceptable good faith. These conducts that constitute bad faith are excluded from the concept of good faith (Summers, 1982). This approach has been accepted by many authors because it is practical and an easy way to define good faith. Moreover, it gets along with the assumption that when determining good faith, it is to be presumed.

Some Nigerian courts have adopted a similar reason to that posited by Robert Summers in defining good faith. In *Shodeinde & Ors. v Registered Trustees of the Ahmadiyya*, (1983) LPELR – 3064 (SC), 53 – 54, the Supreme Court of Nigeria defines good faith as "the absence of bad faith – of *mala fides*". In *Akaninwo & Ors. v Nsirim & Ors*, (2008) LPELR – 321 (SC), 43 paras D – F, the apex court describes bad faith as projecting "A sinister motive designed to mislead or deceive another … it is more than bad judgment or mere negligence. It is a conscious doing of a wrong arising from dishonest purpose or moral obliquity. Mala fide is not a mistake or error but a deliberate wrong

emanating from ill-will". In relation to conceptual clarification, it is difficult to see how Summers' approach, which the Nigerian approach mirrors, provides greater clarity to an attempt to define good faith. Indeed, the approach has been criticized as being "tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached. This hardly advances the cause of intellectual inquiry and it provides absolutely no guide to the disposition of future cases…" (Michael,1984). Steven Burton (1980) notes that with this approach "…good faith performance consequently appears as a license for the exercise of judicial or juror intuition, and presumably results in unpredictable and inconsistent applications".

Good faith has also been construed simply as a 'gap-filler'; "a rechristening of fundamental principles of contract law" (Scalia J in *Tymshare Inc v. Covell,* 727 F. 2d, 1145 - 1152 (DC Cir 1984). While admitting the narrowness of this conception, Farnsworth (1963) opines that "the chief utility of the concept of good faith performance has always been a rationale in a process which is not entrusted to the trier of the facts – that of implying contract terms". Farnsworth's approach can be viewed as a response to the alleged subjectivity of Summers' 'excluder' concept. For Farnsworth, good faith as an incidence of implied terms can be measured by an objective standard based on the decency, fairness or reasonableness of the community, commercial or otherwise, of which one is a member as against the individual's own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance. Jay (2014) has similarly argued that "good faith is simply another embodiment of the basic principle of contract law – the protection of reasonable expectations"

Like Farnsworth, John McCamus argues that good faith might be construed by 'stitching' together the existing rules of common law that appear to implement the good faith duty. Seeking to clarify the conceptual challenge therefore, McCamus proposed that the duty of good faith might be defined as: (1) the duty to exercise discretionary powers conferred by contract reasonably and for the intended purpose; (2) the duty to cooperate in securing performance of the main objects of the contract; and (3) the duty to refrain from strategic behaviour designed to evade contractual obligations McCamus, 2004). The limitation of McCamus's definition is that they were derived from his tri-categorization of cases where Canadian courts have invoked the duty of good faith. Beyond the Canadian courts, their application may be limited to the extent that different socio-economic and political contexts have impact on the performance of contractual arrangements.

Although good faith is a notion with uncertain boundaries, it is possible to distinguish its two meanings and two functions. In the objective sense, good faith is perceived as being the method used to moralize contractual relationships, and to temper the inequalities that could result from the dogma of the autonomy theory. In the subjective sense, good faith aims to protect the mistaken belief of one contracting party, and to give effect to appearances. Even if the objective/subjective dichotomy is found in a number of legal systems, this first rationalization effort was insufficient to dispel the multiple uncertainties surrounding the notion and the functions of good faith. The subjective good faith is found in various pieces of legislation from common law countries (for example, sections 14(2), 23, 24, 25(1) of the UK Sale of Goods Act 1979). The analysis of different legal systems shows that the distinction between objective and subjective good faith is a problem which is found to either a greater or lesser extent in every system. However, good faith in its subjective form appears never to have been a source of difficulties. It is the objective version of good faith which has caused and remains a source of apprehension and the object of debate, especially in certain common law countries. The article explores the civil law approach to good faith in contract law represented by the German law, followed by the common law approach. The work examines good faith as an instrument to control unfair consumer contract terms in the German and English systems. Though good faith in consumer contracts has not been developed in Nigeria, its legal system will benefit from the notion as it applies to consumer contract from other jurisdictions when the Consumer Contract (Unfair Terms) Bill is passed.

Good Faith in Civil Law Systems: German Law

Civil law nations have adopted an expansive approach to the principle of contractual good faith. The obligation was derived from the system of law applied in Roman times, which required a basic tenet of good faith in commercial dealings. The obligation extends out of recognition of the contracting parties existing relationships and the value of fostering civil engagement. While the doctrine is widely recognised across a number of civil law jurisdictions, its application is varied and often lacks a precise definition. The German, Dutch, and Belgium civil codes provide for a good faith obligation, while France utilises tortious liability for pre-contractual negotiations and contract principles once the agreement has crystallised. O'Connor (1990) has observed that the inclusion of good faith both in specific Code provisions and as a blanket concept of importance for entire fields of law has given good faith an "institutional" or formal role in codified civil law systems, which it lacks in common law systems. In many civil law systems, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps more aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is a principle of fair and open dealing (*Interphoto Picture Library Ltd v Stilletto Visual Programs Ltd*., (1988) 1 All ER 348 at 352).

Germany has developed extensive jurisprudence of good faith. Zimmermann and Whittaker identify two types of good faith in the Bürgerliches Gesetzbuch (BGB) or the German Civil Code: (i) subjective good faith (*gutter Glaube*) and, more importantly, (ii) objective good faith (*Treu und Glauben*). Subjective good faith relates more to the personal knowledge, psychological condition, or perception of the party. By contrast, objective good faith constitutes a standard of conduct to which the parties' behaviour must conform and by which it may be judged (Reinhard and Simon, 2000). The concept of good faith in its objective sense has been of significant importance in Germany where the principle of *Treu und Glauben* is found under the heading of 'performance in good faith' in section 242 of the BGB. This section reads: The debtor is bound to affect performance according to the requirements of good faith, considering common usage. This provision has been called a "king" in the Civil Code. It has been used to provide a moralization of the entire German law (Steve, 1980). The literal wording of the text suggests that good faith regulates only performance of the obligation but the courts and legal writers have given its meaning a broader scope (Chantal, 2008). In case law a fundamental principle of contract law has been derived from this article requiring the parties to the contract – the debtor and the creditor – to effectuate their rights and perform their obligations in accordance with good faith.

In general, the German approach distinguishes three functions of section 242. First, **Marietta Auer** notes that it serves to particularize an incomplete contractual obligation by imposition of secondary duties. It includes the imposition of duties to ensure the success of the transaction, to protect the legal interest of the other part, and to inform about important circumstances. Duties of information, documentation, co-operation, protection and disclosure can be mentioned as the secondary duties hosted by the principle of good faith (Simon and Reinhard, 2000). The parties have to act as required to ensure the success of the transaction by providing the information concerning the transaction and observing the other party's interest. In German law, the breach of these secondary contract obligations may make the party in breach, liable to the other party under the doctrine of breach of contract (Werner, 1995). Second, it serves as a general internal limitation of legal rights in case of their illegitimate exercise. Inadmissible exercise of a right and abuse of right are referred in this context. The courts have held that a party's right may be limited or lost if enforcing it would amount to an abuse of right. The attempt to acquire a right through dishonest behaviour, to claim a performance which the party will soon have to give back, to rely on a behaviour which is inconsistent with one's earlier conduct, or to act contrary to a principle of proportionality are regarded as abuse of right (Ole, 1994). Third, good faith has been used to interfere in contractual relations in order to avoid grave injustice. It serves as a legal basis of law making by the judiciary, it forms the basis of legal defences in private law suits, and it provides a statutory basis for reallocating risks in private contracts (Werner, 1995). In addition to these three functions, the German courts have relied on section 157 which relates to the interpretation of contracts. Section 157 of the BGB provides that "contracts are to be interpreted in accordance with the dictates of good faith taking into account normal commercial practice" (*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern).* The German courts have also relied on section 157 which relates to the interpretation of contracts, to create new causes of action where the statute has not provided a cause of action such as liability for breach of pre-contractual duties. The German concept of good faith includes the negotiation stage of the transaction. The theory of fault in contracting (*culpa in contrahendo*) is a judicial creation, which finds its roots in section 242, entitles the injured party to claim for damages if the pre-contractual duty has been breached.

The Council Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts which provides in article 3.1: "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". The transpositions of the directive illustrate the different approaches to the application of good faith as a criterion for unfairness among Member States. Although several jurisdictions within the EU refer to the criterion of good faith, as set out by the Directive to control unfair contract terms, others have strongly opposed the introduction of the notion. In France and Belgium, as in Switzerland, the legislators have chosen not to refer to the notion of good faith in this context. Instead the criterion of 'a significant imbalance' is considered sufficient. Consequently article 132-1 of the French Code de la Consommation/ Consumer Code states that: "... are unfair, clauses which have for object or for effect to create, to the detriment of the non-professional or the consumer, a significant imbalance between the rights and obligations of the parties to the contract". The national legislators of some Member States were concerned that the subjective approach would lead to a weakening of the measures taken against unfair contract terms; in order to avoid this risk they removed any reference to the concept of good faith altogether. On the other hand, other legal systems use the notion of good faith to control unfair clauses. German and English law (Britain was formally a member of the European Union) are examples of where good faith is one of the criteria used to qualify a clause as unfair.

Content Control of Consumer Contract by Good Faith in Germany

Jauernig (2003) notes that content control forms the heart of the German law. The content control consists of three parts: a general clause (section 307); a list of terms that may be prohibited (section 308, sometimes called the "gray list"); and a list of terms that are prohibited (section 309, sometimes called the "black list"). A

court reviewing challenged terms is first to confirm that the challenged terms have become part of the contract under sections 305 through 305c. It is then to test them against the content controls, looking first to the prohibited list, then to the suspect list, and finally to the general clause. The provision of section 307 BGB is based on the good faith contained in section 242 BGB. Section 307 tests standard terms not caught by sections 308 and 309. The first sentence of subsection (1) of section 307 makes invalid (*unwirksam*) certain standard terms "if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable (*unangemessene*) disadvantage." Application of section 307(1) to a particular standard term looks to what the legal positions of the parties would be if there were no such terms. Courts find users have not complied with the good faith requirement when terms are entirely one-sided and take no account of the other parties. They require that obligations imposed by standard terms be reasonable in relation both to the user's own interests and the burden imposed on the other party. In making these determinations, courts rely on other fundamental principles of German law such as necessity *(Erforderlichkeit)* and proportionality *(Verhdltnismidfigkeit)* (Maxeiner, 1979). The second sentence of section 307(1) provides that an unreasonable disadvantage may be found in contract language that is not clear and comprehensible.

The second paragraph provides for two situations when an unreasonable disadvantage is to be presumed. Section 307(2) (1) presumes an unreasonable disadvantage when a standard term makes a material departure from a fundamental principle of otherwise applicable law. Section 307(2) (2) presumes an unreasonable disadvantage if the term takes away or limits a material benefit that the contract is designed to provide. Sections 307(2) (1) and 307(2)(2) complement each other. In practice a clear distinction is not always made between them. Section 307(2) (1), which focuses on the law, is considered clearer and more predictable than section 307(2) (2), which focuses on the contract itself. Section 307(2) (1) does not presume an unreasonable disadvantage merely because the standard term changes the outcome provided by law. It requires that the change be fundamental; that the standard term displaces a material interest of the other party or of the society at large protected by the law. Section 307(2) (2) typically is used to test liability limitations and warranty exclusions that are not otherwise prohibited by sections 308 and 309, for example, a liability limitation for ordinary negligence (The decision of the German Supreme Court of Oct. 24, 2001, VIII ARZ 1/01, JZ 2002, 1001).

German law uses a so-called contract model (Maxeiner, 1979). The alternative approach might be called the "consumer protection model." The contract model applies to contracts generally without limitation as to personal characteristics of the contracting parties. The content controls it imposes are abstract and generalizing. The consumer protection model, on the other hand, is limited to consumer contracts. Its content controls are personalized and particularized. The E. U. Unfair Terms Directive adopts a compromise between the two models (Maxeiner, 2003). The Directive's orientation remains consumer protection; the German law's orientation is general contract law. In implementing the Directive, the German legislature added a new section for consumer contracts – section 310(3). Section 310 (3) (2) of the Code makes section 307 applicable to pre-formulated contract terms even if the latter are intended only for non-recurrent use on one occasion, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their contents. In addition to other prerequisite of good faith under section 307, section 310(3) (3) requires that in consumer contracts, "when deciding whether there has been unreasonable detriment under sections 307(1) and 307 (2) the circumstances surrounding the conclusion of the contract must also be taken into account." No longer is the standard terms law exclusively a shield against imposition of improper contract terms, but now it is also a protection of consumers in their typical position of inferiority.

The legislative inclusion of good faith as a test for fairness bears out the importance of good faith as an underlying principle in German contract law. The code uses it as a criterion to qualify a clause as unfair. The Code adds another requirement of a substantive nature for an unfair term to be invalidated and that is the term has to put the adhering party at an unreasonable disadvantage (*unangemessen benachteiligen*). The German approach seems to have strongly influenced the European conceptual framework of the notion of unfairness in consumer contracts, and the great similarity between the test of fairness in the German AGB-Gesetz and the test of fairness in the European Directive 93/13/EEC cannot be overlooked.

Willett (2007) expresses that the Directive has been immensely influenced by the German AGB-Gesetz which used the judicially developed concept of good faith as a foundation to control unfair contract terms. In fact, the Directive inserts the requirement of good faith among the criteria due to its significance in German law and other continental systems (Paolisa, (2007).

Good Faith in Common Law Legal Systems: English Law

Good faith plays a comprehensive role in some common law countries. In the United States for example, section 205 of the Restatement of Contracts (Second) states that: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'. In Australia both courts and lawyers are open to the use of good faith in contracting and regard it as an enforceable duty.

According to Chitty and Hugh, (2004), English law does not recognize a general principle of good faith and takes a different approach, relying on a number of specific doctrines aimed at securing fair dealing to achieve the same outcome. This is in contrast to German law. However, the concept of good faith is not totally absent in the English legal system. It appeared for the first time in 1766 in the historical landmark case of *Carter v Boehm* (1766) 3 Burr 1905 in which Lord Mansfield established the principle of utmost good faith (*uberrimae fidei*) in insurance transactions where the parties are bound to disclose all important facts relating to the risk before and in the course of the contract. Lord Mansfield described 'good faith' as 'the governing principle . . . applicable to all contracts and dealings'. Despite the significance of this case, English courts have always opposed the recognition of a general principle of good faith on the grounds that it would run counter to the parties' respective positions during contract negotiations and over the duration of the contract and was impracticable (Klaus, B. 1999). In *Walford v Miles,* (1992) 1 All ER 453, the House of Lords held that English law did not recognize the validity of an obligation to negotiate in good faith, therefore, such an obligation was not enforceable.

Roger Brownsword (1999) has identified three distinct views on good faith in English legal doctrine: negative, neutral and positive views. The negative view contains arguments against the adoption of a general standard of good faith in English law. Good faith requires each party to take into account the legitimate interests or expectations of one another and this cuts against the essentially individualistic ethic of English contact law. As Lord Ackner asserted in *Walford v Miles,* the adoption of a requirement of good faith would be incompatible with the adversarial ethic underpinning English contract law: "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation". He concludes that "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 also said that good faith is a 'loose cannon' in commercial contracts in the sense that it is an uncontrollable standard and might well lead to unintended results. While it is accepted that good faith imposes restrictions on the individual's pursuit of self-interest, it is not clear, however, what the limitations of good faith are. In the words of Brownsword 'good faith presupposes a set of moral standards against which contractors are to be judged, but it is not clear whose (or which) morality this is. Without a clear moral reference point, there is endless uncertainty about a number of critical questions'. The following questions, *inter alia*, arise: Should good faith be interpreted in the subjective sense or the objective sense? Should it regulate all phases of contracting, including pre-contractual conduct? Should it regulate matters of procedure only or matters of contractual substance as well? Proponents of the negative view hold that without answering these critical questions, the idea of good faith will remain vague and uncertain. The third concern is that good faith would call for difficult inquiry into the contractors' state of mind. This would involve speculating about the contractors' reasons for action. If good faith were to regulate matters of substance, then it would violate the autonomy of the parties and would become inconsistent with the philosophy of freedom of contract. The final argument of the negative view is that a general doctrine of good faith fails to recognize that contracting contexts are not all alike.

The neutral view is held by many lawyers that there is nothing 'intrinsically objectionable' about a good faith doctrine and, at the same time, point out that English law developed its own concepts and doctrinal tools that achieve the same results that are achieved through good faith in other legal systems, such the doctrines of frustration, misrepresentation, economic duress, promissory estoppels and mistake. It is apparent that this view coincides with and echoes Bingham's statements in the *Interfoto* case. Lord Bingham noted that English law had characteristically committed itself to no such overriding principle, but had developed piecemeal solutions in response to demonstrated problems of unfairness. Accordingly, the adoption of a general doctrine of good faith in English law is neither a good nor bad thing as there is a 'strict equivalence' between a general doctrine of good faith and the piecemeal solutions of the English law, on the one hand, and it makes no difference whether the English law operates with good faith or piecemeal provisions, on the other. The neutral view leans strongly in the direction of the negative view, simply because it suggests that nothing will be gained by replacing the existing approach with another that achieves the same outcome and, therefore, if a choice is to be made between introducing a new doctrine or maintaining the piecemeal provisions then, from an English lawyer standpoint, the choice would be to maintain the status quo.

In 1956 Powell published a seminal article setting out his view on good faith and whether it should be recognized in English law. He maintained that although no overriding general positive duty of good faith was imposed on the parties to a contract, there were a number of individual cases in which the law contained an element of objective or subjective good faith. Powell also indirectly criticized the English piecemeal approach and suggested that common law may be improved if an explicit rule of good faith were adopted. In his opinion, the courts could reach similar results in certain cases if a doctrine of good faith was implemented instead of resorting "to contortions or subterfuges in order to give effect to their sense of the justice of the case". Powell's view was unpopular among English contract lawyers and only a few accepted his view.

Brownsword (1999) gives several reasons in support of the adoption of good faith. He argues that as English law already tries to regulate bad faith dealing, it would be more rational to address the problem directly (rather than indirectly) and openly (rather than covertly) by adopting a general principle of good faith. In the absence of a doctrine of good faith the law of contract is ill-equipped to achieve fair result, on occasion leaving judges

"unable to do justice at all". Brownsword also argues that with the adoption of a doctrine of good faith the courts will be equipped with a better mechanism that will enable them to respond to the varying expectations encountered in the many different contracting contexts and, in particular, it might be argued that the courts are better able to detect co-operative dealing where it is taking place. Further, the beneficial effects of a good faith doctrine go beyond (reactive) dispute-settlement, for a good faith contractual environment has the potential to give contracting parties greater security and, thus, greater flexibility about the ways in which they are prepared to do business. Some authors add another reason for the adoption of a doctrine of good faith, namely that it is a mandatory part of international conventions on contract law, such as the Vienna Convention for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts, which expressly refers to good faith and fair dealing (Ewan, (2005).

It has been observed that the judicial opposition to good faith has faded over the years and the courts have on several occasions demonstrated some leniency towards the existence of a general doctrine in English contract law. This shift in the courts' attitude may suggest that English contract law will eventually come to accept the existence of a general duty of good faith in contracting especially with the influence of international restatements of contract law (Ewan, 2005). Some commentators go as far as pointing out that the question of the desirability of good faith in English law will be replaced with other questions relating to its meaning, impact on existing rules and scope, and whether it should also be applied to cover pre-contractual dealings. However, there is evidence that the English courts do not accept the principle of good faith as the general organizing principle of the common law of contract. In *Bhasin*, the Supreme Court of Canada (SCC) was presented with an opportunity to make the traditional "piecemeal, unsettled and unclear" state of law on good faith "more coherent and more just" – at least according to the SCC (*Bhasin v Hrynew,* (2014) SCC 71. The decision prompted an "incrementally radical evolution" in the Canadian law of contract on good faith; to wit, the endorsement of good faith as a general organizing principle of the common law of contract and the recognition of the duty of honest contractual performance (Robertson, 2015). The impact of the decision has been felt beyond the borders of Canada, with courts in New Zealand, Australia and the United Kingdom, to varying degrees, considering the implications and applicability of the decision in their jurisdictions. A Queens Bench Division decision in 2015 citing *Bhasin* affirmed the principle of good faith as the general organizing principle of the common law of contract. The decision was however overturned on appeal, with the English Court of Appeal instead indicating preference for the traditional piecemeal application of the principle.

In recent years, the concept of good faith has increasingly drawn the attention of lawyers in England and the recent trend on good faith is adopting a good faith requirement. Notwithstanding that there is no general duty of good faith under English law; parties are nevertheless entitled – and increasingly choosing to – incorporate express good faith obligations into their contracts. The English courts have generally strived to give effect to these provisions but, in the absence of a general definition of good faith, have been required to interpret the specific words chosen by the parties on a case by case basis to ascertain the true intention of the parties (*Berkeley Community Village Ltd v Pullen* (2007) EWHC 1330). To the extent that contracting parties select to use the term "good faith", both freedom of contract and nature of contracts suggest that effect should be given to their agreement and that the courts should not lightly conclude that an obligation to act in good faith is unenforceable (Ewan, 2015). This seems to be accepted by courts, for example in *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* (2013) EWCA Civ 200, where the court noticed that "there is no general doctrine of good faith in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract" and concluded that "if the parties wish to impose such a duty they must do so expressly". Another example is the case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (2015) 1 W.L.R 1145, in which the court held that a dispute resolution clause in an existing and enforceable contract which required the parties to seek to resolve a dispute in friendly discussions in good faith and within limited period is enforceable. In the same vein, in *Petromec v Petreleo Brasileiro SA Petrobas* (2005) EWCA Civ 891, the court declares that an express obligation to negotiate in good faith may be enforceable. The English Courts have, however, imposed a number of limits on the import of express good faith provisions. In particular, they have found that a general term requiring the parties to act in good faith will not be interpreted to cover the same ground as other, more specific provisions or to cut across them.

Where the parties have not expressly included good faith provisions in a contract, the English courts have in certain circumstances implied contractual terms broadly similar to a duty to act in good faith. The Supreme Court has however indicated that it will not interfere with a detailed agreement negotiated by the parties by implying a term merely because it appears fair (Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd (2015) UKSC 72. In the case of *Yam Seng Pte Ltd v International Trade Corp Ltd*, (2013] EWHC 111 (QB), the court ruled that a requirement of good faith could be implied in any ordinary commercial contract where it is consistent with the presumed intention of the parties. Later judgments have given a relatively narrow interpretation to *Yam Seng*, restricting the circumstances in which duties of good faith will be implied. Duties of good faith will only generally be implied into so-called 'relational' contracts. In *TAQA Bratani Limited & Ors v Rockrose UKCS LLC*, (2020) EWHC 58 (Comm), the Court found that, although the contracts in question were arguably "relational," no duty of good faith should be implied as the clause relied upon provided an absolute and unqualified power and so it was impermissible

to imply a term which qualified what the parties had agreed between them and the implication of a duty of good faith was not required to make the contract work.

Good Faith in the Context of Consumer Contracts in the United Kingdom

While the English courts were reluctant to recognize a general principle of good faith, emerging interest has been generated to some extent by the European Directive 93/13/EEC (Directive) regarding unfair terms in consumer contracts in which the general test for an unfair term has as its first element a violation of the requirement of the good faith (Brownsword, 1996). The Directive was implemented through the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) which established the test of unfairness, *inter alia*, on good faith (The Regulations of 1994 were revoked and replaced with the UTCCR). According to Regulation 5(1), a contractual term is unfair if it is "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". It would come as no surprise that the inclusion of the "good faith" test gave rise to an intense debate, both among academics and practitioners, about its meaning and scope (Teubner, 1998). There is no reference in English law prior to the implementation of the Directive as to the meaning of the requirement of good faith in the context of consumer contracts.

Director-General of Fair Trading v *First National Bank plc* (2000) 2 W.L.R. 1353, is the leading case including arguments relating to the concept of good faith in English law which was decided under the Unfair Terms in Consumer Contracts Regulations 1994. The case arose over the disputed fairness of a condition in a standard form for regulated consumer credit agreements used by First National Bank plc. The sentence of "interest on the amount which becomes payable shall be charged … until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment)" was objected by the Director-General of Fair Trading. Although, at end of the trial, Evans-Lombe J concluded that there was no infringement of the requirement of good faith with reference to common sense, the Court of Appeal disagreed with the judge's application of the requirement of good faith. It held that the assessment of unfairness was to be done purely by reference to the legislative scheme. Gunther Teubner predicts that "under present conditions it is inconceivable that English good faith will be the same as 'Treu und Glauben' German style which has been developed in a rather special historical and cultural constellation" (Teubner, 1998). The prediction about good faith future in English law focuses on the fact that the principle will be introduced in a way very similar to civil law concept of good faith. Indeed, the English courts have recognized good faith European origins and have not sought to interpret it from a national perspective. In *Director General of Fair Trading v First National Bank*, Evans-Lombe J, after noting that the origin of the UTCCR was a Council Directive, stated that good faith should not be construed in the English sense of absence of dishonesty, but rather in the continental civil law sense. In the Court of Appeal (2000] QB 672, at 686) Peter Gibson LJ stated that good faith had a special meaning in the UTCCR, having had its conceptual roots in civil law systems. In the House of Lords (2001) UKHL 52) both Lord Bingham and Lord Steyn recognized that good faith was an 'objective criterion' that imported the 'notion of fair and open dealing'. Therefore, the concept of good faith as enacted in the UTCCR should not pose any problems in the English law.

It has been asked whether "good faith" and "significant imbalance" are two separate limbs which combine procedural and substantive elements, or simply elements of one general test of unfairness. Lord Bingham in the *Director General of Fair Trading v First National Bank* (Paragraph 17) considered the two elements of the fairness test - the requirement of a "significant imbalance", and then the "good faith" criterion. As far as the former is concerned, he observed that:

> The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer.

As for the interpretation of the "good faith" criterion, Lord Bingham, echoing his observations in *Interfoto Library Ltd v Stiletto Visual Programmes Ltd*, (1989) Q.B. 433 said that this involves:

> … fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, weak bargaining position… Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfied was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. …

As far as the overall fairness test in Regulation 5(1) is concerned, Lord Bingham concluded that it "lays down a composite test, covering both the making and the substance of the contract …" Similarly, Lord Steyn emphasised that the fairness test involved not only a procedural element, but also a substantive one. He treats the

overall fairness test as having three independent requirements, of which good faith and significant imbalance would be more crucial than the "consumer detriment" one. "Good faith" is an objective criterion, requiring open and fair dealing, whereas the "significant imbalance" requirement focuses more on the substantive unfairness of the contract. In applying the test, it was "necessary to consider the position of typical parties when the contract is made". Moreover, as Lord Millett suggested:

> It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonable be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be necessary.

The UK Consumer Rights Act 2015 consolidates in one place the legislation governing unfair contract terms in relation to consumer contracts, which was previously found in two separate pieces of legislation - Unfair Contract Terms Act 1977 and UTCCR 1999 and revokes the two Acts. The Consumer Rights Act retains the requirement of good faith as one of the tests for fairness. Section 62(4) of the Act provides that 'A contractual term ... shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. The decisions of the House of Lords in Director General of Fair Trading v First National Bank provides a relatively clear interpretation of the various components of the unfairness test.

English courts have applied the interpretation of the unfairness test in the light of Director-General of Fair Trading to subsequent cases. In the context of some of the construction cases, the courts have noted that where the seller/supplier takes the time to explain important terms to the consumer, this could at least satisfy the requirement of "good faith" *Westminster Building Co v Beckingham* (2004) EWHC 138 (TCC), para 31. In several of these cases, the courts have also considered the relevance of the fact that the consumer will have had professional advice in selecting a contractor and preparing the necessary contract documentation (Bryen & Langley Ltd. v Martin Boyston (2004) EWHC 2450 (TCC) 4. These cases all involved questions about the fairness of provisions in standard terms regarding adjudication between the contractor and the consumer (known in this context as "employer") in case of disputes. On several occasions the courts have observed that the adjudication clauses concerned do not create a significant imbalance to the consumer's detriment. Furthermore, whilst it is accepted that it would usually be for the seller or supplier to draw particularly onerous terms to the attention of the consumer in the interests of fair and open dealing, in the context of construction contracts, the consumer already employs a professional adviser and that should be sufficient to ensure that appropriate advice about the impact of a particular term has been obtained. In *Bryen and Langley Ltd v Martin Boston*, the Court of Appeal, agreeing with the views expressed at first instance, held that where terms are selected by the consumer's professional adviser and therefore effectively imposed on the seller/supplier, "the suggestion that there was any lack of good faith or fair dealing by the supplier with regard to the ultimate incorporation of these terms into the contract as repugnant to common sense". As noted earlier, whilst there may also be an argument that such terms do not fall within the definition of "not individually negotiated", dealing with this issue in the context of the "good faith" aspect of the unfairness test may be a neater solution. It does appear to be an issue of particular relevance to construction contracts, as well as other types of contracts where consumers have the benefit of professional advice in drawing up the contract.

In *Bankers Insurance Company Ltd v South and Gardner*, (2003) EWHC 380, the insurance policy required that the insured consumer had to report in writing as soon as reasonably possible full details of any incident which might result in a claim under the insurance policy; moreover, any formal documentation relating to the claim had to be forwarded to the insurer immediately on receipt. Although there may be good reasons why it is important to provide such information quickly to the insurer, there was a risk that a consumer would lose his cover for transgressing procedurally. In the court's view, this created a significant imbalance in the parties' obligations under the policy to the consumer's detriment, and the term was therefore unfair.

Good Faith in Nigerian Law

Good faith has not been a subject of robust judicial or scholarly discourse in Nigeria. Unlike common law jurisdictions such as Canada (with the exception of Quebec), the United Kingdom, Australia and the United States of America, the analysis of the concept of good faith in the law of contract has not received much judicial or academic inquiry in Nigeria. Indeed, there are only a handful of cases where the Nigerian courts have examined the common law doctrine of good faith. Nigerian law of contract written by Sagay (2001), Nigeria's leading text on the law of contract only made a remote reference to 'contracts *uberrimae fidei* in the context of exceptions to the nondisclosure

rule on misrepresentation. Olabisi (2019), notes that in the limited cases where the question of good faith has arisen, the Nigerian courts have simply resolved those disputes on a piecemeal. basis. There are cases which indicate that the Nigerian courts have followed the traditional approach, that is, good faith under Nigerian law of contract does not have a coherent, technical or established meaning outside of the requirement to act honestly, without malice or fraud. Beyond this, the concept remains ambivalent and susceptible to the charge of incoherence. The contemporary application of good faith in Nigeria is thus akin to the pre- Unfair Terms in Consumer Contracts era in England.

In *Diamond Bank Ltd. v Ugochukwu,* (2007) LPELR – 8093 (CA), one of the issues was whether the operation of a particular account was tainted with illegality. The respondent was a co-signatory to a company account. He, however, subsequently notified the bank of his revocation of the co-signatoryship of the second signatory to the account. Thereafter, the respondent issued a series of cheques. While the bank honored one of the cheques, it dishonored subsequent cheques, citing incomplete mandate and the freezing of the account by a government taskforce as reasons. In resolving this appeal, the court noted *inter alia* that banker-customer relationship borders on good faith. However, in reaching its decision, the court called in aid the principle of estoppel by conduct; the fact that after the revocation of the co-signatoryship, the bank honoured a cheque solely signed by the respondent. Relying on the provision of the Nigerian Evidence Act, the court concluded that having accepted a solely signed cheque after the notification of revocation of cosignatoryship, the bank is estopped from turning around to lay claim to the requirement in a previous agreement that for money to be drawn the cheque must be signed by two signatories. The court further held that:

> A party is estopped from denying or withdrawing his previous assertion or from going back on his own act, even if it is to tell the truth. The reasoning is simple it would promote fraud and litigation if a party is allowed to resile from his own act or representation on which the other part acted. The object of estoppel has always been to prevent fraud and enthrone justice between the parties by ensuring that there is honesty and good faith at all times, *Diamond Bank Ltd. v Ugochukwu* (2008) 1 NWLR (Pt. 1067) 1 at . 26.

Another category of commercial agreements where the Nigerian Court has dealt with good faith is in respect of admiralty contracts where, as a specie of international business transactions, the 'choice of law' clauses are of critical importance. In *Sonnar (Nig.) Ltd. & Anor. v. Partenreedri M.S. Nordwind Owners of the Ship M.V. Nordwind & Anor* (*Sonnar*), (1987) 4 NWLR (Pt. 66), 520, the Supreme Court of Nigeria (SCN) departed from the express term of a contract in relation to the choice of law on the ground of good faith. The Plaintiffs, Nigerian companies, sued for damages for breach of contract in respect of goods that were not delivered in Lagos from Bangkok on board the M.V. Nordwind. The first Defendant, owners of the M.V. Nordwind carried on their business as shipowners in Germany, whereas the second Defendant, Barbridge Shipping Company was based in Liberia and it issued the Bill of Lading that contained the disputed choice of law clause in this case. The implication of Clause 3 of the Bill of Lading is that in the event of any dispute, recourse will be made to arbitration, with Germany and German law being the place of arbitration and applicable law respectively.

In spite of this clause, one of the parties instituted an action before the Federal High Court of Nigeria alleging breach of the contract. The ship owner and shipping company contended the jurisdiction of the court and filed an application for stay of proceedings pending the determination of the dispute before an arbitral panel in Germany. The trial court upheld the choice of law clause. This decision was affirmed by the Nigerian Court of Appeal on the basis of the sanctity of contract. On further appeal to the SCN by the Plaintiffs, the decisions of the two lower courts were overturned. In reaching its decision, the SCN noted that "It is also conceded that when the intentions of parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention is general and as a general rule determines the proper law of the contract. But to be effective the choice of law must be real, genuine, bona fide, legal and reasonable. It should not be capricious and absurd. Choosing German law to govern a contract between a Nigerian shipper and a Liberian "ship owner" is to my mind capricious and unreasonable*"* (1987) LPELR – 3494 (SC), 44. More interestingly, it is important to note that the plaintiff attempted to call in aid one of the 'piecemeal' good faith concepts under the English contract law – contracts of adhesion (Friedrich, 1943). Such contracts are between unequal parties; here, the party with the bargaining power dictates and imposes the terms on the weaker party In the event of a dispute where the weaker party is gravely disadvantaged by virtue of the unfair terms, English courts have prescribed an objective test of reasonableness. The SCN however found this argument inapplicable to sophisticated contracts such as this one.

Good Faith under the Consumer Contract (Unfair Terms) Bill

The use of good faith as one of the tests of unfairness in consumer contract has also found its way to consumer legislation in Nigeria. However, the jurisprudence in this area of the law is not yet developed as the Bill has not been passed and no case tested in court. The Bill seeks to provide a direct form of consumer protection against unfair contract terms. It promises to reduce the judiciary's need to resort to indirect form of controlling the

use of unfair contract terms. When enacted, the courts will be able to hear cases on whether a contract term is fair and make decisions on the enforceability of the terms.

Section 4 of the Bill states that a term is unfair if it is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer. It further provides that to assess the unfair nature of a term, the nature of the goods or services for which the contract was concluded and referring as at the time of the conclusion of the contract; all circumstances attending the conclusion of the contract; all the other terms of the contract or of another contract on which it is dependent shall be considered. In determining whether a term satisfies the requirement of good faith, regard should be had to the matters specified in the Second Schedule. The second schedule provides that when making an assessment of good faith, the strength of the bargaining positions of the parties; whether the consumer was induced to accept the term; whether the goods or services were sold or supplied to the special order of the consumer; and the extent to which the seller had dealt fairly with the consumer are factors that should be considered.

It is clear that the Nigeria Unfair Term Bill establishes a connection between good faith and fairness. If an unfair term exists, then it is because the duty of good faith has been breached. . Far from being an abstract concept, the Bill clearly spells out the criteria with which good faith can objectively be assessed. However, the Nigerian courts have not gotten the opportunity to consider good faith within the context of unfair terms in consumer contract. This has denied the courts the chance to develop any specific connotations of good faith in consumer contracts.

Conclusion

The concept of good faith seems to generate more interest based on its functions than on its definition. Good faith is therefore an open norm, a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied. Most lawyers from a system where good faith plays an important role will therefore agree that the differences in theoretical conception do not matter very much. What really matters is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates. It seems possible to objectivize the notion of good faith, by providing judges with guidelines, without freezing the notion and detracting from its essential characteristic: adaptability. In German contract law, the principle of good faith as stipulated by section 242 BGB remains the reference point for every contract type and any obligation. Duties of information, documentation, co-operation, protection and disclosure are the secondary duties hosted by the principle of good faith. The parties must act as required to ensure the success of the transaction by providing information concerning the transaction and observing the other party's interest. Good faith has been used to interfere in contractual relations in order to avoid grave injustice. Contracts are to be interpreted in accordance with the dictates of good faith taking into account normal commercial practice. The German contract model applies to contracts generally without limitation as to personal characteristics of the contracting parties. Section 307 makes invalid certain standard terms if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage. There is a deviation from good faith requirement when terms are entirely one-sided and take no account of the other parties. Courts require that obligations imposed by standard terms be reasonable in relation both to the user's own interests and the burden imposed on the other party. Section 310 of the German Civil Code makes German law conform to consumer protection model. The section makes section 307 applicable to pre-formulated contract, and to the extent that the consumer, by reason of the pre-formulation, had no influence on their contents. The standard terms law becomes a shield against imposition of improper contract terms, and it is a protection of consumers in their typical position of inferiority.

In spite of judicial opposition to good faith in England, the courts have on several occasions demonstrated some leniency towards the existence of a general doctrine in English contract law. Notwithstanding that there is no general duty of good faith under English law; parties are increasingly choosing to incorporate express good faith obligations into their contracts. The English courts have generally strived to give effect to these provisions but, in the absence of a general definition of good faith, have been required to interpret the specific words chosen by the parties on a case by case basis to ascertain the true intention of the parties. In consumer contract, good faith denotes fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, and weak bargaining position.

Good faith in its present form is not an independent or autonomous legal concept that can be used on its own to achieve contractual balance. Indeed, a look at the laws of the two jurisdictions under discussion reveals that they use a combination of criteria to determine unfairness. The UK Consumer Rights Act 2015 states that consumer contract terms term or notice is deemed to be unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. This is replicated under the Nigeria Consumer Contract (Unfair Terms) Bill. In Germany, the BGB provides that a term would be unfair if it breaches good faith and places the weak party at an unreasonable disadvantage. The numerous

definitions of the principle notwithstanding, the concept of good faith has been given an essential role in consumer contract law: as an objective criterion that connotes fair and open dealing. Good faith is a criterion used to determine whether a clause is unfair in many jurisdictions both civil and common law. Good faith is the underlying support for the elements cited. Citing these elements without the accompanying notion of good faith would deprive them of what holds them together. The principle of good faith is a foundation to control unfair consumer contract terms. There can be no doubt that the concept of good faith has had a significant impact on consumer contracts in Germany and the United Kingdom as a result of the approach taken by the courts. It will remain to be seen to what extent this is mirrored in Nigeria when the much awaited Consumer Contract (Unfair Terms) Bill is passed.

References

Allan, F. (1995). Good faith in contract performance In J. Beatson and D. Friedman (Eds.), *Good faith and fault in contract law,* (161 – 163) OUP.

Brownsword, R. (1999). Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma Hird and Geraint Howells (Eds), *Good Faith in Contract: Concept and Context,* Ashgate, 16–17.

Brownsword, R. (1996), Good faith in contracts revisited, Current Legal Problems 49(2), 111-157, 112.

Chantal, M. (2008). *Fundamental rights in european contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England.* Kluwer Law International.

Chitty. J. & Hugh, B. (2004). *Chitty on contracts,* 29 edn, Sweet & Maxwell, para 1-022.

Ewan, M. (2005). *Contract law: text, cases, and materials,* Oxford University Press), 561.

Ewan, M. (2015). Contract Law,11th Ed., Macmillan Education.

Farnsworth, Allan. (1963). Good faith performance and commercial reasonableness under the Uniform Commercial Code, *U. Chi L Rev* 30, 666, 672.

Friedrich, K. (1943). Contracts of adhesion - some thoughts about freedom of contract C L Rev 43(5),629 – 642.

Good Faith And its German Sources: Structural Framework For The Good Faith Debate In General Contract Law And Under The Uniform Commercial Code' Marietta Auer, avalaible: http://www.law.harvard.edu/academics/ graduate/publications/papers/auer.pdf. accessed October 26. 2021.

Jacob, Y. (2016). Justice beneath the palms: bhasin v. hrynew and the role of good faith in Canadian contract law Sask LJ 79, 82.

Jay, F. (2014). Good faith and reasonable expectations' Arkansas Law Review 67, 525, 526.

Jauernig, O. (2003). *Bürgerliches gesetzbuch, kommentar* 10ed, München: C.H. Beck Verlag, Jauernig, 312.

Klaus, B. (1999). *The creeping codification of the lex mercatoria.*Kluwer Law International, 167.

Maxeiner, R. (1979). Constitutionalizing forfeiture law-the German example*, AM. J. COMP. L*. 27, 635, 649.

Maxeiner, R. (2003). Standard-terms contracting in the global electronic age: European alternatives, *The Yale Journal of International Law*, 28 **(109)**, 60.

McCamus, J. (2004). Abuse of discretion, failure to cooperate and evasion of duty: unpacking the common law duty of good faith contractual performance, *The Advocates Quarterly* 29, 72, 77 – 90.

Michael, B. (1984). Does Anglo-Canadian contract law need a doctrine of good faith? *CBLJ* 9(4) 385, 398.

O'Connor, J. F. (1990). *Good faith in English Law.* Brookfield USA: Dartmount Publishing Company. Lack Of Good Faith As A Hindrance To Effective Arbitration' William Tetley. Available: http://216.239.51.104/ search?q=cache:aHe_xdPMkpAJ:tetley.law.mcgill.ca/comparative/goodfaith.pdf+tetley+good+faith&hl=en &ie=UTF-8, Accessed October 26, 2021.

Olabisi, A. (2019). To recognize or not? good faith under Nigerian law of contract, *JCommonwealth L* 1, 11.

Ole, L. (1994). Performance and remedies in the law of contracts In Towards a European civil law. Ars Aequi Libri-Nijmegen-Martinus Nijhoff Publishers- Dordrecht/Boston/London, 206.

Paolisa, N. (2007). *Unfair contract terms in European law: a study in comparative and EC Law,* Hart, 143.

Powell, R. (1616). Good faith in contracts. *CLP* 9, 23–25.

Reinhard, Z. and Simon, W. (2000). *Good faith in European contract law.* Cambridge University Press.

Robertson, J. (2015), Good faith as an organizing principle in contract law: bhasin v. hrynew – two steps forward and one look back, *Can Bar Rev.* 93 809-866.

Robert, S. (1968). Good faith in general contract law and the sales provisions of the Uniform Commercial Code *Va. L Rev* 54(2), 195.

Roger Brownsword (1990). 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma Hird and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (Ashgate 1999), pp. 15–32.

Sagay, I. E. (2001). *Nigerian law of contract,* Ibadan: Spectrum Books Limited.

Simon, W. and Reinhard, Z. (2000), Good Faith In European Contract Law: Surveying the legal landscape In Z. Reinhard and W. Simon (Eds.) *Good faith in European contract law, (*24) Cambridge: Cambridge University Press.

Steven, B. (1980). Breach of contract and the common law duty to perform in good faith, *Harv. L Rev.* 94, 369, 369 – 370.

Summers, R. (1982). The general duty of good faith- its recognition and conceptualization' *Cornell L. Rev*. 67, 810.

Teubner, G. (1998). Legal irritants: good faith in British law or how unifying law ends up in new divergences *Modern Law Review* 61, 11.

Troy, K. (1999). Good faith and the vienna convention on contracts for the international sale of goods (CISG) *Vindobona Journal of Commercial Law and Arbitration*, 3(1), 15-40.

Werner F. (1995). The doctrine of good faith in German contract law' in good faith and fault In Jack Beatson-Daniel Friedmann (Eds.) contract law 177, Oxford: Clarendon Press: Oxford.

Willett, C. (2007). *Fairness in consumer contracts: the case of unfair terms.* Ashgate, 79.