



Good Faith in Construction Contract: A Common Law Perspective

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Abstract: The good faith principle requires contracting parties to be honest as well as considering their contracting partners in performing their contractual duties. In the event, contract clauses are insufficient to protect the interests of the innocent party in a breached contract, the said innocent party may rely on the good faith principle to ensure the fair. However, applying good faith principles to construction contracts is a difficult task. By nature, construction contracts are unique due to the fact that parties (Client and Contractor) are presumed competent to carry out their parts of the contractual obligations. Controversially, the construction contract is often unfairly prejudicial as the Client would customarily have the upper hand in deciding the terms and conditions of a contract. It is the objective of the research to examine the relevancy of application of good faith principle in construction contracts by employing qualitative content analysis. This study adopts a qualitative research approach, mainly employing library and internet resources with the intention to explore relevant legislation, textbooks, journals, research papers and articles. The comparative approach in this paper used content analysis from primary and secondary legal resources of different jurisdictions in the United Kingdom, Malaysia and Australia to compare the application of the good faith principle in the context of construction contracts. The findings of the research reveals that the adoption and application of the good faith principle in construction contracts is of limited usage even though it is widely used in general contract law of United Kingdom, Malaysia and Australia. This article contributes to the knowledge of the good faith principle in construction contracts, particularly with standard form contracts, by highlighting the importance of the good faith principle in achieving a fairer functioning of construction contracts in its application.

Keywords: Good faith principle, construction contracts, standard forms of contracts, contract terms

1. Introduction

Good faith is a nebulous concept in contract law. It is a well recognised concept in the legislation and also at international level such as Principles of International Commercial Contracts (UNIDROIT Principles 2004), the Vienna Convention on the Law of Treaties, the Principles of European Contract Law and United Nations Convention on Contracts for International Sale of Goods (CISG). Good faith is a noble concept where its intention is 'not only to condemn deception and lack of candor at the time of bargain is concluded but also to require a forthcoming attitude, to condemn chinary and sharp practise in the carrying out of contractual obligations' (Burrows, 1968). Nevertheless, in recent years, good faith principle has gained the reputation of a controversial principle of law in commercial contracts, especially in common law countries. (Priyono etl, 2018). Its delayed recognition, albeit reluctantly by the courts, in commercial

contracts stir legal havoc that questions the principle's position as against contract law (Calvert etl,2022). Due to this, the applicability of good faith principle is underappreciated in several specific areas of laws, particularly construction law.

Construction contracts, despite their complexity and uniqueness, are often verbose, structured and rigid. There are several different types of businesses that belong to the category of construction, such as the building industry and the infrastructure industry. In *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash Northern*, [1974] AC 689, Lord Diplock defined a building contract as "an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done." Construction contracts are unique in that the parties (Client and Contractor) are presumed competent to carry out their contractual obligations. On the other hand, clients often modify some clauses in the standard form of contract to include their own requirement or to embed project specific condition. Controversially, the construction contract is frequently unfairly prejudicial, as the Client would normally have the upper hand in deciding contract terms and conditions. Due to the complexity of construction activities, the parties involved will frequently utilize standard forms of contract in order to outline the terms and conditions that they have agreed upon in order to carry out the construction works. Standard forms of contract are usually rigid, bias, time-consuming and did not take into account other parties interest.

Unquestionably, construction contracts do not appreciate implied legal principles that could tamper with its terms and conditions, on the ground that those terms and conditions have been agreed by the parties prior to entering the contract (Wallwork,2004). This is in line with the approach taken by the courts to be reluctant to interfere with four corners of the contract where the parties had agreed to it. The dilemma of the construction parties and the court refusal had led to the increase in construction disputes due to contractual issues. In fact, in 2018, the Malaysia's Asian International Arbitration Centre had seen a rising trend in construction disputes when it had recorded 932 cases with over 700 disputes observed to be construction related involving avoidance of payments and contracts clarity (Ratna, 2018).

2. Review of Literature Review

Good faith is a nebulous concept. It has many definitions but the flexibility of its meaning encourages parties to a contract to deal with each other honestly, fairly and to take into account other parties' interest to ensure the success of the contractual performance (Abdullah, 2020). In Australia, the concept of good faith was first to be discussed in a construction case of *Renard Construction (ME) v Minister for Works* (1992) 26 NSWLR 234, paved the way for good faith in construction contracts although the obiter comment by the Priestly J but it received wide attention from the legal fraternity. Adam Wallwork(2014) discussed the significance of expressed good faith principle and found that Australian Courts are inclined to accept implied good faith requirements in a standard form of contract. The issue of good faith is not the main concern but parties ought to proceed with caution in performing their contractual obligation. Abdullah et al (2015) established that in regard to implied application of good faith, Australia Courts are more lenient towards good faith clauses being implied by law instead of by fact. Jackson (2018) is more rigid in his views and argued implied good faith is redundant. This is because contracting parties often overestimate the success of their contracts that they tend to overlook the terms and conditions of the contracts. Due to this, expressed good faith clauses would be disregarded and then the courts would be less inclined to entertain allegations of breach of good faith duty when disputes arise.

On the other hand, the United Kingdom's notorious disinclination to accede to the good faith principle in commercial law. On this, Campbell (2014) implored that the landmark case of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 has proven the significance of good faith principle in commercial relational contracts and he came out strong in expressing his disappointment over the English Courts' reluctant to apply good faith principle without reservation because generally, according to Campbell, all contracts are in essential, relational contracts. A separate note on relational contract is on a study by Christie (2013), wherein they conclude that at present time, project-centric approach based on good faith and relational contract would be more appropriate than party-centric approach that focuses on the parties instead. Crabtree (2019) views Yam Seng's position positively but with caution that good faith principle could actually expend unforeseeably with jarring developments.

On the position of civil law countries, Butarbutar (2015) affirmed the position of expressed good faith principle in civil law jurisdiction positively. Good faith has an important role in civil law codes such as German Civil Law Codes, Italy Civil Law Codes and France Civil Law Codes. Conversely, Dunne (2015) discussed on the gaps between civil law and common law jurisdiction and addressed that the UK Courts' decision in *Yam Seng* and *Mid Essex* seems to suggest that the good faith principle would be properly acceptable by common law jurisdiction soon but in the meanwhile, the construction of expressed clause is significant (Dunné, 2015).

Construction contracts are mostly standard forms of contract where it is modified to be used worldwide with modifications based on the party's needs. There are two construction contracts that mention the obligation of good faith in construction contracts such as Joint Contract Tribunal (JCT) and New Engineering Contract (NEC), or NEC Engineering and Construction Contract. JCT is one of the most popular construction contracts founded by the Royal Institute of British Architects and the National Federation of Building Trade Employers (*JCT contracts, 1998*). JCT Standard Form essentially has non-compulsory provision at Schedule 8 for "*collaborative working*", and such requires the parties to "*work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect*" (Jackson, 2018)

Meanwhile in the United Kingdom, the New Engineering Contract (NEC), or NEC Engineering and Construction Contract, is an enacted system established by the UK Institution of Civil Engineers that provides guidelines in the drafting of documents on construction, civil engineering and maintenance projects in relation to obtaining tenders, awarding and governing contracts (Arbicon, 2022). There is an express provision in NEC standard of form, namely clause 10.1, wherein the parties are required to act in a "spirit of mutual trust and cooperation". This clause arguably stands in place of good faith requirement and a decided case of *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50, Lord Woolman found that a NEC sub-contract imposed an effective and enforceable good faith requirement that "interlocked" with other relevant contractual clauses and was not simply "an avowal of aspiration." He subsequently identified that "i) A contracting party "will not in normal circumstances be entitled to take advantage of [its] own breach as against the other party" (referring to *Alghussein Establishment v Eton College* [1988] 1 WLR 587), ii) A subcontractor is not obliged to obey an instruction issued in breach of contract (referring to *Thorn v The Mayor and Commonalty of London* (1876) 1 App. Cas. 120), and iii) clear language is required to place one contracting party completely at the mercy of the other (referring to *Parkinson (Sir Lindsay) & Co. Ltd v Commissioners of His Majesty's Works and Public Buildings* [1949] 2 KB 632, 662)".

Due to its intricate nature of building projects, it is necessary to utilize extensive contracts that have been meticulously drafted in order to clearly detail the agreement. Standardized general conditions are set of contract precedents that laid down the general terms and conditions of construction contracts. As there are several types of construction contracts, such as building contract and infrastructure contract, these standardized general conditions form the model contracts that can be adopted by the parties to ease the contract documentation process and help the contracting parties to be familiar with the contract's key aspects. Conversely, the standard form of contract can cause unfairness and rigidity. When interpreting a contract, the court must give regard to both the parties' objectives and the contract's terms, even if the court intends to honour the parties' intentions. The common law assumes an objective standard in construction contracts and often disregard contracting parties' actual intention. Lord Hoffmann held in *Transfield Shipping Inc. v Mercator Shipping Inc.* [2008] UKHL 48 at 28, "the court is engaged in construing the agreement to reflect the obligations which the parties may fairly be anticipated to have incurred and paid for. It cannot decline this task on the ground that the parties could have spared it the trouble by using clearer language".

On the aspect of standard form of contracts, the newer standard forms of contracts have started to incorporate good faith clause but it would likely remain to be a general good faith requirement clause without any directive for certain behaviours (Dona et al, 2008). Despite its advantage, it has disadvantages of the forms are time-consuming, difficult to interpret, and complex in their construction, due to the resulting contract is often a compromise, they oppose change. Parties may agree to remove or amend some clauses but those must be with reasonable justifications and improving something takes a long time. Implied terms may emerge from legislation (laws or court cases), local custom, trade practise, or the desire to make a contract more effective for business interests (Nor Ainah Abdullah. (2019)). On the contrary, the opponent of good faith further argued that in referring to NEC standard form of contract and cautioned that parties cannot merely rely on good faith clause in the event of disputes because contractually, parties ought to be held liable for the terms they have agreed and incorporated in the final contract (Bailey, 2020).

This research was motivated by severely limited legal studies undertaken by the scholars in light of good faith principle in construction contracts, particularly, on its significance and relevance. Most of the discussion involving common law countries halted at the juncture where it is agreed that the English Courts generally disfavour good faith in commercial courts, without going into detail on construction contracts subject. Hence, this research aims to provide an insight on the position, application and relevancy of good faith principle in construction contracts, with comparative study between Malaysia, the United Kingdom and Australia. The research methodology, findings, discussion, conclusion and recommendations and further scope for research shall also be discussed by the end of the article.

3. Research Methodology

This research employed qualitative content analysis of legal documents of primary and secondary sources in the discussion of the position of good faith principle in different jurisdictions of the United Kingdom, Malaysia and Australia in the context of construction contracts. First, various primary sources of legislations and case law decisions were identified from the three selected jurisdictions. This analysis provides a comprehensive understanding of the application and legal interpretation of case law and legislations from United Kingdom, Malaysia and Australia. Second, upon identifying the primary sources, the comparative analysis was made from three different jurisdictions of the United Kingdom, Malaysia and Australia in search of the coherent application and interpretation of good faith principles in the context of constructions contract. Followed by the third step which is secondary sources of textbooks and academic writings of the good faith principle in the context of construction contracts.

This research adopts an 'Armchair Approach' (Morse, 1999) i.e., library-based study. Research materials are derived either from primary or secondary sources. Primary sources are, for instance, domestic laws and local case laws. As an extension, secondary research materials, whether in physical form or online shall be based upon academic journals, articles, and textbooks. Reliable online research databases such as Lexis Advance, HeinOnline and ResearchGate will be utilised. Using an 'Armchair Approach', a descriptive and detailed analysis of legal rules found in primary sources and

secondary sources is composed. This approach collects, organize and describe the law and later identify and describe the underlying theme or system and how each source of law is connected. The comparative legal approach involves critical analysis of three different jurisdictions of the United Kingdom Malaysia and Australia to examine the outcome of a legal issue could be different under each set of laws. This approach assists in finding common ground and determining best practices and solutions.

The diagram is shown below in Figure 1:

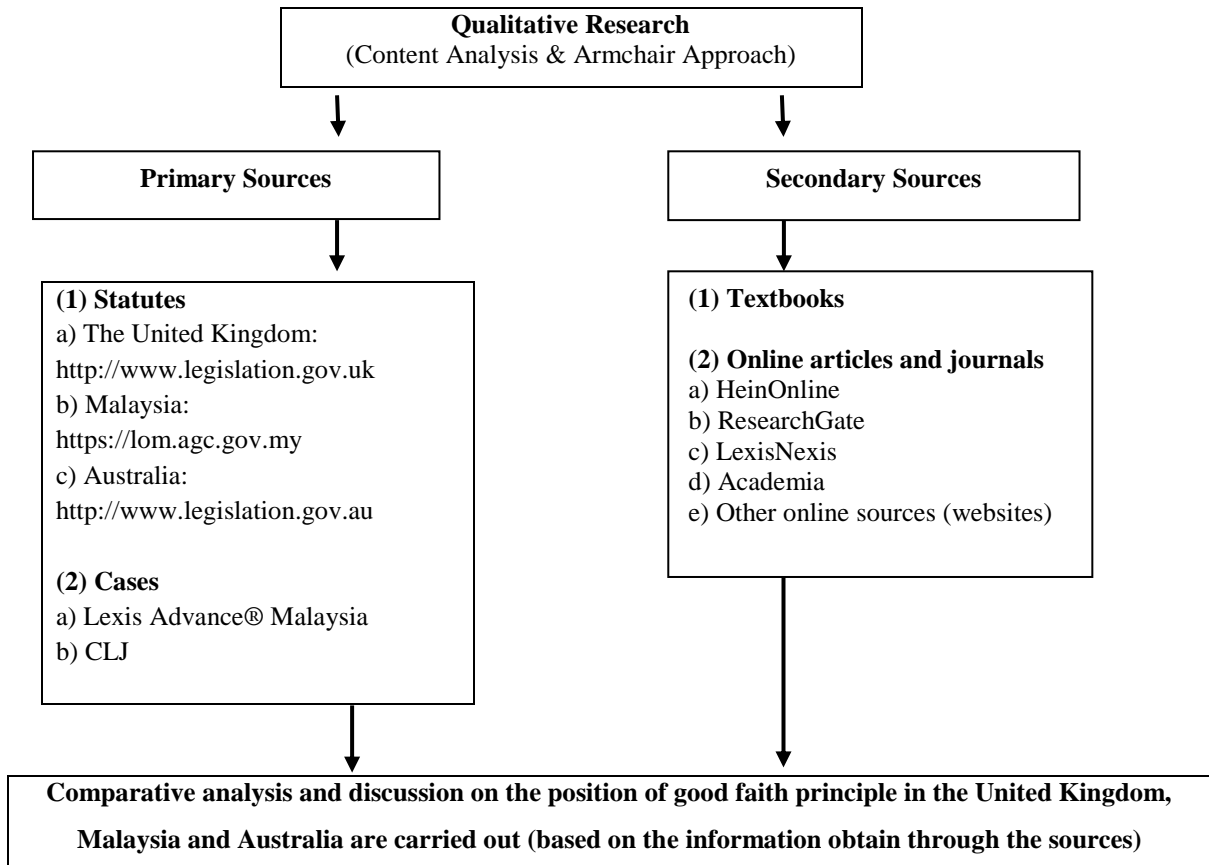


Fig. 1 - Qualitative research workflow

4. Findings

This section elaborates the review findings of good faith in construction contract its position application and relevance of good faith principle in construction contracts in Malaysia, the United Kingdom and Australia.

4.1 Good Faith Principle and Construction Contract

Construction contracts are best interpreted with literal rule (Hiong, 2012) due to the nature of construction contracts is complex, verbose, structured and rigid. Most construction contracts are standard forms of contracts available for the parties to rely on in deciding what are the best approaches and methods to be applied in their projects (Norazam Othman, 2008). While all the clauses in the standard forms of contracts are not mandatory to be included at the end of a negotiation, a party that is not familiar with legal risk assessment may have failed to apprehend any omission by the other party that could damage them during the construction contract performance. Therefore, good faith principle allows the courts to analyze and interpret construction contracts on the basis of ‘treating others like how you would like to be treated’ – which is similar to golden rule interpretation (Schäfer & Aksoy, 2015). In similar vein, the parties are ought to enjoy the benefit of the contractual agreement as discussed in the case of *Automasters Australia Pty Ltd v Brunes Pty Ltd & Anor* [2002] WASC 286 [388] the court held that it is the principle of good faith reflected the “...duty to have due regard to the legitimate interests of both parties in the enjoyment of the fruits of the contract.”

4.2 A Good Faith Clause is Essential in Standard Forms of Construction

Standard forms of contracts such as NEC and JCT have sufficiently covers implied good faith principle. Nevertheless, the express incorporation of clause to indicate the importance of good faith duty ought to be included to safeguard all parties' interests. Often than not, a party with the upper hand in a construction contract would disregard the inclusion of good faith clause. There is no necessity for them to bind themselves onto a principle that requires them to be considerate of their contracting partner when they are able to execute the contracts and reap the benefits for themselves which is unfair.

Good faith principle clause is essential in standard forms of construction contracts in ensuring fair and just contractual relationship between parties, especially because during the tender stage of a construction project, the Client would have the final say on the terms and conditions that are permitted to be incorporated into the contract. A contractor may expect the Client to act in good faith but such expectation would work justifiably if it is put down in writing. The reasonable expectation of good faith must also be followed with specific action, for example, Client shall, in good faith, remit payment to the contractor for the work done in accordance with the contract. This clause would prevent the Client from unnecessarily withholding payment from the Contractor for reasons unrelated to the Contractor's work performance. Inclusion of such clauses could also act as a source of legal rights and duties.

4.3 Good Faith in Malaysia, United Kingdom and Australia

As discussed earlier, good faith principle is growing positively in all jurisdictions; the only differentiating factor is the pace. Australia has developed tremendously in accepting good faith principles where many cases and legislation mentioned it when it was first mentioned in its landmark case of *Renard Construction*. Although the High Courts are still quite reluctant to accept a good faith principle incorporation, the application of good faith principle in various fields of laws are more encouraging than in Malaysia and the United Kingdom.

Malaysia and the United Kingdom on the other hand are still reluctant in allowing good faith principle in contracts due to the fact that they prefer pragmatic solutions by developing piecemeal solutions to police unfairness (Davies, 2019). The most significant application of good faith principle is on insurance law and franchise contracts (being a type of relational contract), but other fields are still lacking in attention (Halberda, 2020). Generally, the common law countries do have a lower tendency to acknowledge good faith principle in commercial contracts, most likely because contracts construction in these countries often depends on the parties' intention which is inferred during the negotiation process until entering a contract (Trakman etl,2014). Courts are reluctant to interfere due to the fact that the good faith principle may lead to abuse of discretionary power when interpreting the four corners of the contract (Schäfer & Aksoy,2015).

4.4 Relevance of the Good Faith Concept

Despite good faith has many meaning and most of the meaning are complex, frustrating and contradictory to each other. The flexibility of the concept opens a wide opportunity for this concept to be more adaptive to contract particular construction contract. Construction contracts are considered rigid, verbose and unforgiving, as the parties (Client and Contractor) are presumed competent to carry their parts of the contractual obligations. Controversially, the construction contract is often unfairly prejudicial as the Client would customarily have the upper hand in deciding the terms and conditions of a contract.

The position was taken by Australia's Renard case whereby good faith principle to be expressly mentioned in a construction contract, but it is also important for the courts to allow its applicability only to an extent where it is reasonable and justifiable. Construction contracts are special in their own nature, thus, employing the good faith principle would uphold the distinctiveness of construction contract by taking into account the Client and Contractor need.

5. Conclusion

It concluded that good faith principle is slowly paving its path in construction law, and its development must not be hindered by scepticism that construction contracts can only be construed by contract laws. Marcus Tullius Cicero, a Roman statesman, lawyer, scholar, and philosopher, once said, "*The foundation of justice is good faith*" (Peaky & Kay , 2019). Hence, it argues in favour of good faith, that merely because construction contracts are formed by the intention of parties, does not mean good faith principle have no significant value. Succinctly, the leniency towards the application of good faith principle in construction contracts is necessary to ensure the interests of all parties are secured, and failure to do so could hinge innocent parties to avertible losses.

This article has provided information on the current position of good faith principle in construction contracts, in Malaysia, the United Kingdom and Australia. Furthermore, existing case laws and legislations as well as prevalent practices were studied. However, while this research was fruitful, there are several areas needing further research. To begin with, construction contracts tend to be heavily one-sided due to the tender bidding process. The selection factors can vary from the best quotation prices from the Contractor, the Contractor's absolute compliance with the Client's proposed contract terms, and Contractor's undertaking to prioritise the Client's project over any other ongoing projects, to political reasons. Further in-depth study should therefore be focused towards the application of good faith principle at the tender bidding stage, where the requirement of good faith should be made relevant at the outset of prospective construction contract relationship.

Another area of research should be aimed towards the grey area of law involving good faith principle. Good faith principle has vast interpretation and its application is infinite but somehow, good faith principle is reckoned to be an enemy of contracts law. An in-depth research on any possible approaches to have good faith principle and contracts law exist harmoniously side-by-side would be an interesting subject to be determined. Mere reliance on judiciary system to decide factually on whether good faith principle can prevail over contracts law and whatnot is obviously insufficient and inconclusive. The researcher implores that good faith principle should not be second to contract laws, but must exist on equal terms.

To finish, in conducting research for the current study, the researcher identified that case laws in this area is scarce. Taking this into consideration, the researcher is of the view that any disputes involving construction contracts and good faith application most likely have taken place in arbitration and adjudication proceedings, as construction contracts often have the clauses requiring any disputes to be disposed of through alternative dispute resolutions. A potential area of research would therefore be the resort taken by parties in the event of disputes involving breach of duty of good faith in construction contracts. This further research would have an interesting viewpoint because arbitration does not have to follow the law of evidence strictly and good faith principle would play an important element in deciding whether any breach of duty of good faith should be determined via alternative dispute resolutions.

6. Recommendations

There is no specific legislation that governs construction matters in terms of context, in Malaysia, the United Kingdom and Australia, but only in terms of procedures. Legislative reform could either transpire by way of amending the current statutes such as Malaysian Contracts Act 1950, to incorporate the duty of good faith principle by parties in a contract in performing or executing the said contract, or by way of new legislation that solely governs the issues and potential risks involving construction contracts. On this note, the codification and/or amendment to include duty of good faith in Contracts Act 1950 would compel the parties to a construction contract to comply the same *in toto* or face legal remedies under the law and not just contractually. This significantly strengthens good faith compliance as not merely contractual obligation, but legal requirement under the law. In comparing the common law countries' position with the civil law countries, the codification of good faith principle by most of the civil law countries is an example to be revered. Transparency and honesty are required by law, and the codification further assist the parties that are not aware of the legal implication due to the absent of good faith requirement. (Dean & Kazaz, 2014)

Most standard forms of contracts do not incorporate specific good faith clause, in lieu of the judicial positions concerning the principle and the parties' lack of awareness. As good faith principle is a novel standard in regard to construction contracts, which had been structured rigidly for centuries, it is recommended to have a specific good faith clause incorporated into the standard forms of contracts. In the event of disputes, the courts would have the discretion whether to allow the application of such clause or not but the initial feat to safeguard all parties' interests by included this clause must be heeded. To facilitate this, all the international organisations that constructed the standard forms of contracts ought to discuss and agree to standardise the general terms and conditions of the standard forms to include specific good faith clause. A reference to JCT and NEC standard forms of contracts would ease the process as there is in existence judicial precedent that viewed the incorporation of implied good faith duty positively.

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