

The Doctrine of Good Faith in Scots and Thai Law: Comparative Perspectives

The doctrine of good faith is an important fundamental of the law of contract in the Civil Law systems. In England, conversely, it has generally been accepted that there is no general doctrine of good faith in contract law. As a result, in the Civil Law contracting parties are required to, for example, negotiate a contract and perform their obligations in accordance with good faith. On the other hand, English law, as a general rule, does not recognise an implied duty of good faith between contracting parties. This reflects a stark contrast between the two major legal systems of the world. In fact, in the Civil Law good faith does not merely govern the law of contract, but it governs all of private law. In other words, good faith is a fundamental basis of private law in the Civilian systems.

Even though Scots law significantly derives its private law from Civilian sources, the role of good faith in Scots law appears to be less important in comparison to those in the Continental European legal systems. Nonetheless, unlike English law, Scots law is not antagonistic to the notion of good faith. This reflects the fact that the recognition of good faith in Scots law is more flexible than in English law, but it is not as obvious as it is in Continental European legal systems. As for Thai law, under the influence of the Civil Law systems, the doctrine of good faith plays a prominent role in Thai contract law, or more accurately Thai private law.

Scots law and Thai law are similar in that their private laws have been influenced both by the Civil Law and the Common Law traditions. Nevertheless, in terms of private law, in both systems the Civilian influence appears to be

stronger than the Common Law one. Therefore, even though Scots law is a mixed legal system, Scots private law is usually regarded as a member of the Civilian tradition. As for Thai law, the Civil and Commercial Code is fundamentally modelled on the German Civil Code (BGB). The drafters of the Civil and Commercial Code also consulted civil and commercial codes of other Continental European countries such as France, Switzerland, Italy and Belgium. Thus, both Scots and Thai private laws, especially the law of obligations and the law of contract, have Roman roots. It is therefore interesting to compare the concepts of good faith in these two legal systems. For instance, it is interesting to analyse why, even though their private laws originated in the same root, the role of good faith in each system appears to be significantly different.

Due to space constraints, in the case of Thai law the research mainly consults legal literature. That is to say, the research does not focus on the role of the Thai courts in applying the doctrine of good faith. In contrast, in the case of Scots law the research deals with the concept applied by the Scottish courts. This is because Scots law is not a codified system, thus there is no general concept of good faith recognised under the Civil Code. In addition, the concept of good faith as explained by Scottish legal scholars are of limited use in analysing the concept. Moreover, the Scottish courts have an important role to play in developing the notion of good faith in Scots law.

The research is divided into four main parts, the first of which is the summary of the recognition of good faith in the Civil Law systems. In addition, the Civilian approach of characterising good faith into subjective good faith and objective good faith will be considered. Second, it will discuss the role of good faith in Scots law. This will be achieved by considering the attitudes towards good faith of

both Scottish legal writers and the Scottish courts. A comparison to good faith recognised in the Civilian sense (discussed in the first part) will be made. Third, it will explore the recognition of good faith in Thai law. Two important types of good faith in Thai law, namely (i) general principles of good faith (or general good faith) and (ii) specific principles of good faith (or specific good faith) will be explored. Like the case of Scots law, a comparison to the Civilian subjective and objective good faith will be made. Finally, a comparison between the studied will be provided.

1. Good faith in the Civil Law

1.1 The recognition of good faith in the Civil Law

Most Continental European systems recognise the concept of good faith as a general principle. Undoubtedly, this is a legacy of Roman law.¹ For example, in Germany the law states in general terms that “everyone must perform his contract in the manner required by good faith and fair dealing (*Treu und Glauben*) taking into consideration the general practice in commerce”.² In the Netherlands, Art 6:2 of the Dutch Burgerlijk Wetboek uses strong language: “Good faith will not only supplement obligations arising from contract but may also modify and extinguish them”.³ In France, the law provides that “Good faith is always presumed, and it is on the person who

¹ For a detailed account of good faith in Roman law see Martin Josef Schermaier, “*Bona fides in Roman Contract Law*”. in Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law*, Cambridge : Cambridge University Press, 2000, pp. 63-92.

² BGB, §242.

³ Dutch BW, Art 6:2.

alleges bad faith to prove it.”⁴ The Belgian and Luxembourg Civil Codes contain the rule that contracts must be performed in good faith.⁵ In Italy, there are provisions, both general and specific rules, imposing contracting parties to act in accordance with good faith in different stages of their relationships.⁶ For instance, Art 1337 of the Italian Civil Code states that “parties must behave in provides that parties must behave in good faith during the pre-contractual bargaining and contract drafting”.⁷ All these examples illustrate that good faith is an important concept in the Civil Law systems.⁸

1.2 Types of good faith in the Civil Law

In the Civilian tradition good faith can be analytically divided into two types, namely “subjective good faith” and “objective good faith”.⁹ It is observed that some systems make clear about this distinction by using terminology for “objective good faith” (e.g. *Treu und Glauben*, *correttezza*, *redelijkheid en billijkheid*).¹⁰

⁴ Code Napoleon, Art 2268.

⁵ Belgian Civil Code, Art 1134; Luxembourg Civil Code, Art 1134.

⁶ See also Arts 1175, 1366, 1375 and 1460 of the Italian Civil Code.

⁷ Italian Civil Code, Art 1337.

⁸ See also Greek Civil Code, Art 288; Portuguese Civil Code, Art 762.

⁹ Martijn W Hesselink. **“The Concept of Good Faith”**. in Arthur Hartkamp et al (editors), **Towards a European Civil Code**. 4th edition. Alphen aan den Rijn, Netherlands: Kluwer Law International, 2011, 619-649 at p. 619. For an overall discussion of good faith in the Civil Law systems see at pp. 620-649.

¹⁰ *Ibid* at p. 620.

1.2.1 Subjective good faith

Subjective good faith is about “subjective state of mind: not knowing nor having to know of a certain fact or event”¹¹, and affects mainly property law and possession.¹² For example, §990 para 1 of the BGB states:

“if the possessor, when he obtained possession, was not in good faith, he is liable to the owner starting from the date of the acquisition under §§987 and 989. If the possessor later discovers that he is not entitled to possession, he is liable in the same way from the date when he obtained the knowledge on.”¹³

Likewise, Art 1141 of the Code Napoleon states:

“Where a thing which one is bound to transfer or deliver to two persons successively is purely movable, the one of the two who has been put in actual possession is preferred and remains owner of it, although his title is subsequent as to date, provided however that the possession is in good faith.”¹⁴

As can be seen, this type of good faith depends on the state of mind of a possessor- whether he or she knows of a certain fact or not.

1.2.2 Objective good faith

The second type is called “objective good faith”. It is referred to a “norm for the conduct of contracting parties:

¹¹ *Ibid* at p. 619.

¹² *Ibid*.

¹³ BGB, §990.

¹⁴ Code Napoleon, Art 1141.

“acting in accordance with or contrary to good faith”.¹⁵ This type of good faith is therefore more relevant to contract law because it governs how contracting parties enter into a contract and how they perform their obligations. For instance, §242 of the BGB states that “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”¹⁶

Similarly, the Code Napoleon states:

“Agreements lawfully entered into take the place of the law for those who have made them.

They may be revoked only by mutual consent, or for causes authorized by law.

They must be performed in good faith.”¹⁷

In another example, Arts 1366 and 1735 of the Italian Civil Code provide that “contract must be interpreted in good faith”¹⁸ and “contract must be executed in good faith”¹⁹, respectively. As can be seen, in these Civil Law systems contracting parties have a duty to act in good faith.

It is suggested that objective good faith is regarded as “a normative concept” in the sense that it is usually considered as the highest norm of, not merely the law of contract law and the law of obligations, but rather the whole area of private law.²⁰ Also, it is often explained as having connection with morality or moral standards. This connection can be seen in two different senses. Firstly, it is *per se* a moral standard, “a legal ethical principle; good

¹⁵ Martijn W Hesselink. *Supra note 9* at p. 620.

¹⁶ BGB, §242.

¹⁷ Code Napoleon, Art 1134.

¹⁸ Italian Civil Code, Art 1366.

¹⁹ Italian Civil Code, Art 1735.

²⁰ Martijn W Hesselink. *Supra note 9* at p. 620.

faith means honesty, candour, loyalty...”²¹ Secondly, it refers to “the gateway through which oral value enter the law”.²² In short, in the Civil Law objective good faith is a normative concept which is the highest norm of all private law.

2. Good faith in Scots law

2.1 The recognition of good faith in Scots law

Unlike English law²³, literature suggests that Scots law has been not antagonistic to this doctrine. In particular to contract law, the compatibility of Scots contract law towards the principle of good faith can be traced back as early as the Institutional writers (between the seventeenth and nineteenth century) and twentieth century writers. Examples of writers who are in favour of the doctrine of good faith in contract law included Bankton²⁴, Bell²⁵,

²¹ *Ibid* at p. 621.

²² *Ibid*. For relevant literature see footnote 7 in *Ibid*.

²³ In England, it has been generally accepted that there is no general doctrine of good faith in contract law, despite the fact that a number of English scholars have argued that English law should recognise this doctrine. See Joseph Chitty. ***Chitty on Contracts***. 31st edition. By H G Beale (general editor). London: Sweet & Maxwell: Thomson Reuters, 2012 at para. 1-039.

²⁴ Andrew McDouall Bankton. ***An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Delivery between Them and the Laws of England***. Edinburgh: Printed by R Fleming, for A Kincaid and A Donaldson, 1751-1753, para 1.11.65.

²⁵ See note 30 below.

Kames²⁶, Gloag,²⁷ Gow²⁸, and TB Smith.²⁹ Nevertheless, none of these writers explicitly suggested that the notion of good faith is rooted in Scots private law in the same way that it has always existed in Continental European systems. This will be particularly discussed in the next heading.

2.1.1 The concept of good faith as explained by Scottish writers

Bell only specifically explained the role of good faith in relation to fraud, namely that an obligation induced by fraud is voidable if, among other factors, “no third parties have in good faith and for value acquire rights under the contracts”.³⁰

In his commentary, Gloag referred to the notion of good faith in a number of specific circumstances. For example, he wrote:

²⁶ Henry Home Kames. *Principles of Equity*. 3rd edition (in two volumes). Originally published: Edinburgh: Printed for J Bell, & W Creech; London: T Cadell, 1778. (Reprinted: N J Clark: Lawbook Exchange, 2011, p.194.

²⁷ William Murray Gloag. *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*. 2nd edition. Edinburgh: W. Green, 1929, p. 400.

²⁸ James John Gow. *The Mercantile and Industrial Law of Scotland*. Edinburgh: W Green, 1964, p. 73.

²⁹ See note 35 below.

³⁰ George Joseph Bell. *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*. 5th edition. Edinburgh: William Blackwood, 1826) at 263; George Joseph Bell. *Principles of the Law of Scotland*. 4th edition. Edinburgh: Edinburgh Legal Education Trust, 2010, §13.

“[it] is a general rule that contracts are to be construed on the assumption of honest dealing. No merely general clause of exemption, however widely expressed, is to be taken as enabling the party using it to escape the normal consequences of his fraud.”³¹

In addition, when dealing with offers made by mistake, he stated that:

“When the party to whom the mistaken offer is made has no knowledge of the mistake, and accepts in good faith, there is some authority for saying that he may hold to this bargain.”³²

TB Smith is well-known for being nationalist Scots lawyer.³³ His works also show that he generally prefers the Civilian approach to the English approach on the basis that Scots

³¹ William Murray Gloag. ***The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland***. 2nd edition. Edinburgh: W. Green, 1929, p. 400.

³² *Ibid* at 438. He cited *Seaton Brick and Tile Co v Mitchell* (1900) 2 F 550.

³³ For example, he expresses his concern that the English influence could undermine the promissory doctrine (which is an independent obligation from contract) in Scots law. He wrote: “we are in danger of confusing and frustrating one of the most valuable doctrine of our law of obligations—the unilateral juristic act by bare promise or pollicitatio (as contrasted with contract or agreement)”. Thomas Broun Smith, ***“Strange Gods: The Crisis of Scots Law as a Civilian System”***. in the same author, ***Studies Critical and Comparative***. Edinburgh: W. Green; New York: Oceana Publications, 1962, 72 at p. 86.

law is rooted in the Civil Law.³⁴ Therefore, it is worth considering his view on good faith, given that this doctrine exists as a fundamental basis in the Civil Law, but not in the Common Law.

TB Smith pointed out that “in the Scottish law of contract *bona fides* is a general concept—with the possible exception of certain agreements such as *mutuum* and transaction”.³⁵ At first glance, this quote from Smith’s commentary seems to show a positive attitude towards the role of good faith as a general principle in Scots contract law. On closer inspection, however, Smith did not really provide an analysis which would make his claim that Scots law recognises good faith as a normative concept in the same sense as it is in the Civilian tradition. As suggested by MacQueen, “Smith’s never fully developed views on good faith in contract (mostly tied to duties of disclosure)”.³⁶

The opinions of more recent writers³⁷ are in accordance with the former writers that there is no clear general

³⁴ Thomas Broun Smith. ***A Short Commentary on the Law of Scotland***. Edinburgh: W Green, 1962, pp. 297-298, 746-751.

³⁵ Thomas Broun Smith. *Ibid* at pp. 297-298. (He cited Kames, *Equity*, 4th edn 246; Stair, *Inst* 1.11. 6; Bankton, *Inst* 1.11.65; Stein, *Fault in the Formation of Contract in Roman Law and Scots Law*, 171 et seq.)

³⁶ Hector L MacQueen. “***Glory with Gloag or to the Stake with Stair?***”. in Elspeth Reid and DL Carey Miller (eds). ***A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law***. Edinburgh: Edinburgh University Press, 2005, pp.138-172 at p. 144 (note 28).

³⁷ Interestingly, some outsiders (i.e. non-Scots lawyers) suggest that there is an underlying basis of good faith in Scots law, despite the fact that it has not been clearly

principle of good faith in Scots law. MacQueen, for instance, proposes that good faith has a substantive role to play in Scots contract law, but it is recognised through particular rules, rather than general principles.³⁸ He observes that there are two areas of contract law in which good faith appear to play an important role, namely insurance and suretyship.³⁹ This is because in those contexts, parties are bound to disclose (in the case of insurance) or give a proper advice to a potential surety⁴⁰ (in the case of cautionary obligation). These duties of the assured and surety are grounded in good faith. Nonetheless, this does not mean that there is a general underlying basis of good faith in Scots law, give that these good faith duties only exist in particular types of contracts. As MacQueen concludes, “if there is a general principle of good faith in Scots contract law, it has been mostly latent and inarticulate until now”.⁴¹

presented. For instance, O Lando and H G Beale state that “there is also an underlying principle of good faith in the Scottish law of contract although it is difficult to find a clear and comprehensive statement of it”. See O Lando and H G Beale (editors), *The Principles of European Contract Law. Part I: Performance, Non-Performance and Remedies*. Dordrecht, Boston and London, 1995, p. 58.

³⁸ Hector L MacQueen. “**Good Faith in the Scots Law of Contract: An Undisclosed Principle?**”. in ADM Forte (editor), *Good Faith in Contract and Property*. Oxford, England: Hart Publishing, 1999 pp. 5-38 at p. 33.

³⁹ Known as “cautionary obligations” in Scots law.

⁴⁰ Known as “cautioner” in Scots law.

⁴¹ Hector L MacQueen. *Supra note 38* at p.13.

2.1.2 The concept of good faith as explained by the Scottish courts

The existence of a tendency towards a principle of contracting parties' duties to act in good faith appears to be more obvious as a result of the strike decision in a particular 1997 case, namely *Smith v Bank of Scotland*⁴². In this case, the House of Lords established a requirement for parties making personal guarantees that they are required to act in accordance with good faith. The courts reasoned that:

“there should also be a duty in particular circumstances to give the potential cautioner certain advice. Thus in circumstances where the creditor should reasonably suspect that there may be factors bearing on the participation of the cautioner which might undermine the validity of the contract through his or her intimate relationship with the debtor the duty would arise and would have to be fulfilled if the creditor is not to be prevented from later enforcing the contract.”⁴³

However, the decision of the case did not establish the role of good faith in Scots law as equivalent to the doctrine of good faith in Continental systems, given that the scope of good faith in the *Smith* case was limited to a specific framework of personal guarantees.

There continued to be a few cases in which the UK and Scottish courts had to deal with the duties of parties making personal guarantees in relation to the notion of good faith. However, the decisions of the relevant cases show that the court did not advance the doctrine by imposing the

⁴² 1997 SC (HL) 111.

⁴³ 1997 SC (HL) 111, [121].

requirement that each party has a general obligation to conform their performance in accordance with good faith. For example, in *Braithwaite v Bank of Scotland*⁴⁴, the court reasoned that there were no grounds for reducing security, merely based on the fact that the creditor did not provide any proper advice to the cautioner. Also, in *Forsyth v Royal Bank of Scotland Plc*⁴⁵, the fact that the creditor was led to believe that the cautioner had already been given professional legal advice excluded the former from such duties to provide the latter with proper advice.

In another case in 2004 concerning immigration law, Lord Hope observed, by citing MacQueen⁴⁶, that

“Good faith in Scottish contract law, as in South African law, is generally an underlying principle of an explanatory and legitimising nature rather than an active or creative nature.”⁴⁷

Consequently, it can be concluded that the courts do not go that far in establishing the doctrine of good faith as a broad general principle or a fundamental basis which

⁴⁴ 1999 SLT 25.

⁴⁵ 2000 SLT 1295.

⁴⁶ MacQueen’s original texts appear as “The use of the principle in this way was something of an innovation in Scottish contract law because, as in South African law, good faith is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature.” Hector L Macqueen, ***“Delict, Contract, and the Bill of Rights: A Perspective from the United Kingdom”*** South African Law Journal 121, (2004) 359 at p. 382.

⁴⁷ *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1, [60].

would govern the legal concepts in the jurisdiction by requiring them to be in accordance with it.

More recently, a case in early 2014 shows some extent development of the role of good faith in Scots law. In *Cooper v Bank of Scotland Plc*⁴⁸, the court held that the requirement for the application of good faith in *Smith v Bank of Scotland*⁴⁹ was not satisfied, given that the creditor neither provided the cautioner with proper advice nor brought to her attention to the effect of executing a standard security. As the court explained:

“Neither the defenders nor their agents advised the pursuer of the consequences of executing the deed; nor did they advise her to take independent legal advice. They were not accordingly in good faith in terms of *Smith*. I am also satisfied that the defenders were not in good faith in the *Smith* sense.”⁵⁰

The court decision in the most recent case suggests that there has been an advance, to a certain degree, in Scots legal opinion in favour of the doctrine of good faith in Scots law. It appears that the 1997 *Smith* case has become an authority which the courts can rely on when dealing with the duties of contracting parties in relation to the principle of good faith. However, it would be an exaggeration to state that in Scots law there is a normative concept requiring contracting parties to perform their duties in accordance with good faith. This is because most cases concerning a duty to act in good faith are cases about personal guarantees or cautionary obligations.

⁴⁸ (2014) [2013] EWHC 4645 (Ch).

⁴⁹ 1997 SC (HL) 111, 121B-C.

⁵⁰ *Ibid.*

2.2 Good faith in Scots law in comparison with the Civil Law

It is worth comparing the concept of good faith in Scots law with the doctrine of good faith that is recognised in Civilian tradition in order to see how their doctrines map on to each other.

Firstly, recall that subjective good faith refers to state of mind of a person whether he or she knows of a certain fact or not. In Scots law, where goods are bought from a seller without title, the person who is in possession of the property in good faith and a good faith buyer are protected by the law.⁵¹ As a result, Scots law is familiar with the Civilian subjective good faith.

However, the analysis of the court in the *Smith*⁵² case which is discussed earlier shows that the Scottish courts did not entirely distinguish between good faith in contract and

⁵¹ James Dalrymple Viscount Stair. ***The Institutions of The Law of Scotland, Deduced From its Originals, and Collated with the Civil, and Feudal-Laws, and with the Customs of Neighbouring Nations. In Four Books, the Third Edition, Corrected and Enlarged, with Notes.*** Eighteenth Century Collections Online Print Editions, 2010 at para. 3.2.7; Bankton. *Supra note 24* at para. 1.3.18; George Joseph Bell. ***Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence.*** 5th edition. Edinburgh: William Blackwood, 1826 at 299 and 305; George Joseph Bell. ***Principles of the Law of Scotland.*** 4th edition. Edinburgh: Edinburgh Legal Education Trust, 2010 §1314; *Forsyth v Kilpatrick* (1680) Mor 9120); *Pringlee v Gribton* (1710) Mor 9123.

⁵² 1997 SC (HL) 111, 121B-C.

good faith in property. In this case, two property law cases⁵³ were referred to in order to support the principle of good faith in contract law. Therefore, it can be concluded that the Civilian objective good faith is different from that of Scots law. MacQueen further suggests that if the theory of distinguishing between subjective and objective good faith is sound, there should be a clear distinction between good faith in property and good faith in contract under Scots law.⁵⁴ MacQueen's view is satisfactory. There should be a clear distinction between good faith in property law and good faith in contract law on the basis that the underlying basis of the principle of good faith in property law is fundamentally distinct from that in contract law or the law of obligations. As has been seen, good faith in property law is concerned with the state of mind of a person, whether or not he/she has any knowledge of an event. Then, a right to possess a property will be justified on the basis of that knowledge. Therefore, it is merely a question about the knowledge of a party regarding certain facts. It is not an underlying basis of the law which would sufficiently reflect the fact that some parties are required to perform their obligations in accordance with the principle of good faith.

Nevertheless, the issue concerning a distinction between subjective and objective good faith is also something which appears to have recently changed in Scots law. In *Braithwaite v Bank of Scotland* case in 2014, the court did not draw any doctrinal analysis of good faith from any property law case. Three relevant cases are referred to. First, the court referred to the famous Smith case as

⁵³ I.e. *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510 (1997 SC (HL) 121B-C, as cited by MacQueen in Hector L MacQueen. *Supra note* 38 at p. 3 (note 12).

⁵⁴ Hector L MacQueen, *Ibid* at p. 8.

grounds for imposing on parties the requirement to act in accordance with the principle of good faith. Second, two other cases, namely *Braithwaite v Bank of Scotland*⁵⁵ and *Royal Bank of Scotland v Wilson*⁵⁶ were referred to in relation to proof of an actionable wrong. Thus, the latter two cases were not directly about the topic of good faith. Therefore, it appears that the decision in the *Smith* case has become the grounds for imposing on contracting parties in the act of contracting the requirement to take the step of performing their obligations in good faith. That is to say, the duties to act in good faith among contracting parties were drawn merely from the doctrine of good faith in contract law. This also suggests that the court perhaps no longer needs to draw an analysis of good faith from property law cases.

Secondly, the Civilian objective good faith is different from good faith in Scots law. As noted above, Scots law has not traditionally had a clear principle that good faith exists as a fundamental basis of law. The courts have applied the doctrine of good faith quite strictly. Even though the decision in the recent 2014 case shows an advance in terms of the application of good faith in Scots contract law, the way that the Scottish courts apply the doctrine is still rather strict in comparison to the application of the doctrine of good faith in the Civilian sense.

It is worth considering the role of good faith under the Draft Common Frame of Reference (DCFR), which is the latest model of harmonising European private law. At first glance, given that the role of good faith, especially the objective good faith, between the Civilian systems are significantly different from those of Scots and English law, one may

⁵⁵ 1999 SLT 25.

⁵⁶ 2004 SC 153.

assume that this difference may significantly cause a difficulty in harmonising the notion of good faith under the DCFR.⁵⁷ Nonetheless, it appears the approach concerning good faith adopted by the DCFR “is not far-reaching”.⁵⁸ Although good faith is the fundamental concept in the Civilian countries and the DCFR does recognise this concept by requiring contracting parties to perform their duties in good faith, breach of such duties do not result in cause of action. Rather, it only applies to estoppel (known as personal bar in Scots law). This means that a party who breaches his or her duty of good faith “is precluded from exercising or relying on a right, remedy or defence which he would otherwise have.”⁵⁹ This reflects the fact that good faith in the DCFR is a shield, rather than a sword (i.e. not a cause of action).⁶⁰

It is suggested that the approach adopted by the DCFR is compatible with the role of good faith in Scots law.⁶¹ It is

⁵⁷ Laura Macgregor. **“Good Faith in Contract Law”**. in **Report on the Draft Common Frame of Reference: a report prepared for the Scottish Government**. Available at <http://www.gov.scot/Publications/2009/03/05095249/4>.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ The most important provision of good faith in the DCFR is Art I. – 1:103. The provision reads:

“(1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.”

⁶¹ Laura Macgregor. *Supra note 57*.

further observed that several UK scholars are not in favour the Civilian approach that contracting parties are bound to perform their duties in good faith on the basis that it undermines certainty of contract.⁶² Therefore, the good faith approach adopted by the DCFR may be the compromise between the Civilian and the English/Scottish approaches.

2.3 Concluding remarks

Scots law has not yet recognised good faith as a general concept in the same sense as in the Civilian tradition. The research in this section shows that there has been a development of the role of good faith in contract law. However, it merely concerns with personal guarantees or cautionary obligations, rather than the whole system of contract law. Thus, in general contracting parties are not required to perform obligations in accordance with good faith.

3. Good faith in Thai law

3.1 The recognition of good faith in Thai law

Under the influence of the Civilian tradition, the doctrine of good faith plays a prominent role in Thai private law. The general principle of good faith is contained in §5 of the Civil and Commercial Code, which states: “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith”. The Civil and Commercial Code derives this provision from Art 2 of the Swiss Civil Code.⁶³ The Swiss provision, in the textual forms of this

⁶² *Ibid.*

⁶³ Phraya Manavarajasevi (Plod Vichian Na Songkhla). ***Drafting's Instances of Books 1-2 of the Civil and***

provision in force at the time of drafting of the Civil and Commercial Code, reads:

“Every person is bound to exercise his right and fulfil his obligations according to the principles of good faith.

The law does not sanction the evident abuse of a man’s rights.”⁶⁴

The Swiss provision had been inspired by §242 of the BGB.⁶⁵ The German provision, in the textual forms of this provision in force at the time of drafting of the Civil and Commercial Code, reads: “The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration”.⁶⁶ Therefore, the Thai general provision of good faith is inspired by both Swiss and German law.

Commercial Code. Edition of the Department of Legislative and Sources of the Provisions in the Civil and Commercial Code, Books 1-5, 1990, p. 1.

⁶⁴ Swiss Civil Code (1925), Art 2. The texts are from ***The Swiss Civil Code of December 10, 1907 (Effective January 1, 1912)***. Translated by Robert Porter Shick, Boston: Boston Book Company, 1915.

⁶⁵ Kittisak Prokati. ***Good Faith & Supervening Events***. Bangkok: Winyuchon, 2011, p. 60.

⁶⁶ BGB, §242. The texts are from ***The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices***. Translated by Chung Hui Wang, London: Stevens and Sons, 1907, p. 55.

3.1.1. Types of good faith in Thai law

There are several provisions under the Civil and Commercial Code containing the notion of good faith.⁶⁷ These provisions can be characterised into two main groups based on their nature. That is to say, good faith in Thai law can be theoretically divided into two main types, namely “general good faith” and “specific good faith”.

3.1.1.1 General good faith

(1) General good faith as explained by Thai academics

The first type of good faith can be referred to as the “general principles of good faith” or general good faith, which is equivalent to the Roman *bona fides*. Preedee Kasemsup defines general good faith as “honesty and trust”.⁶⁸ He further explains that good faith is the fundamental basis of all of private law. Its aim is to provide a justice to society. It is a legal rule for justice.⁶⁹

Yud Saeng-Uthai explains that the actual aim of good faith is an internal justice or substantial justice. States must regulate legal rules which are in accordance with justice.

⁶⁷ E.g. §§ 5, 6, 155, 216, 303 para 2, 368, 412, 413, 415, 905, 1299, 1300, 1303, 1310, 1312, 1329, 1330, 1331 and 1332.

⁶⁸ Preedee Kasemsup. ***“Good Faith is Honesty and Trust”***. in ***Funeral Memorial Book for the Fire King Royal Funeral of Associate Professor Dr Somsak Singhaphan***, 1983.

⁶⁹ Preedee Kasemsup. ***Civil Law: General Principles***. Bangkok: Charenwit, 1976, pp. 32-33. A similar explanation is proposed by Kittisak Prokati. See Kittisak Prokati. *Supra note 65* at pp. 61-62.

Also, courts must make their decisions based on justice. It is the responsibility of lawyers to apply law in accordance with justice, morality, honesty and trust.⁷⁰

Prasit Khovilaikul explains that the term “good faith” has an abstract characteristic. It has a broad meaning. It does not merely limit to the state of knowing something of mind.⁷¹

(2) Provisions of general good faith under the Civil and Commercial Code

The general principles of good faith can be found in three provisions under the Civil and Commercial Code.

First, as mentioned above, general good faith is recognised in §5 of the General Principles Book (Book I). This means that the doctrine of good faith not merely governs the law of contract, but rather it governs all of private law.⁷²

For example, there appears to have been no discussion about the direct role of good faith and the law of promise provided by Thai academics. Thai academics mainly refer to good faith in contract law. This stems from the fact that contract is the main route for creating voluntary obligation under Thai law. Nonetheless, the fact that Thai law has a general principle of good faith means that this principle applies to the law of promises, which is not regarded as an independent obligation, too. The role of good faith in

⁷⁰ Yud Saeng-Uthai. ***Introduction to General Law***. Bangkok: Thammsat Printing House, 1976, p. 102.

⁷¹ Prasit Khovilaikul. ***Civil Law: General Principles. Commentary on the Civil and Commercial Code Sections 4-14***. Bangkok: Nititham, 2005, p. 78.

⁷² Kittisak Prokati. *Supra note 65* at p. 61.

promise is rather obvious in the case of a promise to make a contract (e.g. a promise of sale), given this type of promises is linked with a contract. Thus, even though a promise to enter into a contract itself is a unilateral obligation (in the sense that only the promisor is bound to perform his or her obligation), both the promisor and the promisee would be required to perform their obligations in good faith.

Moreover, the principle of good faith applies to all kinds of promises, i.e. not strictly to only promises to make a contract. This is according to the effect of the general doctrine of good faith, like the case of the promissory parties in promises to make a contract. Consider the following example. A has made a promise of reward for the safe return of his lost rabbit. His rabbit is found by B who does not know about A's promise. A is informed by a third person that his rabbit has been found by B. A then revokes his promise before B can return him the rabbit. Under Thai law, a promisor can withdraw his/her promise of reward as long as there is no person who has completed the specific act.⁷³ In this case, A is still entitled to withdraw his promise, given that B has not yet completed the specific by returning the rabbit to A. However, according to the doctrine of good faith, A would be barred from withdrawing his promise.

Second, §6 of the Civil and Commercial Code deals with a presumption of good faith. The Code states that "Every person is presumed to be acting in good faith."⁷⁴ This means that it is presumed by the law that individuals generally act in good faith. Hence, if a person acquires a right as a result of acting in good faith, the person does not need to prove that he/she acted in good faith. Rather, the

⁷³ Thai Civil and Commercial Code, §363.

⁷⁴ Thai Civil and Commercial Code, §6.

burden of proof falls on the other party who alleges that an acquiring person did not act in good faith.

Thirdly, there is another provision specifically dealing with good faith in contract law. Section 368, concerning the interpretation of contract, states: “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.”⁷⁵ This provision is inspired by §157 of the BGB.⁷⁶ The German provision, in the textual forms of this provision in force at the time of drafting of the Civil and Commercial Code, reads, “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration”.⁷⁷ This provision only applies in circumstances where a contract’s terms are unclear, or to fill the gaps of a contract, or to modify the contents of contract. In other words, in normal circumstances, where a contract’s terms are clear, or there is no necessity to modify its contents, or no need to fill the gaps, the interpretation of the contract will be interpreted according to the intentions of the parties regardless of whether their intentions are in accordance with good faith or not. Thus, §368 does not directly impose a requirement for contracting parties under Thai law to act in good faith.

⁷⁵ Thai Civil and Commercial Code, §368.

⁷⁶ Phraya Manavarajasevi (Plod Vichian Na Songkhla). ***Drafting’s Instances of Books 1-2 of the Civil and Commercial Code***. Edition of the Department of Legislative and Sources of the Provisions in the Civil and Commercial Code, Books 1-5, 1990, p. 11.

⁷⁷ BGB, §157. The texts are from ***The German Civil Code: Translated and Annotated, with an Historical Introduction and Appendices***. Translated by Chung Hui Wang, London: Stevens and Sons, 1907, p. 35.

Rather, the obligations of the parties to act in good fair is governed by §5 as already mentioned above.

3.1.1.2 Specific good faith

The second type of good faith can be referred to as “specific principles of good faith” or “specific good faith”. This type of good faith has a narrower meaning. It refers to the acknowledgement of the parties - whether they know or should have known of a certain fact or event in such circumstances or not. There are several provisions under the Civil and Commercial Code concerning this kind of good faith. These provisions can be categorised into eight main groups as follows:⁷⁸

First, a bona fide party/third person who is suffered from a fictitious declaration of intention⁷⁹ and fraud⁸⁰ is protected by law.

Second, a bona fide third party whom a claim is transferred to him or her is protected, even if the obligational parties

⁷⁸ This approach is proposed by Nattapong Posakabutra. Nattapong Posakabutra. “**Good Faith: The Principle of the Civil and Commercial Law**”. Assumption University Law Journal, Vol 3 (2015), pp. 18-35 at pp. 26-27.

⁷⁹ Section 155 of the Civil and Commercial Code states: “A declaration of intention made with the connivance of the other party which is fictitious is void; but its invalidity cannot be set up against third persons injured by the fictitious declaration of intention and acting in good faith.”

⁸⁰ Section 160 of the Civil and Commercial Code states: “The avoidance of a declaration of intention produced by fraud cannot be set up against a third person acting in good faith.”

had previously declared that the (transferred) claim cannot be transferred.⁸¹

Third, the law provides that the performance of obligation is valid only where it is performed in good faith.⁸² That is to say, a creditor is entitled to refuse the performance of obligation if it is performed in bad faith.

Fourth, in the law of unjustified enrichment⁸³, the law provides that where a person, who was in good faith, unduly received a sum of money, he or she is bound to return the remained amount, i.e. the money that exists at the time when restitution is demanded, rather than the full money.⁸⁴

Fifth, a person who acquires real right through registration is protected, if he or she has acted in good faith and paid for the value of the property (e.g. land).⁸⁵

⁸¹ Section 303 of the Civil and Commercial Code states: “A claim may be transferred, unless its nature does not admit of it. The provisions of the foregoing paragraph do not apply, if the parties have declared a contrary intention. Such declaration of intention, however, cannot be set up against a third person acting in good faith.”

⁸² Section 216 of the Civil and Commercial Code states: “If by a reason of default, the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance.”

⁸³ The Thai Civil and Commercial Code uses the term “undue enrichment”.

⁸⁴ Thai Civil and Commercial Code, §412. See also §§413 and 415 of the Thai Civil and Commercial Code.

⁸⁵ Thai Civil and Commercial Code, §§1299, 1300.

Sixth, in circumstances where more than one person claims to have acquired the same movable property under different titles, who is in possession of the property is preferred on the condition that he or she has obtained the possession in good faith and has acquired the property for value.⁸⁶

Seventh, where a person has constructed a building upon another person's land, he will be paid the for the increase of value accruing to the land by reason of the building on the condition that he has acted in good faith.⁸⁷

Finally, in a number of circumstances, a bona fide person is protected even if he or she has obtained the property from a person who has no ownership in the property. For example, a possessor and buyer who bought immovable property from a seller, at a sale by public auction or in open market ,who does not have title is protected, subject to the condition that he/she has obtained possession in good faith.⁸⁸ Similarly, a bona fide possessor and buyer who bought property at a sale by public auction under an order of the Court or of the Official Receiver in bankruptcy is protected, even if it is subsequently found that that the property did not belong to the defendant, judgment debtor or bankrupt.⁸⁹

Similarly, the Thai courts have decided the notion of specific good faith by referring to the subjective state of mind of the parties, whether they did not know nor have to

⁸⁶ Thai Civil and Commercial Code, §1303.

⁸⁷ Thai Civil and Commercial Code, §1310. See also §1312.

⁸⁸ Thai Civil and Commercial Code, §1332.

⁸⁹ Thai Civil and Commercial Code, §1330. See also §§1329 and 1331.

know of a certain fact or event. That is to say, the courts have applied the notion of subjective good faith to cases.

For example, in the Decision of the Supreme Court No 550/1947 (B.E. 2490), the defender unknowingly bought stolen property. It was held that the defender possessed the property in good faith.⁹⁰

3.2 Good faith in Thai law in comparison with the Civil Law

Since the provenance of good faith in Thai private law is the Civil Law systems, it is worth comparing good faith in Thai law with the concept of good faith recognised in the Civilian sense.

Firstly, the Thai specific good faith doctrine is indeed similar to the Civilian subjective good faith doctrine on the basis that they are concerned with the knowledge or absence of knowledge of a person. Consequently, in situations where goods are bought from a seller without title, for instance, the outcomes in both Thai law and Civil Law would be the same, that is, a good faith buyer who did not know that the seller did not have title will be protected by law.

Secondly, the Thai general good faith doctrine shows similarities to the Civilian objective good faith doctrine. Recall that the Civilian objective good faith refers to a norm for the conduct of contracting parties.⁹¹ Given that under Thai law contracting parties are obliged to perform his or her conduct in accordance with good faith, it can be concluded that Thai law recognises the concept of

⁹⁰ Decision of the Supreme Court No 550/1947 (B.E.2490)

⁹¹ *Ibid.*

objective good faith in the same sense of that of the Civil Law.

Moreover, according to the explanations of Thai scholars regarding good faith, the Thai general good faith doctrine is perfectly similar to the Civilian objective good faith in that they are a normative concept. They refer to the highest norm of, not merely the law of contract or obligation, but indeed all of private law.

3.3 Concluding remarks

It is clear that Thai law recognises the concept of good faith as a general principle. It is a fundamental basis of Thai law. Individuals are required to perform his or her obligations in accordance with good faith. In addition, both the Civilian subjective and objective good faith show great similarities to the specific and general good faith in Thai law. This comes as no surprise, since the concept of good faith under Thai law originated in the Civilian tradition, rather than the Common Law one.

4. The recognition of good faith in Scots Law and Thai Law: Comparison

The research in the previous sections has shown that the position of good faith in Thai law is clearer than that of Scots law. There is no doubt that good faith is recognised as a broad general statement of principle in Thai private law. This is fundamentally similar to the recognition of good faith in the Civil Law countries. That is to say, good faith is rooted in Thai private law in the same way that it exists in Civil Law systems. Therefore, the Thai courts can apply good faith in order to protect a party, or to provide a fair result, in any areas of law.

On the other hand, in Scots law the doctrine of good faith has not yet become established as having the nature of an active legal concept. In other words, it is not clear whether Scots law recognises this concept as a broad general principle or not. Although a number of scholars have accepted that, unlike English law, Scots law is not antagonistic to the notion of good faith, none of them has explicitly argued that good faith is rooted in Scots law as the highest norm of private law. The Scottish courts, therefore, cannot apply the concept of good faith to cases in the same way as the Thai courts do.

Furthermore, the Civilian idea of subjective good faith is similar to the idea of good faith both in Scots law and Thai law. In both systems, for example, a good faith purchaser is protected by law even though he or she had bought the property from a seller who does not have title, i.e. not the owner of the property. This determines from the state of mind of the person- whether he or she has the knowledge of a certain fact or not.

However, the Civilian doctrine of objective good faith is different from Scots law but similar to Thai law. Under Thai law, it is clear that the concept of good faith can be implied within the whole area of private law, including voluntary obligations. In Scots law, in contrast, the notion of good faith does not exist as the core of voluntary obligations.

Nevertheless, in Scotland there has been an advance in imposing the obligations of parties to act in accordance with good faith. This, however, only limits to particular types of voluntary obligations such as cautionary obligation and insurance. Accordingly, it may be concluded that in Scots law the recognition of the concept of good faith (in its

objective sense) is nascent, and in the process of development.

5. Conclusion

Although Scots law and Thai private law are significantly influenced by the Civilian tradition, the role of good faith, which is one of the most important fundamental basis of the Civil Law, in each system is fundamentally different. The role of good faith in Thai law is indeed similar to that of the Civil Law system. In addition, like the Civilian approach, Thai law makes a distinction between subjective and objective good faith. Most importantly, Thai law regards good faith as the highest norm of all private law. Scots law, in contrast, does not regard good faith as the fundamental basis of private law, even though the concept does exist in particular areas of private law. This stems from the fact that Scots law developed its own law, not always following the Civilian tradition. Thai law, on the other hand, mainly followed the Civilian approach as a result of the reception of foreign law in Thailand.

