

A Study on the Principle of Good Faith in Korea : Concept and Application *

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한국에서의 신의성실 원칙에 관한 연구: 개념 및 적용

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Abstract

Good faith is difficult to define due to the facts that there is not an objective and concrete concept of good faith, and good faith in contracts for the international sale of goods is a principle that parties to the contract must act with sincerity as members of a social community. The Korean Supreme Court shall pay attention to setting the applicable standards that can be universally applied to good faith based on the self-established criteria. Through such effort, it is possible not only to realize the value of concrete validity pursued by the general clause of good faith but also to realize the value of legal stability by assuring the predictability of results when applying good faith. In the modern sense, it can be said that the arbitrary application of general rules rather than the escape and general clauses is a problematic situation in the application of good faith, but this problem can be solved by setting a reasonable standard of good faith. This paper studies good faith in the view of Korean law, international laws, and related cases in contract law. The purpose of this paper is to find the problems and solutions of the practical application of good faith by analyzing the Korean case (2009Da86000), which undermined the legal stability of good faith in Korea.

Keywords: Good Faith, Korean Supreme Court, Principle of Good Faith, Application Case

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I. Introduction

After undergoing codification in common law, the concept of the principle of good faith (hereinafter: the good faith) has become a basic principle that applies in civil law in all jurisdictions under the premise of mutual cooperation and tolerance. However, despite good faith as general principle and basic principle to be obeyed contractually in civil law, common law and the domestic laws is an agreement to eliminate bad faith, good faith is difficult to be defined due to the facts that there is not an objective and concrete concept of good faith and good faith is, in each case, a question of fact rather changing with time and place (Zaccaria, 2004).

In other words, good faith is a concept opposed to unfairness, and in some cases it may be confused with or interpreted as fairness, rationality, rational standards in fair dealing, fair deeds, fair conducts, genuine sincerity, conscience and goodwill. Therefore, it can be said that this principle is an abstract and comprehensive concept to be decided based on the common sense in the society and socially accepted notion (Troy, 1999).

The principle of good faith in Article 2 (1) of the Civil Code of Korea is a “the general principle”, thus its requirements and effects are not stipulated in the law itself, and as a result specific criteria have been set forth through the court precedents. In this respect, in order to promote legal stability, the courts must present reasonable and predictable criteria as a standard for judging the violation of good faith, but in practice they list some of the vague facts and make the decision in an abstract way regarding ‘whether or not the issue falls under good faith in light of any factual relationship or in considering certain points in a comprehensive manner’. Therefore, they must clearly present the grounds,

requirements, and effects of the judgment etc., as well as the categories of the problematic types in view of good faith in order to make sure that ‘the general provision’ as a way of evading could not be brought out in relation to the application of good faith (Lee Yeong-Jun, 2007).

Judging from the actual practice of the court regarding good faith, however, the cases in question among the existing cases and similar cases did not present any reasonable reasons and backgrounds of decision and also were frequently based on not criteria of decision by supreme court but another criteria. This is an inevitable choice to seek the particular validity for the application of good faith but this is a big problem in view of legal stability and predictability in applying the good faith.

This paper studies good faith in view of Korean law and international laws and related cases in contract law. The purpose of this paper is to find the problems and solutions of practical application of good faith in view of the requirements for application of good faith by analyzing the Korean case(2009Da86000) which undermined the legal stability of the good faith in Korea.

II. Definition of Good Faith and National Laws

1. Definition of Good Faith

Generally, good faith in contracts for the international sale of goods is a principle that parties to the contract must act with sincerity as a member of a social community, so that they do not violate mutual trust, and as such the fundamental view of good faith has a lot in common with the principle of the prohibition of abuse of rights. Good faith has

its roots in the Roman law, which reflected the obligation to fulfill the contract faithfully (Buckland, 2007), and in the modern judicial system, it was first introduced in the French civil law (Civil Code des Français, Article 1134), and it has been developed as the highest principle throughout the Swiss Civil Law (German: Schweizerisches Zivilgesetzbuch, French: Code Civil Suisse, Italian: Codice Civile Svizzero, English: Swiss Civil Code). On the other hand, in the Korean academia, the view that good faith is the highest principle of the civil law prevailed in the past, but recently there is an opinion that the principle of private autonomy must be regarded as the highest principle of civil law and good faith is a limited principle that shall be applied exceptionally (Kwak Yun-Jik, 2007).

This principle of good faith is an important notion for harmonizing law with morality for preserving good morals and other social order, so-called as public policy, but the standard of harmonizing law with morality mainly focuses on the objective and social position of order and morality, while the standard of preserving good morals and other social order focuses more on the subjective and individual status of exercising the rights of contracting parties and fulfilling their obligations. In the event that the exercise of rights and the fulfillment of obligations violate good faith, they are also contrary to good morals and other social order, and shall cause liability for unlawful act by abuse of rights or non-performance of an obligation.

As of now, good faith is practically the most widely accepted general principle in all legal systems worldwide. On an international basis, good faith is widely recognized in various international conventions, together with the principle of party autonomy as well as the principle of the binding force of the contract

that “*pacta sunt servanda*” (“agreements must be kept”). Nevertheless, since good faith is a behavioral factor of subjective nature, it is very difficult to prove its existence definitely in the acts of the parties under these international conventions.

In this respect, all parties to the contract are presumed to have the capability for the justice in view of guaranteeing that the promise is not of no use. When considering all relevant matters, including general facts about the moral state of minds of the parties concerned in their positions, good faith adopted between the parties is expected to be abided by. Thus, considering the essence of the commitment, when the parties can expect the consequences are unacceptable to them in their contractual relationship, the contract could not be concluded (John, 1971).

The first court case that accepted good faith in common law system was *Carter v. Boehm* (1766) in which Lord Mansfield famously articulated the principle of *uberrima fides* (utmost good faith), which became the standard benchmark for disclosure in modern insurance contracts. In other words, Lord Mansfield stated that insurance in this case was a contract based on speculation and it is impossible to admit good faith in transaction where the other party is unaware of the facts or believes that the opposite is true by concealing the fact known to one party from the other party. It was the first case based on good faith. In this case, Lord Mansfield explained that good faith is a governing rule that can be applied to all contracts and business relationships.

The concept of good faith can also be found in American law. The good faith is included in the Restatement (Second) of Contracts, and Uniform Commercial Code (hereinafter UCC) regulates that all contracts and obligations shall be in compliance with

good faith in fulfilling their obligations and enforcing the law (Kim Young-Ju, 2014).

According to Juenger, the good faith “is loose and amorphous, so it lacks a fixed meaning” (Juenger, 1995). Powers states that “good faith can be defined as an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community”(Powers, 1999). Probably the first source from that judges and lawyers seek valid definitions of good faith is the legal dictionary. One of the most quoted definitions for good faith comes from Bouvier's Law Dictionary (Rawle, 1914). According to the often-quoted definition mentioned in *Warfield Natural Gas Co. v. Allen* (1993), good faith is “an honest intention to abstain from taking any unconscientious advantage of another.” According to Black's Law Dictionary, a representative dictionary of the common law, good faith is “an intangible and abstract quality with no technical meaning or statutory definition” (Nolan, et al., 1990). Williston, American jurist and law professor, defines good faith as follows (Williston, 1957): “Generally speaking, good faith means being faithful to one's duty or obligation (*Hilker v. Western Automobile Inc. Co. of Ft. Scott* (1931), it is the opposite of fraud and of bad faith, therefore, its non-existence must be established to prove good faith (*McConnel v. Street* (1855)). Good faith, in the popular sense, is used to denote the actual existing state of mind, without regard to what it should be from given standards of law or reason (*Seymour v. Cleveland* (1896)). Good faith includes not only personal upright mental attitude and clear conscience, but also intention to observe legal duties.”(*Fujikawa v. Sunrise Soda Water Works Co.* (1946))

Therefore, it is difficult to uniquely define

good faith as it is an uncertain concept, but in general, it can be seen as a principle that the parties to a contract should act honestly, fairly, and rationally in doing transaction (Tetley, 2004).

2. Good Faith in National Law

1) Good Faith in Civil Law

(1) Good Faith in German Law

Sections 157 and 242 of the German Civil Code (Bürgerliches Gesetzbuch: BGB) regulate good faith, which is repeated in more detail in most articles of the Civil Code. And good faith has a wide effect on the German jurisdiction. Germany law legally requires the parties to conform to good faith in both stages of contract negotiation and performance (Klein & Bachechi, 1994).

Section 242 of the BGB is known in its broadest sense as a trust and credit provision, and it stipulates that “an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.” This definition of good faith is not only included as part of customary practice which is familiar or known to contracting parties, but also considered as a general requirement for them to act reasonably.

Section 138 of the BGB also stipulates that a legal transaction which is contrary to good faith and public policy is void. Therefore, all conditions and agreements contrary to public policy including good faith are void. The concept of good faith in Germany is applied to the negotiation phase of the contract, and therefore the breach of good faith made in the pre-contractual negotiation can fall under torts, and result in the remedy for the breach of contract (Palmieri, 1993; Thomas, 1976). The obligation of good faith in Germany

requires trust relationship based on the particular transactions between trading parties as more than a mere requirement to act reasonably.

Article 9 of the German Act on General Terms and Conditions (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen : AGB-Gesetz), which was incorporated in Article 305 to 310 of the BGB in 2002, emphasizes the importance of good faith in business relations and stipulates the following, identical to Article 307 of the BGB:

“Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1. is not compatible with essential principles of the statutory provision from which it deviates, or

2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.”

Article 9 of the AGB-Gesetz adopts the consideration to maintain the balance between the parties. The concept of good faith is used in contracts to control the content of particularly excessive provisions. Its adoption in AGB-Gesetz was made as protection for the most economically disadvantaged consumers, for example, those under non-negotiable contracts, and continued to be extended to merchant agreements.

(2) Good Faith in French Law

The origin of good faith can be found in Article 1134 of the French Civil Code. That is, agreements must be performed in good faith. In addition, Article 1135 stipulates that the agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature.

Good faith is an ambiguous concept expressed by both intuition and morality. There is subjective concept in which good faith is often confused with honesty and there is objective concept in which good faith reflects reasonable acts for protecting mutual interests of parties to contract. Because Articles 1134 and 1135 of the French Civil Code are closely related, good faith and equity are also closely related.

In fact, Article 1135 is based on equity. That is, the contract must be executed completely in accordance with the *pacta sunt servanda* principle. Equity allows the judge to refer to what is reasonable and adjust the rigidity and ambiguity of the provision based on the circumstances. However, the recent French Supreme Court does not refer to Article 1134 of the Civil Code, but the judgment that the obligation of good faith has been breached was made based on Article 1382 (Robin, 2005).

Consequently, the breaches of obligation of good faith in contracts lead to liability for illegal acts. That is the reason why good faith has legally binding on parties in the given environment and case law and legislation explain the breaches of rule of conduct.

(3) Good Faith in Japanese Law

Article 1 Paragraph 2 of the Japanese Civil Code enacted in 1947 regulates good faith.

This article states that one of the basic principles of civil law is to perform in good faith in exercising or claiming the rights and performing the duties. Under this provision, a party must act in a manner adequate sincerely to assert the rights and fulfill obligations without betraying other party in contracts and transactions. This opinion is not specifically prescribed by law, but is considered as obvious. Good faith is natural, so that this principle is considered as a clause which can be referred to in any case, but there are no cases where this clause is used recklessly in the application of law.

There are so many cases in which good faith is widely applied in real estate transactions. Japanese law had no provisions regarding good faith in the Old Civil Code of 1898, but good faith was introduced since 1925, after the Supreme Court decisions on December 18, 1920, and July 15, 1924.

Good faith has been established as the principle of law as the theory asserted, it is the Article 1 Paragraph 2 of the Civil Act that prescribes as the general basis according to the amendment of the civil law in 1947 (Taniguchi & Isida, 2002). Also, Japan's common view and judicial precedents are based on the opinion that good faith "dominates claim-obligation relationships" (Azuma, 1968). In particular, in the case of sale of goods, the claim-obligation relationship of the buyer and the seller with respect to the provision of the subject matter shall be the relationship of the community organically combined according to good faith, rather than the respective claim-obligation relationship. The parties have the obligation to cooperate in realizing the purpose of the transaction for each other.

Equity and fairness are the essentials of good faith in contracts. Good faith in these contracts applies to all cases of trade relations,

such as fulfillment of obligations to furnish the goods, delay in performance, change of circumstances and hardship. Also, good faith in contracts applies to after the termination of the trade relations as well as before the conclusion of the contract such as negotiation and preparation stages. Moreover, good faith is the basis of the interpretation of the contract, and an important principle that governs the contractual relations.

2) Good Faith in Common Law

(1) Good Faith in English Law

Historically, the principle of good faith was not recognized by the English common law (Baker, 2002). The English common law, in comparison with the civil law, has responded to the issues of good faith as a fragmentary solution for solving the problem of unfairness by its nature, and not as the principle of the highest priority (Kim In-Ho, 2006).

Instead of good faith, fragmentary solutions used by the English courts to monitor the fairness and fulfillment of contracts are the rules of common law regarding mistake, misrepresentation, compulsion, unreasonable oppression, objective interpretation of contract, unfair juristic act, implied clause, waiver of right, estoppel, etc. (Tetley, 2004).

As such, the English law has addressed respective issues of unfairness separately, without applying the principle of good faith. However, the concept of good faith in the English law was not recognized except for a few laws and regulations, but now it is accepted in a different way. That it, recently British jurists are interested in applying the principle of good faith in the performance of the contract (Harrison, 1997).

However, British jurists believe that it is desirable to require the general obligation of good faith, and British law is forced to reflect

the concept of good faith. That is because the British judges can apply good faith that is a concept tested well enough to be openly and explicitly applied for the implementation of the European Union Directive into the United Kingdom. As a result, good faith as an respectively accepted principle has begun to penetrate into British commercial law.

2) Good Faith in American Law

The United States have the regulations for good faith as a general obligation for the performance and enforcement of contracts in particular UCC §1-201 introduces the definition of good faith that means honesty in fact and observance of reasonable commercial standards of fair dealing.

So, good faith is a de facto honest will in dealing (UCC §1-201(19)). The UCC stipulates the principle of good faith, which imposes an obligation of good faith on the parties in the performance of the contract (UCC §1-203). The demands of good faith and fair dealing are based on the longest developments in US contract law.

The standards of good faith in the United States are to be virtually honest, and be observant of reasonable commercial standards of fair dealing (UCC §1-201(20)) except for the case regulated by Article 5 (Credit Transactions). Moreover, Article 205 of the Restatement (Second) of Contracts has the same regulation that all contracts impose obligation of good faith and fair dealing on each party to the contract in the performance and enforcement of contracts. Therefore, in the United States, it is considered that good faith does not apply at the stage of negotiation or establishment of the contract (Zimmermann & Whittaker, 2000).

These characteristics are as result of the UCC's reflection of good faith according to the

increasing demands of good faith also in the common law countries (Burton & Andersen, 1995). Thus, UCC is one of the few codes that codify an essential element of good faith as custom, just like the German law.

Summers claims that good faith does not have a general obvious meaning, but has the function to evict various matters according to their environmental conditions (Summers, 1968), while Farnsworth argues that the obligation to perform in good faith is a legal source which common lawyers refer to as contractual implied conditions and explains that it is being accepted in some cases (Farnsworth, 1963).

Burton explains that courts and lawyers have made every effort to set the standard which is in compliance with the expectations of contracting parties because there is not a definite standard to separate the performances of good faith and bad faith. He also argues that since good faith limits the exercise of discretion in performing the obligation of good faith imposed to one party by the contract, to use discretion to regain the opportunities lost in the contracting process would belong to bad faith performance (Burton, 1980).

III. Good Faith and Issues in Korean Law

1. Good Faith in Korean Law

Korean Civil Act stipulates good faith in Article 2 Paragraph 1, stating that the exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith. Under the influence of the civil laws of Germany and Japan, the Civil Act stipulates that good faith is applied to the

whole of the rights and duties and it is considered as a general principle in the civil law.

The basis on which this principle applies not only to duties, but also to rights, is the recognition of the social and public nature of rights. In other words, since the guarantee by law of the free exercise of rights resulted in harmful consequences, the Constitution stipulates that the right is not absolute but is exercised under social restriction in accordance with the public welfare, and Civil Act also regulates that the exercise of rights shall be in accordance with the principle of good faith (Lee Yeong-Jun, 2007).

This principle is understood to be applicable not only to civil law, but also to public law and litigation law. The judgment affirming the application of this principle to the taxation law is 23 April, 1985, Osaka Court, Case No.84(Me) 855, and the case of affirming the application of the lawsuit laws is Supreme Court's Judgement of 24 May 185, Case No. 82Daka1919 and it applies to the exercise of rights and the fulfillment of obligations, as well as the interpretation of legal acts and the interpretation of laws. In Korean Civil Act, "good faith" means an abstract norm, which signifies that a party to the contract shall not exercise its rights or fulfill its obligations in a way or manner that contradicts the equality of the other party or betrays trust in considering the benefit of the other party. Therefore, to deny the exercise by the other party of rights owing to the breach of good faith requires that it is justified that one party grants the other party good faith or the other party must exercise objectively good faith and the other party's exercise of its right against good faith could not be permitted in view of justice (Supreme Court's Judgement of 10 December 1991, Case No. 91Da3802).

Since the legal cases on good faith in Korea need to be analyzed to reason out their characteristics, they are outlined below.

① It is not against good faith that a person who violated what is prohibited by mandatory regulations claims invalidation on their own (Supreme Court's Judgement of 28 September 1997, Case No. 96Da39196).

② Even if a land sale contract is concluded in a state of flexible invalidity before obtaining a land transaction authorization, the contract will be null and void if it is rejected by the competent authority in the application process. Even if the contract that was in a state of flexible invalidity without the application for transaction becomes definitively null and void, it is not contrary to good faith that the contract is claimed invalid (Supreme Court's Judgement of 22 February 1995, Case No. 94Da51789)

Judging from the precedents related to good faith, it can be seen that it is judged based on the contemporary conception of justice, ethical belief, and common practice, and since good faith cannot be codified in detail by law, ultimately, individual matters can only be relied upon by court decisions through trial. The court's ruling has a dynamic nature that reflects the needs of the times and the social life, and the transition of thought, therefore good faith is constantly changing and evolving.

In addition to good faith, Article 2 Paragraph 2, "Prohibition of Abuse of Rights" is an important provision of the Korean Civil Act. The exercise of rights that is subject to abuse of rights should be the case in which subjectively the purpose of the exercise of rights is not only to cause suffering and harm to the other party, but also to be of no benefit to the party itself. It shall be objectively deemed as violating social order. But if the profits from the exercise of rights are

significantly smaller than the loss of the other party in such a case, it cannot be considered as abuse of rights (Supreme Court's Judgement of 23 March 1991, Case No. 90Da13055). In addition to this, the principles that stem from good faith are: ① change of circumstances (*clausula rebus sic stantibus*), ② the doctrine of estoppel, ③ principle of lapse.

In Korea, good faith has been recognized as a general principle, and good faith is applied in real estate transaction. However, since the principle of private autonomy is strengthened in view of applying good faith, the application of good faith is evaluated to be limited (Hahn Jae-Phil, 2008).

Good faith in the negotiation stage of the contract and change of the circumstances are considerably different from country to country and there are considerable differences in good faith in Korean laws, therefore it seems that the universal standard of good faith does not exist at the level of Korean law. Korean Civil Act needs to introduce that uniform standard of good faith seeing that Korean law is applied to as the applicable law in international transactions where the Korean law is selected in accordance with the agreement between the parties to the contract or it is designated as a governing law according to the private international law of jurisdiction.

2. Good Faith Issues in Korean Law

Scholars have diverse opinions in explaining what are the functions of good faith and the concrete situation in which good faith is applied. However, they generally enumerated the functions and types of good faith in parallel in particular and explained

that the functions are to specify the right and obligation to interpret and determine legal act, give rise to, change and extinguish rights (Lee Yeong-Jun, 2007), realize the concrete validity and fill the gap of law (Kim Jun-Ho, 2010).

Moreover, the types of good faith are mentioned to be the doctrine of estoppel, the principle of the prohibition of abuse of rights, principle of termination, change of circumstances. These are explained as principles derived from good faith. But the relationship between the types of good faith and these derived principles are not explained specifically (Kwak Yun-Jik, 2007). There is an opinion that change of circumstances is related to the function of right change, the principle of the prohibition of abuse of rights and principle of termination are in relations with the function of right termination and each principle is a type of good faith in view of its functions (Lee Yeong-Jun, 2007).

But the types of the application of good faith is divided as change of circumstances, principle of lapse, the doctrine of estoppel and the cases are to some degree limited that the principle of the prohibition of abuse of rights to these types and the requirements and effects of these principles are accumulated to some considerable degree, to categorize the types of the application of good faith is of no practical use.

On the other hand, the issues related to the function to give rise to rights and duties which are often problematic in actual matters are not appropriate when classifying one of the above principles, therefore, in many cases the act of categorizing good faith according to the above principles is not helpful in looking for the solution.

For example, the question of whether a particular incident obligation is recognized by the parties to the contract, although it is of great significance to the area where good faith

is primarily applied, cannot be included in any of the categories of the above principles. This is because the current scholars' discussion on the typology of good faith does not take an inductive approach that typifies the major cases in practice, but a deductive approach that starts from an abstract principle and classifies it. In addition the function of good faith and the typification of good faith are not explained in parallel, but the empirical typification clearly explains the functions of good faith in each case, therefore, it is necessary to carry out an in-depth study on the relationship of each other through generalization.

IV. Problems and Solutions of Good Faith in Special Case

1. Facts in Case 2009Da86000

Defendant entered into a pre-construction sales contract with Hankuk General Construction Co. as developer on March 27, 2007, for the amount of 1,444,680,000 Won for the entire new commercial building. The earnest for 400 million Won was paid on contracted date, the first intermediate money for 288,936,000 Won to be paid on November 20, 2007, and the second intermediate payment for 288,936,000 Won to be paid on March 20, 2008, and the remaining balance of 477,808,000 Won to be paid on date to be chosen later. In fact, the first and second intermediate payments were made on the net dates.

Under the situation that defendant paid to Hankuk General Construction Co. only 54,400,000 won as a earnest on October 11, 2007, defendant made a contract for one store with plaintiff for 272,690,000 Won on April

11, 2007. The contract writes that earnest is 54,400,000 Won and the amount of first immediate payment is 81,600,000 Won which is to be paid on 20 Dec., 2007, the amount of second intermediate payment is 54,400,000 Won which is to be paid on 20 March, 2008 and the remaining balance of 82,290,000 won is to be paid on date to be chosen later.

And plaintiff paid 54,400,000 Won as earnest on contract date.

The plaintiff did not pay the amount of first intermediate payment on the due date, thus on 12 February 2008, the defendant informed the plaintiff that the contract is cancelled owing to nonpayment of first immediate amount.

The price of the store was 121,652,000 Won in the store sale announcement by Hankuk General Construction Co. in which the sales of stores was subject to prior sale by September 13, 2007. And the seller of the sales contract was listed as Hankuk General Construction Co.

The defendant sold the store by acting as if he were the original developer, even though Hankuk General Construction Co. was the original developer.

2. Problems of Good Faith in Special Case

1) Problems regarding Judgement Criteria

The difficulty of identifying commercial good samaritanism in a specific factual setting supports rejection of the extended responsibility inherent in such conduct(Gillette, 1981). Regardless of whether the term "honesty in fact" excludes only acts of trickery and deceit or also broader categories of taking advantage or profiteering from misfortune of others, courts and commentators seem to agree that

the test is to be applied subjectively (Farmers Coop. Elevator, Inc. v. State Bank (1975): Balon v. Cadillac Auto. Co. (1973)). Proof that other commercial actors would have performed differently does not suffice to demonstrate the absence of good faith. The obligor is not expected to comport with conduct that he is incapable of performing. The obligation requires only that he perform to the best of his ability.

The subjective, aspirational nature of the obligation creates two related difficulties in addressing its violation. First, once the content of good faith extends beyond the narrow scope of honesty, a vagueness in definition exists that impedes agreement on the components of good faith conduct and thus interferes with the directive to act in good faith (Summers, 1968). Second, subjective differences in the ability to comply with a command to act in good faith create difficulty in identifying whether the obligation has been satisfied and thus may promote misapplication of remedial sanctions (Henderson and Pearson, 1968).

In other words, the standard set by Supreme Court Decision (2009Da86000) decided on Feb. 25, 2010, used as a criterion for determining the burden of duty of disclosure in good faith, that is “where it is evident from the rule of thumb of general transaction that the other party did not do the related legal act based on the truth he has known”, in fact, takes into account the position of the other party to the contract. Therefore, where the above criterion is applied even if the wrong information is given to the other party who is responsible for collecting information for his legal acts, there is a difficulty in reaching the conclusion that it is necessary to specify the duty of disclosure in good faith.

The reason why the existing Supreme Court

precedents apply the above criterion only in the “real estate transaction” is that the real estate is relatively expensive and it is the object of important transactions in social life, thus it can be understood as a way to make it easier for the other party to cancel the indication of intention on grounds of the breach of the duty of disclosure in good faith. However, to apply above criterion to specific cases results in excessive protection of the other party’s position, there is a flaw that this criterion does not play a role as a universally valid standard. It might be that the Supreme Court did not apply the above criterion to the barter contract or this case, because it took into consideration the above point.

This decision results in a serious problem in legal stability. And that is more so because the Supreme Court’s judgment is final. Even if such issues are pointed out, where the decision of the Supreme Court is more valid from the objective third party’s point of view rather than from the plaintiff’s point of view, the issues could be weakened to some extent and the Supreme Court’s judgment will be justified. The above decision is against the precedents such as Supreme Court Decision (2004Da48515) decided on Oct. 12, 2006, Supreme Court Decision (2005Da5843) decided on Jun. 1, 2007 and Supreme Court Decision (2005Da5812, 5829, 5836) decided on Jun. 1, 2007, which set the standard in regard to levying the duty of disclosure in good faith in the real estate transaction (Lee Yeon-Ju, 2011).

In this case, High Court decision was based on this standard but Supreme Court Decision did not give any explanation of some reasons why the criteria were not applied in this case. Even though the case is the case that the principle of stare decisis does not apply in Korean legal system like in the common law countries, the reason why that the criteria are

not applied must be explained as the Supreme Court precedents of the same intent have been accumulated for a long time in cases in which the duty of disclosure in good faith is controversial as prerequisite of 'lying by omission' like real estate transactions. In addition, because the High Court followed the intent of the existing precedents, the Supreme Court had to explain the reason why the judgment of the court of original jurisdiction was wrong in order to reject the judgment of the High Court. From the plaintiff's point of view in this case, even though the cancellation of the indication of intent could be permitted according to the standards which have been applied for decades, the Supreme Court did not refer to the existing precedents by developing new logic, without clearly explaining the reason why that the criteria are not applied. As the result, the Supreme Court overturned the High Court judgment in favor of the plaintiff (Lee Yeon-Ju, 2011).

For the legal stability and clarification of good faith, principle of stare decisis should be kept and the universal standard of good faith should exist at the level of Korean law. The relationship between the types of good faith and these derived principles should be explained specifically to categorize the types of the application of good faith as uniform standard of good faith.

2) Problems regarding Judgement

Supreme Court Decision (2009Da86000) decided on Feb. 25, 2010 seems to follow the examples of Supreme Court Decision (99Da38583) decided on Jul. 13, 2001, Supreme Court Decision (2000Da54406, 54413) decided on Sep. 4, 2002, etc., which tackled the issue of whether or not it was possible to claim the cancellation of the

indication of intention by reason of keeping silent and disclosing wrongly the ruling price of the object in barter contract, considering that the plaintiff claimed that his indication of intention should be cancelled owing to no knowledge by the plaintiff of the fact that the fixed selling price in lots was set too high by the deceitful act of the defendant (Lee Yeon-Ju, 2011).

This Supreme Court decision sets too lenient range of actions that defendants can do in order to pursue their interests, and consequently sacrifice good faith as the decision is faithful to only the principle of private autonomy. Ultimately, in view of the application of the standard for judging, the Supreme Court Decision (2009Da86000) was erroneous in not only failing to follow the existing precedents of the Supreme Court without any explanation, but also excluding the criteria set by the High Court judgment without giving any reason for exclusion, and in view of the adequacy of legal view, it can be said that there was a mistake of excessively emphasizing the principle of private autonomy, while disregarding the principle of good faith.

However, in this precedent on the contract for the sale in lots, the defendant, before entering into the contract for the sale in lots with the plaintiff, colluding with Hankook General Construction Co., Ltd. in order that the plaintiff has disguised himself as a selling company, and concluded the contract for the sale in lots for the sale price of 272,690,000 won as if it were the first sale price even though a pre-sale contract was concluded for the whole building (Lee Yeon-Ju, 2011).

In those respects, comparing to the above case on the barter contract where the market price was kept silent or the higher price was given due to false information, it can be said that in this case the defendant's degree of

defamation is higher. Moreover, the Supreme Court decision stated that it is the seller's main duty under the contract to transfer the full ownership and possession of the lot to the buyer and to enable the buyer to enjoy all the benefits generated from the object of sale, and that the buyer shall judge whether or not he can get the profits from resale before construction on their own. Unless there are any special circumstances that the seller was aware of the fact that the buyer wants to purchase the lot to receive the profits from the resale, and caused the buyer to conclude a contract for the sale in lots by making the buyer misjudge whether or not there will be profits from resale or what could be the amount of profits in a way that is unacceptable in sale, the defendant as seller is deemed as having no duty of disclosure in good faith to the buyer. (Lee Yeon-Ju, 2011).

This Supreme Court decision was based on the principle of private autonomy that defendants can do in order to pursue their interests. But good faith has been established as a principle that "A party in a legal relationship shall not exercise rights or fulfill obligations in a way or manner that contradicts the equality of the parties or betrays trust between them in consideration of the interests of the other party"(Supreme Court's Judgement of 20 December 1991, Case No. 91Da3802 ; Supreme Court's Judgement of 22 May 1992, Case No. 91Da36642) in real estate transaction. From the fact that the defendant did not disclose the certain facts to the plaintiff disregarded the plaintiff's profits and trust between them for seller to maximize his own profits from resale, it should be considered that the defendant is deemed as acting against the duty of disclosure in good faith.

Therefore, there should be a standard for selecting one in case that two principles, that

is, good faith and private autonomy are competing for the decision of the case in consideration of relationships between two principles and principle of *stare decisis* etc.

For prevention of decision without its background and reason, to categorize the types of the application of good faith as uniform standard of good faith is indispensable.

3. Solutions of Good Faith in Special Case

The principle of good faith require the parties to a contract to act in good faith while negotiating, performing duties, exercising rights under the contract and interpreting the contract. A conduct contrary to the principle of good faith has two main consequences. The party may have to be pay losses of the other party for acting contrary to the principle of good faith. The contract may be changed, modified, and even terminated if the changing circumstances apparently cause imbalance between the parties(Apaydin, 2019). Good faith, a general principle deriving from Roman law and embodying an important and inevitable part of modern law in international law, is going on to draw the increasing attention of jurists. The civil law tradition led by German and French law has presented good faith as a general principle underlying the recently introduced uniform law, such as the CISG, UNIDROIT Principles and the PECL.

When evaluating the above elements in a comprehensive manner, the plaintiff can revoke the contract for the sale in lots on the grounds of defendant's lying by omission, because the defendant acted against the duty of disclosure in good faith.

To sum up, the decision of the High Court abode by the existing criteria for judging whether the principle of good faith has been breached, but the Supreme Court Decision

(2009Da86000) was erroneous in not only extensively simplifying the criteria, thus losing the concrete validity, but also disregarding the significance of the principle of good faith by overvaluing only the principle of private autonomy.

If the Supreme Court judged that this case in the real estate transactions was an exception unsuitable for citing the criterion that High Court, that is “where it is evident from the rule of thumb of general transaction that the other party did not do the related legal act based on the truth he has known”, the Supreme Court shall specify a scope of application of this standard for predictability. If it is judged that there is the reason for the existence of a separate standard for real estate transactions, or the above standard is generally meaningless, it is reasonable to propose and apply the new standard instead of the existed standard.

As seen above, the difference in decisions by the High Court and the Supreme Court can be overcome to some extent by the elements that have to be taken into consideration when applying good faith, which the Supreme Court itself presents. Although the above criteria already proposed by the Supreme Court enumerate various elements, the diversity of the situations where good faith may be applied makes it necessary to comprehensively consider various factors when deciding upon the application of good faith, and rather it can be said that it is not appropriate to judge based on one or two restricted criteria. As such, it can be said that, considering the various factors in a comprehensive manner, the significance of good faith as a general provision aiming at concrete validity is secured.

The meaning of good faith as a general principle of law is necessarily broad and has not any precise definition. This is a consequence

of the principle’s function: good faith plays an accessory (Ziegler and Baumgartner, 2015), supportive role in legal relationships that expose the parties to the influence and discretion of other parties. Hence, there is some uncertainty in these relationships about the exact scope of the rights and duties of either party. The good faith principle is meant to offset these risks by requiring mutual trust from the parties. This role requires considerable vagueness from the good faith principle itself, as it needs to apply to a vastly array of divergent relationships and situations that are by definition unpredictable. The broad, general scope of good faith is thus simultaneously its virtue and its vice. For precisely this reason, courts are sometimes hesitant to apply it (Ziegler & Baumgartner, 2015).

The challenge for legal scholarship is therefore to narrow down the meaning of good faith through a typology that is simultaneously precise enough to facilitate the application of the principle in practice and general enough to allow for its further development establishment of sufficient mutual trust among the parties to a legal relationship even in unforeseen situations. This endeavor is complicated by the fact that good faith has a bearing both upon the substantive content of rights and duties, and on the procedures by which they are exercised (Abaclat et al. v. Argentine Republic (2011)).

Therefore, the overview of the meaning of good faith leads to two conclusions (Goldman, 2016). First, good faith sometimes overlaps with other principles. For example, estoppel could be considered a general principle of law of its own, or a specific example of good faith. *Pacta sunt servanda* is sometimes qualified as a principle deriving from and comprised within the idea of good faith (O’Connor,

1991). Good faith duties of information and consultation correspond to important elements of an (emerging) transparency principle(Peters, 2013). Such overlaps flow from the necessary, inevitable normative openness of the good faith principle.

Second, while the aforementioned categories narrow the meaning of good faith to some extent, its full meaning cannot really be explored in the abstract(Kolb, 2006). It is characteristic of the good faith principle that it is amenable to specific contexts and gains its full significance only in respect of a specific context, such as a specific international regime which the good faith principle is supposed to keep operative and bring in line with basic fairness requirements.

Despite the importance of the principle of good faith, there are limits such as the ambiguity of the concept and the application of good faith. The concept is based on the notions of moral value, and these limitations are commonly referred to in many studies. However, most studies have only mentioned these limitations and have not significantly expanded the categorization of the principle of good faith.(Choi Han-Byul et al. 2019) Therefore, to enhance the clarity of the principle of good faith is required by drawing a hierarchical structure model for the classification of the principle of good faith and spreading the categorization of the principle of good faith for preventing this decision which is not in line with precedents. For the this, to draw up the legal propositions of the principles of good faith, in particular, the principle of being lapse, the principle of estoppel, and the principle of change of circumstances should be requisite by accumulating case studies of good faith as uniform standard.

V. Conclusion

Since Ancient Greece and Rome, the concept of good faith has existed and has been developed as the legal system for the civil law, but recently it has been accepted and developed also in the common law. However, there are differences in the civil and common law regarding the recognition of good faith, and the scope and specification of good faith where good faith is recognized, and the concept of good faith even more ambiguous.

There are rules of global commerce, such as CISG, PICC, PECL, etc., which regulate good faith and fair dealing, and during the process of enactment, due to the conflict of mutual understanding between the legal systems, these rules have been limitedly enacted in order that good faith applies only to the interpretation of the rules. However, it has been found that the concept of good faith is a comprehensive legal principle applicable at all stages from contract negotiation to contract formation, fulfillment, and termination. With regard to the specific problems of good faith applicable to the contracts for the international sale of goods, there is an issue of good faith in entering into a contract at the stage of contract negotiation and preparation, and also an issue of frustration or hardship in the performance due to unexpected changes in the process of the performance under the contracts for the international sale of goods. In particular, those issues may arise from the theoretical analysis process of good faith, and from at all stages from contract negotiation to contract formation, fulfillment, and termination.

As a solution to these problems, firstly, it is necessary to establish a clear concept of good faith, which may be rather abstractly interpreted without internationally unified

concept of good faith. Secondly, as contracts for the international sale of goods need the principle of good faith at international level rather than that of good faith at the domestic law level, it is necessary to designate the rules of global commerce as governing law. Thirdly, since only the interpretation and application of the rules of global commerce cannot solve the problem of a complex and diverse meaning of good faith, it is necessary to actively use the more specific cases and D/B that have been gathered so far in solving the issues of the interpretation of good faith.

Actions against good faith or deemed as abuse of rights are in contradiction with the concept of natural law and the mandatory laws and regulations of each country, and they are the judging criteria that can be applied by the arbitrator or the judge to resolve the dispute. Therefore, if good faith and the principles that stem from it can be understood under the contract for the international sale of goods, its predictability and legal transparency could be enhanced, and commercial disputes could be prevented in advance, thus global commerce would be greatly stimulated. In particular, since global

commerce is a transborder economic activity that takes place between countries, it is necessary, by its nature, to establish special, global, universal standards of good faith. In order to achieve it, it is necessary to find the legal principles of good faith based on international rules such as CISG, PICC and PECL, which are jus gentium, and set the standards of good faith based on the accumulated cases regarding good faith.

On the other hand, the Korean Supreme Court shall pay attention to setting the applicable standards that can be universally applied to good faith based on the self-established criteria. Through such effort, it is possible not only to realize the value of concrete validity pursued by the general clause of good faith, but also to realize the value of legal stability by assuring the predictability of the result when applying good faith.

In the modern sense, it can be said that arbitrary application of general rules rather than the escape to general clause is a problematic situation in the application of good faith, but this problem can be solved by setting a reasonable standard of good faith,

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