THE ROLES OF "GOOD FAITH" AND "GOOD COMMERCIAL PRACTICE" IN INTERPRETING A CONTRACT IN THAILAND*

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Abstract

Two main rules of interpretation, sections 171 and 368 of the Thai Civil and Commercial Code were copied from English translations of §§ 133 and 157 of the German Civil Code 1900, respectively. In Thailand, good faith has universal applicability in identifying and interpreting contracts. It assists the courts in implying a contractual duty into a contract and is the main tool used to interpret a contract. Despite being products of two conflicting theories, namely intention and expression theories, sections 171 and 368 CCC are often cited collectively when a contract is interpreted. Thai courts have combined these two provisions to establish common guidelines for interpretation to the effect that in interpreting a contract, the common intention of the parties must be ascertained in accordance with the dictates of good faith in relation to good commercial practice. Thai courts neither define nor distinguish between these two concepts. Their collective citation has become a pattern in the application of sections 171 and 368 CCC. Although we have yet to obtain clear criteria for invoking good faith and good commercial practice by the courts, it is clear that we cannot rely on the literal meaning of the words used in the contract to interpret contractual terms. Thai courts can revoke a term even if is written in the clearest possible manner. This may improve the debtor's chance of relief from a contractual obligation.

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1. Introduction

> Words are not always understood as intended. The meaning of a verbal statement depends essentially on what the parties making and receiving it think it means, but since what people think depends on their personal knowledge, experience, preferences, concerns, and interests, a statement often means different things to the author and its addressee.[1]

Even if a contractual term is expressed in the clearest possible way, its meaning can always be disputed. This is the case in Thailand, where the literal meaning of words or expressions is less relevant to the interpretation of contract than good faith and good commercial practice. The debtor's breach of contract may be justified by implying a duty within a contract or by redefining the common intention of the parties by referring to good faith. Based on two main rules of interpretation, sections 171 and 368 of the Thai Civil and Commercial Code ('CCC')[2], copies of an English translation of sections 133 and 157 of the 1900 German Civil Code ('BGB'), respectively, Thai courts provide guidelines for interpretation to the effect that, in interpreting a contractual term, the common intention of the parties is to be ascertained in accordance with good faith in relation to good commercial practice without clinging to the literal meaning of the statement. These guidelines are laid down in a way that is perfectly in line with European jurisprudence. Yet questions arise as to what the terms 'good faith' and

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[1] Hein Kötz, *European Contract Law* (Tony Weir tr, Clarendon Press 1998) 108. See also Hugh Beale and others, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing 2010) 667.

[2] In this paper, the English translation of the Thai Civil and Commercial Code is based on Chung Hui Wang's *The German Civil Code Translated and Annotated with an Historical Introduction and Appendices*. This text was also used by the drafting committee in making the Thai Code in 1925. See Chung Hui Wang, *The German Civil Code Translated and Annotated with an Historical Introduction and Appendices* (Stevens and Sons 1907).

‘good commercial practice’ mean exactly and how they can be employed in identifying and interpreting contractual terms. This article sets out to answer these questions. While there are many judicial decisions on contract interpretation, there is shockingly little scholarly literature on the topic, which explains the lack of any theoretical framework. This article aims principally to answer the questions as to what the terms ‘good faith’ and ‘good commercial practice’ mean exactly and how they can be employed in identifying and interpreting contractual terms. By so doing, it will also have the opportunity to explore Thai scholars’ and courts’ theoretical and practical understanding of the roles of ‘good faith’ and ‘good commercial practice’ in identifying and interpreting contractual terms.

2. Historical Reflections

To fully and properly understand the roles of good faith and good commercial practice in interpretation of contract, a historical investigation of the root of the two main provisions relating to contractual interpretation is required. This section will give an historical account of the making of the Thai Civil and Commercial Code (‘CCC’) in general and sections 171 and 368 CCC in particular.

2.1 The Making of the Thai Civil and Commercial Code

The promulgation of the CCC in 1925 marked the birth of modern Thai private law. The history of the CCC of 1925 is a history of legal borrowing; nearly every single rule of the Code was extracted from English translations of foreign civil and commercial codes, principally the German Civil Code of 1900 and the Japanese Civil Code of 1898. The latter was chosen mainly because of the draftsmen’s belief that it was merely a mirror of the former. Unsurprisingly, this was a mainstream perception of the Japanese Civil Code of 1898 during the first half of the twentieth century both in Japan and abroad.

Despite draftsmen of the Japanese Civil Code of 1898, from the very beginning, insisting that they 'could not agree to take the law of any one country as an exclusive model'[3] and that 'the new [Japanese] code is based on the French code and other codes of French origin at least as much as it is on the German code',[4] the influence of German law is overwhelming. Indeed:

> Because of the belief that the new Code was based on German Law, Japanese scholars and lawyers have worked hard to digest German civil law theories. The most common destination of Japanese academics studying abroad was Germany, especially before the Second World War.[5]

The broad conception of German law's dominant influence in the Japanese Civil Code was later proved to be fallacious. Comparative researches on the reception of foreign private law in Japan emerging from the 1960s reinterpreted the relationship between Japanese, German and French private law. According to Zentaro Kitagawa, German jurisprudence exerted far more influence in the process of *interpreting* and *expounding* the Japanese Civil Code than in the process of making it.[6] This confirms the draftsman Ume's remark that German law was not predominantly used in shaping Japanese provisions of the Code.

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[3] Nobushige Huzumi, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Tokyo Printing 1904) 10.

[4] Kenjiro Ume's Speech at the French Civil Code Centenary Celebrations in 1904 at the Faculty of Law of the Imperial University of Tokyo, quoted in Yosiyuki Noda, *Introduction to Japanese Law* (University of Tokyo Press 1976) 52.

[5] Hiroshi Oda, *Japanese Law* (3rd edn, Oxford: OUP 2009) 666. See also Kenzō Takayanagi, 'Occidental Legal Ideas in Japan: Their Reception and Influence' (1930) 3 Pacific Affairs 740, 747.

[6] Zentaro Kitagawa, 'Japanese Civil Law and German Law – From the Viewpoint of Comparative Law' in Zentaro Kitagawa and Karl Riesenhuber (eds), *The Identity of German and Japanese Civil Law in Comparative Perspectives* (De Gruyter Recht 2007) 33-34.

Whether the Japanese rules are of German or French origin is crucial to our understanding of the making of the CCC of 1925, in general, and the adoption of foreign rules concerning specific performance and damages in Thailand in particular. The reason for this lies in the change of Thai policy in 1925 which involved replacing the French Civil Code of 1804 with the German Civil Code of 1900 as the principal model for a new Thai civil and commercial code. After a long and unsuccessful process of codification of private law modeled on the French Civil Code and directed by French draftsmen, the new drafting committee with a Thai majority agreed that the new code would be founded on the German Civil Code and the Japanese Civil Code of 1898 by means of 'copying'. To follow the German Code was clearly the Thai draftsmen's ultimate aim, but the Japanese Code was also chosen because they believed that it was made by 'copying the German Civil Code'.[7] Most of the provisions of the CCC of 1925, especially Book II on Obligations, were thus copied from the German Civil Code and the Japanese Civil Code, side by side, without any concern for their conceptual differences.[8]

To employ the copying method, the draftsmen of the CCC of 1925 relied heavily on a number of English materials. They obtained English translations of German Cc rules from Chung Hui Wang's *The German Civil Code: Translated and Annotated* of 1907, and their source of knowledge about German civil law was Ernst Schuster's *The Principles of German Civil Law* of 1907. The English translations of Japanese provisions were taken from JE de Becker's *Annotated Civil Code of Japan* of 1909, and the draftsmen consulted de Becker's *The Principles and Practice of the Civil*

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[7] Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Bangkok: Thammasat University 1982) 4, 13, 23, 42.

[8] For a detailed account of the making of the Civil and Commercial Code of Thailand in 1925, see Munin Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (PhD Thesis, University of Edinburgh 2013) 88-121.

Code of Japan of 1921 when commentaries on Japanese rules were needed. These English publications are pivotal in understanding the systems of contractual interpretation in Thai law, since all of the relevant Thai provisions were copied from them.

Thus, the draftsmen of the CCC of 1925 principally relied on two foreign codes – the German Civil Code of 1900 and the Japanese Civil Code of 1898. They used the English drafts of Books I and II of the old CCC of 1923, which was drafted by the French draftsmen, as the basis for Books I and II of the CCC of 1925 and examined them article by article. They compared the drafts of the CCC of 1923 with the English translations of the German and Japanese Codes, written by Wang and De Becker respectively. Most of the CCC of 1925 rules were newly imported from the German and Japanese Civil Codes. The old articles that were consistent with the German and Japanese Codes were preserved (although revised), and those that were inconsistent were removed. Some provisions, which were products of French jurisprudence, were kept when they were consistent with the German and Japanese rules, but the Thai draftsmen, who were critical of the French Code, avoided adopting any new French rules. When it came to a choice between German and Japanese provisions, one that was more articulate prevailed.

The Thai drafting methodology resembles Watson's notion of legal borrowing, especially his view that the framing of a single basic code of private law is a relatively easy task[9] and that a successful transplant does not require 'a systematic knowledge of the law'.[10] The draftsmen of the CCC of 1925 concentrated their attention on the letter rather than spirit of the law. They did not discuss, for example, the sources of the Japanese model's rules or how they had developed. They were often satisfied with

[9] Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 100-101.

[10] Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79, 79.

the Thai rules provided that their wording was in line with those of the Japanese and German provisions.[11]

2.2 The Making of Sections 171 and 368 CCC

To trace the origin of sections 171 and 368 CCC, it may be necessary to explore their English drafts prepared by the draftsmen of the CCC of 1925 which were subsequently translated into the Thai language. Even though the English drafts are not an official version of the CCC as the only official version is in the Thai language, they are essential to the understanding the origin of the Thai rules and their interpretation. This is because if one seeks to discover the true intent of a Thai rule, one needs to look at its foreign origin.

English Draft of the CCC[12]	Foreign Models Adopted by the Draftsmen[13]
Section 132 [currently section 171]: In the interpretation of intention, the true intention is to be sought rather the literal meaning of the words or expression. Section 368: Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taking into consideration.	§ 133 BGB: In the interpretation of a declaration of intention the true intention is to be sought without regard to the literal meaning of the expression. § 157 BGB: Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.

Table 1-1: Comparison between the texts of the English drafts of sections 171 and 368 and their German models.

[11] Pongsapan (n 8 above) 117-121.

[12] Office of the Council of State, Doc No 79, 'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925).

[13] Chung Hui Wang, *The German Civil Code: Translated and Annotated* (Stevens and Sons 1907).

From the table above, it is evident that the texts of the English drafts of sections 171 and 368 prepared by the draftsmen of the CCC of 1925 were copied from Chui Hui Wang's English translations of §§ 133 and 157 BGB of 1900 respectively.

Ernest Joseph Schuster, a German jurist, who authored the book "The Principles of German Civil Law, which was principally used by the draftsmen of the CCC of 1925 to understand German civil law when they copied German rules from the German Civil Code of 1900, comments § 157 BGB that:

> The appeal to good faith shows that, in the cases to which the rule is to be applied, the parties are assumed to be well aware of the fact that a literal interpretation of the words used by them would not carry out the bargain which they had in view when entering upon the agreement.
>
> The reference to custom is only a particular application of the general principle. Where special modes of expression have, in a particular trade or among a particular class of people, a meaning different from the ordinary meaning, it would clearly be against good faith, in the case of an agreement between persons accustomed to use such special meaning, to assert that the ordinary meaning was intended.[14]

3. Identifying Contractual Terms

This section deals with the identification of contractual terms. In Thailand, 'implied terms' is not commonly known among Thai lawyers; identifying contractual terms is not a normal step in interpreting a contract and is not dealt with as a topic of contractual interpretation in Thai

[14] Ernest J Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 105-106.

literature on contract law. Thai scholars and practitioners appear to be more familiar with the term 'express terms of contract', than 'implied term'. When they interpret contractual terms, they tend to focus their attention on express terms – terms which are written down in the contract. The so-called "implied terms" as commonly known in common law jurisdictions are known by Thai lawyers merely as the application of the principle of good faith in search for a true intent of the contracting parties.[15] However, to see a clear position of Thai law's contractual interpretation in the comparative world, the chapter attempts to fit the related Thai law in a common law structure of contractual interpretation that is to understand Thai law from a common law perspective.

3.1 Preliminary Observations

Unlike English law,[16] Thai law's response to the disappointment of one contracting party's expectations from a concluded contract is not determined by the distinction between a warranty and representation. If the debtor fails to perform its contractual obligations, the creditor may seek remedies for breach of contract, namely specific performance, compensatory damages, and termination of the contract.[17] However, under Thai law, the creditor's reliance on the debtor's misrepresentation does not give rise to any remedial rights other than the right to set aside the voidable contract. In fact, Thai law does not recognize misrepresentation apart from mistakes that cause invalidity. Where a contracting party's mistake in

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[15] Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 138-139.

[16] Mindy Chen-Wishart, *Contract Law* (5th edn, OUP 2015) 382; See also Andrew Burrows and Edwin Peel, 'Overview' in Andrew Burrows and Edwin Peel (eds) *Contract Terms* (OUP 2007) 3-16..

[17] For more information on breach of contract in Thai law, see Munin Pongsapan, 'Remedies for Breach of Contract in Thai Law' in Mindy Chen-Wishart, Alexander Loke, and Burton Ong (eds), *Studies in The Contract Laws of Asia: Remedies for Breach of Contract*, vol 1 (OUP 2016) 370-399.

relation to an essential quality of a person or thing was induced by the debtor's fraudulent act, the contract is rendered voidable on the grounds of fraud. The party has the right to choose between ratification and avoidance. As invalidity cannot be a basis for a claim for damages under Thai contract law, that party may instead need to seek compensation for any loss caused by the fraudulent act on the grounds of tort.

As the availability of compensatory damages depends on proof of breach of contract, it is essential for the contracting party seeking such remedy to prove the existence of the contractual term that has allegedly been breached. In Thai law, a contract can be formed simply by mutual agreement—the meeting of an offer and its acceptance (*consensus ad idem*).[18] Formality is not required for the formation of a contract, except for certain types of contract[19] such as sales, gratuitous gifts, and exchanges of immovable property. A contract can thus be either oral or in writing. To form a contract, an offer must be unequivocal and must be expressly communicated to the offeree who can, however, implicitly accept it. The parties are not required to agree on every detail of the contract,[20] as a contract can be formed by agreement on all essential terms. What is essential should be determined objectively. For example, the subject matter and price are usually essential to all sales contracts, while the place and time of performance are not. However, the essential elements can also be established subjectively during the process of forming the contract.[21] An

[18] Section 151: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

[19] Section 152: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

[20] Section 367: 'If the parties to a contract, which they regarded as concluded, have in fact not agreed as to one point upon which an agreement was to be settled, those parts which were agreed upon are valid in so far as it may be inferred that the contract would have been concluded even without a settlement of this point.'

[21] Section 366: 'So long as the parties have not agreed upon all points of a contract upon which, according to the declaration of even one party, agreement is essential,

offeror may attach a condition to the offer to the effect that a contract will not come into existence until the place of performance is settled. Accordingly, a contract is not formed until the parties agree on this term, even though all objectively essential terms on the subject matter and price have been finalized.

3.2 Express Terms

As has been discussed above, contractual terms may be expressed or implied in Thai law. As Mindy Chen-Wishart points out, '*Express terms* are those set out in the contract. *Implied terms* are those which are read into (added to) the contract.'[22] Her observation on express terms in English contact law can also apply to Thai contract law, namely that 'express terms can be in writing or oral or both'.[23] As was mentioned earlier, in Thai law, the formation of most contracts requires no form. Testimony is sufficient to prove the existence of the contract. However, certain contracts, such as, for example, loans and rental of immovable property, require written evidence to file a claim. Written evidence as a rule requires a statement bearing the signature of the party liable that demonstrates the existence of the claim. It can be produced at any time, even after the contract has been formed.

3.3 Parol Evidence Rule Equivalent

Influenced by the parol evidence rule in English law[24], section 94 of the Thai Civil Procedure Code[25] stipulates that, where the law requires

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the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.

If it is agreed that the contemplated contract shall be put into writing, in case of doubt, the contract is not concluded until it is put in writing.'

[22] Chen-Wishart (n 16) 382.

[23] Ibid 382.

[24] The parol evidence rule is a rule in the Anglo-American common law regarding contracts, and governs what kinds of evidence parties to a contract dispute can

written evidence, the court may not admit a witness called by a party irrespective of the consent of the other party: (1) to adduce the claim instead of a document; and (2) to add to or contradict the document.[26] However, a witness may be admissible to prove the forgery of documents, the invalidity of the contract, or the incorrect interpretation of contractual terms by the other party, or where the original copy of the contract is destroyed by *force majeure* or lost in circumstances for which the claimant is not responsible.[27] In contrast to the parol evidence rule, section 94

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introduce to identify the specific terms of a contract. The rule prevents parties who have reduced their agreement to a final written document from later introducing other evidence, such as the content of oral discussions from earlier in the negotiation process, as evidence of a different intent as to the terms of the contract. Robert E Scott and Jody S Kraus, *Contract Law and Theory* (LexisNexis 2013) 542. According to Mindy Chen-Wishart, "The parole evidence rule ostensibly promotes certainty and predictability and avoids evidential difficulties. However, these advantages turn out to be more apparent than real because of the long list of *exceptions* to the rule necessitated by the equally legitimate demands of justice. Amongst the most important exceptions are when it is claimed that:

- the contract is vitiated, eg for misrepresentation, mistake, *not est factum*, duress, and undue influence...;
- the contract includes term *additional* to those contained in the contractual document, whether express (called 'collateral'... or implied...);
- the contract should be *rectified* because its wording does not accurately record the parties' agreement...

The collective width of these exceptions calls the rule into question since, in practice, it will rarely prevent a party from adducing the sort of evidence the rule theoretically prohibits. The rule is better understood as an easily rebuttable presumption that a document purporting to be the contract contains the whole contract." ibid 418-119.

[25] While the Thai Civil and Commercial Code is a virtual copy of European civil codes, mainly the German and French Civil Codes, English civil procedure had a considerable influence on the Thai Civil Procedure Code.

[26] The Supreme Court explained that a document is purported to record the parties' will: see Supreme Court Decision No 121/2491.

[27] Thai Civil Procedure Code, section 94(2).

permits extrinsic evidence as long as it is not a witness. Hence, written collateral terms or contracts are admissible to adduce a claim, by adding to, varying, or contradicting a document which contains the main terms. For example, the court may admit a document containing an amendment to the main contract in relation to the interest rate of a loan. However, it cannot accept a request by the defendant to call a witness to testify that the interest rate stated in the main contract has been amended. Those contracts which require neither the written form for contract formation nor written evidence to prove a claim do not fall within the purview of section 94. The fact that the parties put the contract in writing does not make section 94 applicable. The Supreme Court of Thailand, in Case No 2186/2517 (AD 1974), held that the defendant who entered into a work-for-hire agreement which was put in writing had the right to call a witness to prove an amendment to the floor plan which was included in the main contract, as the Civil and Commercial Code neither requires the written form to make a work-for-hire contract nor written evidence to adduce a claim arising from it.[28]

3.4 Implied Terms

In addition to express terms, a contract may also include implied terms. Similar to English law, Thai law recognizes both terms implied in fact and terms implied in law. According to Chen-Wishart, 'terms may be implied into contracts from the *factual context* to give effect to the parties' *unexpressed intention*.'[29] The general rule in Thai law is that an unexpressed intention cannot form a contract or part of a contract. In Case No 199/2545 (AD 2002), the Supreme Court held that the surety was not liable for the debt because the alleged surety contract which it signed did not contain the amount of debt, even though the contract did include a statement that the signee agreed to accept all liability incurred by the

[28] Supreme Court Decision No 2186/2517.

[29] Chen-Wishart (n 16) 392.

debtor. In this case, the claimant prepared a surety contract template and only required the surety to fill in some blanks. The surety filled in all but the amount of debt. The Supreme Court refused to enforce the contract on the ground that the party had not expressed its intention as to the amount to which it agreed to be bound.[30] However, in a more recent case (AD 2012), the claimant handed the land title deed, a copy of his ID card, a copy of his household registration, and a blank sheet signed by himself to the defendant to guarantee a loan. The defendant later filled in the blank sheet, turning it into a power of attorney to mortgage the defendant's land, and then registered the mortgage at a land office. The claimant sought revocation of the mortgage registration on the grounds that by filling in the signed sheet without his consent, the defendant had not acted in good faith. The Supreme Court held that the claimant, by signing the blank sheet, could have foreseen a sales or mortgage of the land and 'impliedly' permitted the claimant to 'misuse' the property. The Court considered this to be 'gross negligence' and instead accused the claimant of violating the principle of good faith.[31] The question arises as to whether the Court regarded the mortgage as an implied contract.

In interpreting a contract, Thai law attaches greater importance to the parties' real intention than to the literal meaning of the words or expressions.[32] Where the parties have failed to include a term which they would have included had they thought about it, or had had the time to draft the contract properly, such a term may be implied into the contract. Unfortunately, Thai law has no test for implication. However, the Supreme Court has provided some examples. In one case, the claimant, a property development company, entered an agreement to buy a piece of land from the defendant for 43,000,000 Baht. Thereafter, the claimant borrowed

[30] Supreme Court Decision No 199/2545.

[31] Supreme Court Decision No 14437/2555. See also Supreme Court Decision No 3922/2548.

[32] Section 171 CCC.

155,000,000 Baht from a commercial bank with 43,000,000 Baht proposed for the aval of a promissory note. The claimant followed the practice of paying the price of land by means of a promissory note avalled by a bank. However, the agreement between the parties did not include such a practice. The defendant refused to accept a promissory note without an aval from the claimant. The claimant brought a claim for breach of contract against the defendant. The Supreme Court held that, even though there was no express term which required an aval of the promissory note, the contract contained an 'implied term' that did impose such a requirement.[33] In another case, the defendant entered an overdraft agreement with the claimant. In a second supplemental agreement, the defendant agreed to pay interest at the rates of 9.25, 12.5, and 13 per cent per year, depending on the amount of money withdrawn. A provision was included stating that the parties agreed to be bound indefinitely by all the terms of the second supplemental agreement. Later, the defendant entered into a third supplemental agreement that contained no interest rates. The defendant argued that, in the absence of a provision on interest rates, the claimant had no right to claim any interest on the sum withdrawn. The Supreme Court referred to the provision in the second supplemental agreement as grounds to apply the interest rates specified therein to the third supplemental agreement.[34] It might be more appropriate to maintain that the parties impliedly agreed to adopt the interest rates featured in the second supplemental agreement in another supplemental agreement.

3.5 Implied Duty of Good Faith

Terms may be implied into a contract by virtue of the principle of good faith. This is the most well-recognized type of implied term in Thai law. In truth, an implied duty of good faith may well justify every

[33] Supreme Court Decision No 5678/2545.

[34] Supreme Court Decision No 13098/2555.

implication in fact.[35] The principle of good faith—a product of European legal science—is mainly reflected in section 5 CCC[36] and has been integrated into many other provisions across the Code. Section 5, which is situated in Book I on 'General Principles' designed to govern the entire Code, states:

> Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.

Similarly, section 368 CCC, a principal rule of contract interpretation, states:

> Contracts shall be interpreted according to the requirements of good faith, custom being taken into consideration.

In Thai law, good faith seems to have universal applicability.[37] It governs the exercise of rights and the performance of obligations, whether such rights or obligations derive from contracts or torts.[38] It has the power to override express contractual terms and to impose an implied duty on a contracting party. It is, however, unfortunate that Thai courts do not provide clear guidelines on the application of this principle, and there is little effort on the part of Thai legal scholars to systematize and intellectualize the relevant judicial decisions. The good faith principle is employed piecemeal and on a case-by-case basis.

Good faith can be applied to negate the sanctity of contract. In a case decided by the Supreme Court in 2012 AD, the defendant agreed to repay a loan in instalments and give the claimant the right to demand immediate repayment of the outstanding amount if the defendant resigned from the organization involved. The agreement also permitted the claimant

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[35] See Kittisak Prokati, หลักสุจริตและเหตุเหนือความคาดหมายในการชำระหนี้ (*Good Faith & Supervening Events*) (Winyouchon 2012) 60-61.

[36] Section 5 is a copy of an English translation of Article 2(1) of the Swiss Civil Code.

[37] Prokati (n 35) 60-61.

[38] For example, section 421 states: 'The exercise of a right which can only have the purpose of causing injury to another person is unlawful.'

to enforce the mortgage in the event of default by the defendant. The defendant continued to pay in instalments at the agreed times after leaving the organization and the claimant accepted the payments without reservation. The claimant subsequently demanded immediate repayment of the balance of the loan. The Supreme Court dismissed the claim on the grounds that the claimant had forfeited its right to demand immediate repayment of the balance by continuing to accept the instalments even after the defendant had left the organization. The court found that the claimant had not acted in good faith.[39] In another case decided in 1959 AD, the claimant sold a piece of land to the defendant with the right to redeem it within a year. The claimant attempted to redeem the property, but the defendant craftily prevented the claimant from paying the price of redemption. The Supreme Court held that the defendant had not acted in good faith and that the claimant's attempts to redeem the land were a proper tender of performance. The court also cited the principle of good faith to negate the effect of section 94 of the Civil Procedure Code that no witness can be admitted to contradict a document. The claimant was permitted to call a witness to adduce the defendant's bad faith even though the contract for the sale of immovable property with a right of redemption must be in writing.[40] In this author's view, the claimant's right to redeem the property after expiry of the redemption period may alternatively be considered to include an implied term that the defendant has a good faith duty to extend the period of redemption where the claimant is unjustly prevented from redeeming the property.

A term may be implied into the contract by the dictates of good faith to impose a contractual duty on a party. In a case decided in 2006 AD, according to the agreement of acknowledgement of debt, the claimant

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[39] Supreme Court Decision No 11482/2555. See also Supreme Court Decision No 1728/2558.

[40] Supreme Court Decision No 339/2502. See also Supreme Court Decision Nos 1283/2508 and 1538/2508.

permitted the defendant to repay the debt in instalments of 7,000 Baht per month, which were to be deducted from the defendant's salary. However, the defendant was later dismissed by the claimant. This effectively rendered the agreed mode of payment ineffective. Before the September instalment was due, the defendant sent a letter to tender performance by bank transfer and requested details of the claimant's bank account. The claimant received the letter but did not reply, not even after receiving two reminders from the defendant. The defendant then decided to pay the instalment by postal order. The claimant refused to accept the payment, instead demanding immediate payment of the balance of the debt. The Supreme Court held that the claimant's demand was not based on the principle of good faith.[41] The court did not refer to implication in fact, but it might be more reasonable to claim that a term was implied into the contract to impose a good faith duty on the claimant to provide the defendant with information on the new mode of payment. In a case decided in 2004 AD, the defendant, who had 100 Baht in a savings account with the claimant, entered a credit card agreement with the same party. The agreement permitted the claimant to balance mutual debts with the defendant. The claimant did not do so at first, but waited for a year before making a set-off, mainly in order to prevent the period of prescription from lapsing. The Supreme Court found that the claimant had dishonestly exercised its right to earn more interest and interrupt the period of prescription. Such an act was contrary to the principle of good faith. It therefore held that the period of prescription had not been interrupted but had lapsed instead.[42] It might be better to view the claimant's act as a failure to comply with a term that was implied into the credit card agreement by virtue of good faith. The term imposed a good faith duty on the claimant to balance mutual debts with the defendant without delay.

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[41] Supreme Court Decision No 4091/2549.

[42] Supreme Court Decision No 6504/2547. See also Supreme Court Decision No 2591/2543. The period of prescription for a credit card debt is two years, according to Section 193/34 (7).

3.6 Implication by Law

In addition to implication in fact, a term may be implied into the contract by statute or custom. According to Chen-Wishart, 'contracts that fall into *certain commonly occurring* types attract their own set of obligations as terms implied in law … unless the parties contract out of (i.e. exclude) them.'[43] In Thai law, courts and legal writers are not familiar with the term 'implied in law'. This may be the case in other civilian jurisdictions as well. Accordingly, no reference is found in Thai legal literature to the so-called 'terms implied in law'. Thai contract drafters know that they do not need to include every term in the contract as the law always comes to their assistance whenever there is a dispute over a contracting party's rights or duties. That is why its relevance to contracts may be considered as 'express' rather than 'implied' and 'direct' rather than 'indirect'. However, for academic purposes, it may be sensible to recognize the existence of 'implication in law' in Thai law as a separate category of implied terms and as opposed to 'implication in fact'. In Thailand, to form a contract, the parties are not required to settle every detail. They only need to agree on the essential terms.[44] Those of the parties' rights and duties that are not stated in the contract can be implied from statutes, mostly the Civil and Commercial Code. In the English case *Liverpool City Council v Irwin* (1977 AD), the House of Lords found that, in tenancy agreements, landlords had an implied-in-law obligation to their tenants to take reasonable care to maintain the common parts of tower blocks, such as lifts, staircases, lighting and rubbish chutes.[45] Had the same situation occurred in Thailand and had the case been brought before a Thai court, in the absence of any term imposing on the lessor a duty to maintain the common parts, the court would have had to invoke section 550 CCC, which states that the lessor is

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[43] Chen-Wishart (n 2) 401.

[44] See sections 366 and 367 CCC.

[45] *Liverpool City Council v Irwin* [1977] AC 239, 254 (HL). See also Chen-Wishart (n 2) 402.

liable for any defects that arise in the course of the contract and must make any repairs that might become necessary, except those that are by law or custom the responsibility of the lessee. Despite the absence of any express term, the lessor's contractual duty to maintain the common parts is implied by this statutory rule.

The Civil and Commercial Code provides a number of default rules for all types of contract. While some default rules are subsumed under the general parts of obligations and contracts which apply to all types of contract, some are peculiar to specific contracts. Their interrelationship is known as general and specific rules. The parties can always contract out of, or contradict, any default rule as long as such a rule is not related to public order or good morals.[46] Section 195(1) CCC is an example of a general rule which may become an implied term of a contract. It states: 'When the thing which forms the subject of an obligation is described only in kind, if its quality cannot be determined by the nature of the juristic act or the intention of the parties, the debtor must deliver a thing of medium quality.' Section 203(1) CCC is another example of a general rule. It states: 'If a time for performance is neither fixed nor to be inferred from the circumstances, the creditor may demand the performance forthwith, and the debtor may perform his part forthwith.' Section 458 CCC is an example of a specific rule that is only applicable to sales contracts. It states: 'The ownership of the property sold is transferred to the buyer from the moment when the contract of sale is entered into.' Most default rules in the Civil and Commercial Code, including all the above examples, are provisions that can be contracted out by the parties as they are not related to public order or good morals. There are, however, some default rules which cannot be deviated from. For example, an agreement to exempt the debtor's liability for fraud and gross negligence is void.[47] A non-liability clause cannot exempt

[46] Section 151: 'An act is not void on account of its differing from a provision of any law if such law does not relate to public order or good morals.'

[47] Section 373.

the seller from the consequences of its own acts or of facts which it knew but concealed.[48]

3.7 Implication by Custom

A term may also be implied into a contract by custom, as section 368 CCC affirms that 'ordinary usage'[49] must be taken into account when a contract is interpreted. In Thai law, customary law is generally regarded as a secondary source of law,[50] but on occasion it plays an equal role to that of statutory rules. For example, according to section 550 CCC, the lessor is liable for any defects that arise in the performance of the contract, and the lessor must make all repairs which may become necessary, except those which are by law or 'custom' to be done by the lessee. Section 552 CCC states that the lessee cannot use the property hired for any purpose other than that which is 'ordinary and usual', or which has been provided in the contract. However, Thai judges and legal scholars have difficulty in determining exactly what custom or commercial practice is and how it may be discovered. When Thai courts refer to 'custom' when interpreting a term or considering that a term should be implied into the contract, 'good faith' is often also mentioned. Their reference to 'custom' may be seen as part of a pattern of applying section 368 CCC, which contains both the expressions 'good faith' and 'ordinary usage' (custom or commercial practice). At times, Thai courts provide distinctive examples of terms implied by custom or commercial practice without relying on good faith. In a case that was

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[48] Section 485.

[49] The expression used in the English draft of the Civil and Commercial Code which was copied from an English translation of the German Civil Code. A more appropriate translation of this word would be 'good commercial practice'.

[50] Section 4 CCC: 'The law must be applied in all cases which come within the letter and spirit of any of its provisions.

Where no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.'

decided in 1962 AD, the defendant hired the claimant to transport kenaf fibre from Thailand to Taiwan by sea. There was no contractual term requiring the claimant to have the goods bound up tightly during the transport, yet the Supreme Court held that this duty must be implied into the contract by 'good commercial practice'.[51]

In Supreme Court Case No 5678/2545 (AD 2002),[52] the court held that, even though the contract did not impose on the buyer the requirement to have a promissory note avalled by a bank, 'good commercial practice' in buying and selling high-priced property, payment by promissory note requires an aval. The court cited sections 171 and 368 CCC to imply such a duty into the contract. In a case decided by the Supreme Court in 1999 AD, the defendant rented a piece of land next to his own from the claimant to plant an orange tree grove. The defendant needed an even surface that, in the circumstances, stretched across its own land and the rented parcel. The defendant dug up the soil in the rented land and used it to fill its own land to create a flat surface. The claimant terminated the lease on the grounds of breach of contract. The Court found that the defendant's use of the property accorded with 'common practice' under section 552 CCC and dismissed the claim.[53]

In the judicial application of good faith and custom, especially under section 368 CCC, the two concepts arguably appear to have been

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[51] Supreme Court Decision No 1375/2505.

[52] See the details of the case at n 33 above.

[53] Supreme Court Decision No 8602/2542. See also Supreme Court Decision Nos 7105/2546 and 1246/2504. In the latter case, the defendant rented a house and also a plot which extended from the house of the claimant. The defendant built a bathroom on the land and made a hole in the wall to ventilate it and receive sunlight. Since the air vent was made in the bathroom belonging to the defendant and could be demolished when the lease ended, the Court found that the defendant's use of the house and land followed 'common practice' and that he had did not breached the contract.

amalgamated to the point of eclipsing the latter. The practical insignificance of custom in identifying and interpreting contractual terms may be explained by the fact that the Civil and Commercial Code is virtually a copy of various foreign legal sources which have taken the place of traditional Thai private law, which has become well-nigh extinct. What little has survived is to be found in family law and the law of succession.[54] When the Code can provide solutions to all legal problems, it is understandable that there is no need to resort to unwritten sources of law such as custom. Another reason may be that Thai courts seem to be more comfortable with invoking good faith to negate the sanctity of contractual terms or to imply a term into a contract. Good faith seems to be a panacea for difficult legal questions. It is relatively easy for the courts to determine that the exercise of a contractual right or the enforcement of a contractual term is inequitable and therefore that a good faith duty has been neglected, while to establish custom or commercial practice may require more effort to prove its existence and hand down a convincing judgment.

In contrast with English courts, Thai courts have no power to imply terms into a contract without statutory or customary support, since judicial decisions are not considered a source of law in Thailand.[55] However, they play a central role in identifying implied terms, especially terms implied in fact. The applicability of the principle of good faith in Thai law is largely determined by the courts. Despite being the most recognized means of implication, good faith is neither systematically deployed by the courts nor enthusiastically studied by Thai legal scholars.

[54] See Pongsapan (n 17) 371-2.

[55] See Section 4 above.

4. Interpreting Contractual Terms

'Once courts have identified the binding terms of the contract, the next question is what those terms mean; in particular, whether and how they apply to the dispute before the court.'[56] When a contract requires interpretation, Thai legal scholars and judges often seek guidance from two general rules: sections 171 and 368 CCC. Section 171 stipulates that, in interpreting a declaration of intention, the true intention is to be sought rather than the literal meaning of the words or expressions used. Section 368 seems to supplement Section 171 by stating that contracts are to be interpreted according to the requirements of good faith, ordinary usage being taken into consideration. Since these two rules were copied from English translations of sections 133 and 157 BGB, respectively, Thai law inherited the 'tension between more 'subjective' and more 'objective' interpretations – the 'intention theory' and the 'expression theory'', which 'run through the whole of European legal history.'[57]

> Until the late nineteenth century 'subjective' interpretation dominated legal literature, though whether it was equally dominant in practice is less certain. It figures in [original version of] the French Code civil (art. 1156: *On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes*), and most of the European civil codes have followed suit: § 133 BGB, for example, provides that in interpreting an expression of intention, "the real intention is to be ascertained without clinging to the literal meaning of the statement". However, these provisions are often complemented by another rule which looks more to the "objective"

[56] Chen-Wishart (n 16) 405.

[57] Kötz (n 1) 108.

> meaning of the expression, and a discrepancy ensues which it falls to the judge to resolve in the individual case. Thus alongside §133 BGB we find §157, which provides that contracts are to be interpreted "in accordance with the dictates of good faith in relation to good commercial practice''.[58]

4.1 Fictitious Intentions and Mistakes

Before expounding on sections 171 and 368 CCC, it is worth noting that some legal devices, notably the rules of mistake and the rules of fictitious intentions, can also be used to deal with the problems of defective declarations of intention that occasionally compete with the rules of interpretation. Where a declaration of intention is made fictitiously with the connivance of the other party, section 155 CCC nullifies such intention. However, the invalidity of the fictitious intention cannot be set up against third persons who are damaged by the fictitious declaration of intention and who act in good faith. If a contract is invented to conceal another contract, the invented contract becomes void because of its fictitious intention, while the concealed contract may be enforceable, depending on whether its formation meets the other essential requirements, namely the object and form of the contract, and the legal capacity of the parties.[59] There is no need to find the real intention behind a contract or contractual term which is fictitiously made, as the law finds it too defective to allow enforceability. This is also the case with mistakes.

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[58] Ibid 108.

[59] Section 155: '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.

If a declaration of fictitious intention under paragraph one is made to conceal another juristic act, the provisions of law relating to the concealed act shall apply.'

The Civil and Commercial Code recognizes two types of mistake. Section 156 CCC governs mistakes as to an essential element of a juristic act,[60] while section 157 CCC deals with the other type of mistake – mistakes as to an essential quality of a person or a thing.[61] The consequences of the two types differ; a section 156 mistake renders the contract void, while the contract becomes voidable if a party makes a mistake under section 157. Even among contract law experts, these two types are sometimes difficult to distinguish. A common dividing line is that a section 156 mistake occurs during the process of communicating the intention, while a section 157 mistake is formed during the process of decision-making.[62] For example, A wishes to sell a shirt to B for 1,000 Baht but erroneously writes down 100 Baht in the offer. B accepts the offer. A contract is formed but simultaneously becomes void under section 156.[63] The contract should be void because A's defective expression of intention led B into believing that the price was correct. If A had written down the correct price in the offer but B accepted the offer because it believed a counterfeit shirt to be a

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[60] Section 156: 'A declaration of intention is void if made under a mistake as to an essential element of the juristic act.

A mistake as to an essential element of the juristic act under paragraph one is for instance a mistake as to the character of the juristic act, a mistake as to a person being a partner of the juristic act and a mistake as to a property being an object of the juristic act.'

[61] Section 157: 'A declaration of intention is voidable if made under a mistake as to a quality of the person or the thing.

A mistake under paragraph one must be a mistake as to the quality of the person or the thing which is considered as essential in the ordinary dealings, and without which such a juristic act would have not been made.'

[62] See Sanunkorn Sotthibandhu, คำอธิบายนิติกรรมสัญญา (Text on Juristic Acts and Contracts) (19th edn, Winyouchon 2016) 131-2.

[63] However, A may not be able to benefit from the invalidity of the contract according to section 158 CCC which states: 'If the mistake under section 156 or section 157 was due to the gross negligence of the person making such a declaration, he cannot avail himself of such invalidity.'

genuine one, B's mistake as to the quality of the shirt would render the contract voidable. B would have the right to avoid or to ratify the contract.

Section 156 mistakes are relatively problematic. Referring to the first hypothetical situation above, B had seen A's advertisement offering the shirt for sale at 1,000 Baht, so he knew of A's real intention to sell the shirt at that price from the beginning. When B accepted the offer at the correct price, he did not at first notice the incorrect price written down in the letter. When B later discovered the difference he raised the issue of nullity under section 156 to refuse payment. What, however, if B had in fact noticed the incorrect price at the beginning and had doubts about it, but decided to keep silent so as to benefit from a potential error? Can section 156 still apply to both cases to render the contract void? Despite meeting the requirements of section 156, these two cases should not be solved by the mistake rule. In the first case, B intended to accept the offer at the correct price. It is feasible for us to find the parties' real intention to be bound by the contract for the sale of the shirt at 1,000 Baht. Here, we can invoke section 171 which states that, in interpreting an expression of intention, the real intention should be ascertained without bothering with the literal meaning of the statement. The result should be the same as the following hypothetical scenario. C and D make a written contract in the English language, although this is not their native tongue. Their contract says that C will sell 'sharkmeat' to D. Both parties erroneously believe that this word denotes the meat of whales, and in fact they both intended to conclude a contract for the sale of whalemeat. C tenders whalemeat to D. D cannot insist on sharkmeat as the common intention of the parties is to buy whalemeat. In the second case, D's dishonesty may enable us to apply section 368, which states that contracts are to be interpreted in accordance with the dictates of good faith in relation to good commercial practice. We may conclude that, in this situation, a sales contract was formed at the price of 1,000 Baht. D can neither benefit from the mistake nor raise the nullity of the contract.

To avoid confusion over the application of the rules regarding mistake and those regarding interpretation, the latter should apply only when the former are irrelevant. They should be not used concurrently. When the offeror makes a mistake in communicating its intention that leads to an acceptance by the offeree who is unaware of the mistake, section 156 can apply and the rules of interpretation should be disregarded. But where a mistake by one party does not impair the other party's expression of intention, there is no need to apply the rules of mistake. The parties' real intention can be identified with the assistance of section 171, and the contract may be enforceable in accordance with such intention. In a rather confusing case, A owned a piece of land which was registered as Plot 2924. A later sold it to B. Both parties erroneously registered the sale of Plot 2924 on the title deed as Plot 2949. C intended to purchase a piece of land which was registered as Plot 2946, but the parties erroneously registered the sales of Plot 2946 on the title deed of Plot 2924. Despite the fact that C was referred to in the title deed of Plot 2924 as the owner, C took possession of Plot 2946 and lived on it for many years. C later agreed to sell the land it possessed to D (Plot 2946). Both parties had jointly inspected the plot previously. They later registered the sale on the title deed of Plot 2924, which now had D as its owner. Both parties erroneously believed that the sale referred to Plot 2946. The Supreme Court held that, despite being mistakenly referred to as the owner of Plot 2924 in the official records, D was not its rightful owner since D and C intended to buy and sell Plot 2946, not Plot 2924.[64] It was noted that neither section 156 nor section 171 was cited by the Court. On the surface, this case seems to concern a section 156 mistake that occurred during the process of expressing the parties' intention, i.e. when registering the sale on the title deed of the wrong plot. The Court's decision to ignore section 156 is convincing. This case should not be resolved by the rule of mistake, since both parties made the same

[64] Supreme Court Decision No 1707/2523. See also Supreme Court Decision No 2038/2519.

mistake and their real intention was not impaired. The Court set out to establish the real intention of the parties without expressly referring to section 171. Since the real intention of the parties could be identified, a straightforward, practical solution in this confusing case would have been simply to correct the names of the owners on the title deeds.[65]

Another complicated case was brought before the Supreme Court in 1997 AD. The Court applied both the rules of mistake and of interpretation. In this case, the claimant entered into an agreement with the defendant to buy a building in the belief that it was located on two pieces of land registered as Plots 614 and 616. In fact, it was located on Plot 615. The claimant became aware of the mistake when she registered the sales contract of the building and the two plots at the land office. She refused to sign the contract and set it aside. The defendant filed a counter-claim for damages on the grounds of breach of contract. The Supreme Court found that the building was located on a plot different from the plot that the claimant had contracted for. As the building was located on Plot 615, it became a component of this property and its ownership belonged to the land owner. The Court referred to 'good faith' and 'commercial practice' in section 368 to interpret the claimant's intention. It observed that the claimant would never have bought the building knowing it was located on another property, and this pointed to the conclusion that the claimant made a mistake as to the quality of the subject matter of the contract under section 157. This mistake rendered the contract voidable.[66] The question arises as to whether the Court needed to refer to section 368 at all. I would suggest that contract interpretation is not at issue here. Section

[65] See Supreme Court Decision 2143/2525. In this case, the claimant purchased insurance from the defendant, but the insurance policy named someone else as the insured person. The Supreme Court held that based on the real intention of both parties, the claimant was legitimately the insured person and thus had a right to make the claim against the defendant.

[66] Supreme Court Decision No 8056/2540.

368, as a rule of objective interpretation, in particular, is the wrong tool with which to address the main problem in this case as its purpose is to identify the objective meaning of contractual terms. It should rather be treated as a simple case of section 157,[67] where the Court needs to determine whether the quality of the thing is considered 'essential' in 'ordinary dealings'. This is an essential requirement of section 157 which must be satisfied before a mistake can be established. What is considered to be essential in ordinary dealings is a question of 'statutory interpretation', not of 'contractual interpretation'.

In another case decided by the Supreme Court in 1999 AD, the defendant entered an agreement to buy a piece of land with an area of 167 square *wa*[68] for 18,000,000 Baht from the claimant. The defendant relied on information on the land title deed which stated the correct area and the claimant's confirmation of the property area. Before registering a sale of property at a land office, the defendant discovered that the actual area of the property was approximately 124 square *wa*, smaller than the area agreed. The defendant then requested a price reduction while the claimant demanded the full price. The Supreme Court cited section 368 to ascertain the parties' real intention. It observed that the agreement to buy the property was not a 'wholesale agreement', where variations in size do not affect the agreed sum, and that the price of 18,000,000 Baht was calculated on an area size of 167 square *wa*.[69] The Court dismissed the claimant's claim. It is unfortunate that the issue of fraud under section 159 CCC was not raised in court, even though the claimant was discovered to have been fully aware that the figure on the title deed was incorrect when it entered

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[67] It should also be considered a case of fraud under section 159 CCC. This provision states 'A declaration of intention produced by fraud is voidable.

In order that fraud may make a contract voidable under paragraph one, it should be so serious that without it the juristic act would not have been made.'

[68] A Thai unit of measurement of land. 1 square *wa* is equal to 1 square metre.

[69] Supreme Court Decision No 8705/2542.

into the agreement with the defendant. The Court's failure to refer to fraud may have been because it was not disputed by the parties or because of the claimant's continued interest in enforcing the contract, which amounted to implied ratification.[70] However, from a scholarly point of view, in this case it should first be determined whether the contract was voidable on the grounds of fraud and, if so, whether the voidable contract was ratified. Once it is clear that the contract was ratified, we could seek to interpret the contractual terms and apply section 368 to determine whether the claimant intended to pay 18,000,000 Baht for the property in question, irrespective of its reduced size.

4.2 When a Contract Needs Interpretation?

Bearing in mind the application of the rules of mistake outlined above, two points should be noted before proceeding to the interpretation of a contract. First, where there is a mistake in the process of expressing an intention, the rules of mistake apply, unless the parties' real intention can be ascertained. Secondly, statutory interpretation should be clearly distinguished from contractual interpretation. When the courts determine the meaning of a word or expression in a statutory rule, they may need to look beyond the common intention of the 'individuals involved'. They may need to look objectively into the common understanding or common practice of 'the people in society'.

The Supreme Court, in Case No 3325/2548 (AD 2005), held that contractual interpretation is required when a contract term contains unclear or conflicting words or expressions or when the parties differ as to what the words or expressions mean. If such a condition does not exist, there is no

[70] According to section 181, 'if the party who has the right to avoid the voidable contract demands performance from the other party or do any other acts which imply ratification without reservation the contract is deemed to be ratified.'

need to interpret the contract.[71] Even if the contract is clearly written, a party may dispute the meaning of a word or an expression. Cases such as these should not be brought before the court as there is no valid ground for dispute. However, if the parties do not share a common understanding of the disputed word or expression, the court may need to intervene. In one case, one of the terms of a marine insurance policy stated 'VOYAGE: At and from LAEM CHABANG, THAILAND TO HOCHI MINH'. Some insured goods were lost at the Port of Laem Chabang before the carriage commenced. There was disagreement as to whether the insurer was liable for this loss. The insurer argued that the insurance coverage commenced when the vessel carrying the insured goods left the port. The Supreme Court held that it was 'clear', according to the term, that the insured loss had occurred 'at' the Port of Laem Chabang.[72] In another case, a couple with two children made a divorce settlement that included a provision by which the husband agreed to pay 8,000 Baht in child maintenance for each child on a monthly basis until they had 'completed their bachelor's degree or reached the age of 20'. The woman continued to demand maintenance payments for a child who was now 20 years old but who had yet to complete his undergraduate studies. The man refused to pay. The Supreme Court referred to the word 'or' to hold that the word suggested that, if one of the two conditions was fulfilled for either child, the right to demand maintenance for that child was terminated.[73]

4.3 Subjective Interpretation

Section 171 CCC, which reflects the subjective interpretation or intention theory, lays down a general rule of interpretation in Thai law that, when interpreting an expression of intention, the real intention rather than

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[71] Supreme Court Decision No 3325/2548. See also Supreme Court Decision Nos 679/2547 and 4932/2545.

[72] Supreme Court Decision No 4712/2546.

[73] Supreme Court Decision No 3618/2543.

the literal meaning of the statement is to be ascertained. This rule is the starting point of contract interpretation. While it dictates what is to be sought (the real intention), it provides no clues as to where and how to find it. So, where can it be found? Do we need to look at the 'common intention' of both parties? Or is the intention of one party sufficient? Supreme Court Decision 679/2547 (AD 2004) clearly answers this question. The Supreme Court opined that in resolving a dispute over the meaning of a statement or a term the court needs to ascertain the real intention that is 'commonly' shared by 'both' parties.[74] This is upheld by a recent decision, where the Supreme Court contended that, in interpreting a contract, the common good faith intention of 'both parties' must be ascertained in accordance with their common practice and good commercial practice.[75] However, the Supreme Court, in the Case No 8056/2540 (discussed above) only took the claimant's intention into consideration in interpreting the contract. In that case, the Court had to determine whether the quality of the thing that the claimant mistook was essential in ordinary dealings. It should be emphasized that this question should not be resolved by the rule of contract interpretation which requires a search for a common intention of both parties.

4.4 Objective Interpretation

As we now know that, in interpreting a contractual term, we need to ascertain the common intention of both parties,[76] the next important question is: how can this be done? According to Thai legal literature[77] and judicial decisions, this question is perfectly answered by section 368 CCC.

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[74] Supreme Court Decision No 679/2547. See also Supreme Court Decision No 3924/2551.

[75] Supreme Court Decision No 20348/2555.

[76] Seni Pramoj, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้ (The Civil and Commercial Code on Juristic Acts and Obligations) vol 1 (Munin Pongsapan edn, Winyuchon 2016) 346.

[77] Ibid.

Thai courts often apply both sections 171 and 368 concurrently when they interpret contractual terms. Their connection is well illustrated by Supreme Court Decision No 20348/2555 (AD 2012) stating:

> In interpreting a contract, the common intention of the parties is to be ascertained in the dictates of good faith in relation to their normal practice and good commercial practice. We cannot rely on one party's intention.

Words do not always represent the real intentions of both parties. This is why we cannot rely on the literal meaning of the statement of intention. Good faith and good commercial practice are seen as essential tools in establishing the common intention. They are often collectively employed by Thai courts, so that it is increasingly difficult for legal scholars to draw a distinction between the two. In one Supreme Court case, one of the terms of a land lease agreement stipulated that the lessee must not sublet the 'land' to other persons. The lessee built a factory and two apartments on the land, and later sublet the 'factory' to a third person. The lessor held the lessee liable for breach of contract. The lessee's argument was grounded on the literal meaning of the expression 'sublet the land'. The Supreme Court held that

> Based on the normal commercial practice of lessors and lessees who act in good faith, in leasing property, the lessor does not intend the lessee to sublet the property. The reason lies in the trust that the lessor places in the lessee only. This is affirmed by section 544, which prohibits subletting without agreement. Therefore, the lessee must not sublet the property or let anyone dwell in it. To interpret the statement 'the lessee must not sublet the land', we must take the whole of the contract and the common intentions of the parties into consideration and must not be misled

> by one side's intention. By subletting the factory which was built on the disputed land, the defendant let someone else use and dwell in it instead of himself. This is contrary to the purpose of the lease, which is to bar the lessee from subletting the land, which includes any buildings on it or letting anyone live in it.[78]

In another case, the claimant requested a court to evict the defendant from a piece of land. They later reached a settlement. The claimant agreed to give the defendant the disputed land with an area of 'approximately' 4 *rai* 3 *ngan* 78 square *wa*,[79] measured from the middle of the road from the north. An official measurement found that the actual area of the disputed land was some 6 *rai*. The defendant claimed the entire area. The Supreme Court dismissed the claim. It found that the fact that the size of the area was clearly stated indicated that this was essential to the agreement; if the parties had really agreed on the whole property, they would not have specified the area. The word 'approximately' did not mean 'whatever' area it turned out to be. It only expressed the parties' uncertainty about the actual area involved.[80]

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[78] Supreme Court Decision No 6843/2541. See also Supreme Court Decision 2231/2540. In this case, the defendant, a Buddhist temple, agreed to open its private street for 'use of the claimants' who agreed to pay compensation for each building which was completed on their land and used for commercial purposes. The claimants sold their vacant land to third persons who soon constructed several buildings on it. The claimants refused to pay compensation. The Supreme Court found that the main purpose of the agreement was to give the claimants a right of way to pass through the street in exchange for compensation paid to the defendant. As the third persons inherited the right to pass through the street from the claimants, the buildings they erected should be deemed to be the claimant's for the purpose of enforcing performance. The claimants were thus liable for compensation.

[79] Thai units of measurement of land. 1 *rai* is equal to 1,600 square metres. 1 *ngan* is equal to 400 square metres.

[80] Supreme Court Decision No 3766/2542.

In a case decided by the Supreme Court in 2009 AD, one of the terms of the lease agreement clearly stipulated that, if the building was severely damaged by fire, the agreement would automatically end and the lessor would have the right to have the security deposit paid to it forfeited 'no matter what causes the fire'. The court held that the purpose of such a security deposit was to deter the lessee from causing any damage to the property. Therefore, the lessee's fault was a determining factor for the forfeiture of the deposit.[81] In another case, one of the terms of a hire purchase agreement stated that the debtor agreed to pay interest on 'any payments' made to compensate for its default or breach of contract. The Court held that 'any payments' meant instalment payments only; compensation for breach of contract was not included.[82] In yet another case, one of the terms of a settlement agreement stipulated that both parties must register the sale of land and make a payment at the land office on '22 March 1999 at 13.00'. The defendant arrived before 13.00, whereas the claimant was 25 minutes late. Even though they met at the land office, the defendant refused to register the sale on the grounds of the claimant's breach of contract. The Supreme Court held that the common intention of both parties was to register the title of the land and to receive payment 'that afternoon' by commencing the process of registration at 13.00 and that they did not regard a slight delay as a breach of contract.[83]

In view of the 'parties' common intention' and 'good faith' approach taken by the Supreme Court in interpreting contracts in past cases, the result of the following hypothetical situation may be predictable. A commercial tenancy agreement between a landlord and tenant A, who is an optician, includes a clause providing that the landlord will not rent out space to another optician. One of the other tenants in the same building,

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[81] Supreme Court Decision No 4614/2552.

[82] Supreme Court Decision No 2755/2544.

[83] Supreme Court Decision No 8219/2544. See also Supreme Court Decision No 5911/2544.

tenant B, is an ophthalmologist who after a while begins to sell spectacles and contact lenses directly to his patients. The Supreme Court would probably not interpret the term literally but would rather search for the true intention of the parties, which is to prevent competition. The Court may then resort to the principle of good faith to hold that the landlord, who is aware of the ongoing competition, has an implied duty to prevent B from competing with A. Failure to perform this duty would give rise to a claim for damages for breach of contract.

The Supreme Court sometimes looks at 'the whole contract' and 'parties' conduct pursuant to it' to determine their common intention. A contract was entitled 'copyright assignment agreement', but neither the contract price nor the parties' conduct suggested it was an assignment agreement.[84] A contract was entitled a 'car ownership transfer contract', yet none of the terms mentioned the transfer of the car ownership. In fact, there was another term which implied that the true purpose of the contract was to put up the car as a guarantee for a loan repayment.[85] If both parties fictitiously form a contract to conceal another contract, whether or not the concealed or fictitious contract is enforceable is not a question of contract interpretation but a question of contract invalidity. According to section 155 CCC, the fictitious contract becomes void while the concealed contract may be enforceable, depending on whether its formation meets other validity requirements, namely the object, the form of the contract and the legal capacity of the parties (see the section on *Fictitious intentions and mistakes* above).

In exploring 'the whole contract' to determine the parties' common intention, the Supreme Court never uses evidence of prior negotiations. It usually looks at both the main and the supplemental agreements. The 'relevant documents' may be taken into consideration in contractual

[84] Supreme Court Decision No 679/2547. See also Supreme Court Decision 6843/2541 above.

[85] Supreme Court Decision No 1411/2505.

interpretation only when they are clearly connected to a valid agreement. In a case decided by the Supreme Court in 2011 AD, an insurance contract did not state a named beneficiary. The court expounded on the rule of interpretation in section 368 CCC by asserting that the interpretation of a contract following the dictates of good faith in relation to the parties' normal practice and good commercial practice should not be limited to the wording of the main contract but that it should also take into account 'relevant documents'. In the case at hand, the relevant documents included an invoice 'referred to' by an insurance policy document. The Court discovered the named beneficiary from that invoice.[86] Based on this decision of the Court, evidence of prior negotiations is unlikely to be considered as 'relevant documents'.

When prior negotiations contradict the normal practice of the parties or good commercial practice, the latter will most likely prevail. If the following hypothetical situation were to arise in Thailand, the result should not be surprising. A sells a piece of land to B. The exact price is to be determined on the date of conveyance, based on a formula specified in the contract. Among other things, the formula refers to 'the price to be paid for successful installation of water pipes by the developers.' On the date of conveyance, A argues that the formula refers to the price without value added tax (VAT); B argues that it refers to the price inclusive of VAT. Usually, businesses in the jurisdiction of A and B refer to prices exclusive of VAT. However, previous drafts of the contract which were exchanged between the parties explicitly refer to 'the price (VAT-inclusive) to be paid for successful installation of water pipes by the developers'. At some stage of the negotiations, the wording in brackets was dropped, although it is not clear why. If the question as to whether the formula refers to the price inclusive of VAT were to be raised in a Thai court, it is reasonable to believe

[86] See Supreme Court Decision No 8724/2554.

that the court will refer to good commercial practice to rule in favour of prices exclusive of VAT.[87]

4.5 Interpretation in Favour of the Party Who Incurs the Obligation

In addition to sections 171 and 368 CCC, there is another rule of interpretation which seems to supplement these provisions. Section 11 CCC states:

> In case of doubt the interpretation shall be in favour of the party who incurs the obligation.

This rule was copied from Article 1162 of the 1804 French Civil Code.[88] There is no clear guidance as to who 'the party who incurs the obligation' is, but it is commonly understood among Thai lawyers to be 'the debtor'. In ascertaining the common intention, unlike sections 171 and 368, which are often collectively cited, Section 11 is only occasionally employed independently. Arguably, it usually applies when the court has to determine the scope of the debtor's liability. It may also be noted that section 11 is invoked when the main tools are ineffective, although it is sometimes referred to along with the latter. In one case, one of the terms of a surety agreement stipulated that the surety was to be responsible for all present and future debts owed to the bank and incurred by the debtor for a total amount of up to 1,500,000 Baht. The bank requested the surety to pay the debt incurred by the debtor. The Supreme Court referred to section 171 to determine the surety's scope of liability. It contended that, in case of doubt, the search for a common intention must be in favour of the surety who may be liable for the disputed obligation. It held that the surety's liability should be limited to the obligations that the debtor incurred as a

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[87] Please note that under the current Thai tax law regime, a sale of land is not subject to VAT.

[88] 'Dans le doute, la convention s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation.'

principal debtor.[89] The surety agreement did not specify the amount of the debt, notwithstanding that the contract also included a statement that the surety agreed to accept all liabilities incurred by the debtor. The Court held that the agreement was unenforceable.[90] In an interesting case, which was decided in 2006 AD, one of the terms of the loan agreement stated the interest rate as 1 per cent per month. However, the next clause conflictingly stated the interest rate as 1.5 per cent per month. The court chose to enforce the latter, showing the higher rate, only to nullify it. According to a statute outside than the Civil and Commercial Code, the interest rate for a loan may not be higher than 15 per cent per year. Any provision on interest that is contrary to this rule becomes void, and as a result the loan contract contained no agreement on interest at all. This effectively means that the creditor cannot demand interest until the debtor is in default. In this case, only default interest is permitted. In the absence of a default interest agreement, the law offers a rate of 7.5 per cent per year.[91]

Where the interpretation of contract in favour of the debtor conflicts with the interpretation of contract according to the dictates of good faith, Thai law seems to incline towards the latter. This can be illustrated by the following hypothetical example. A builder undertakes to construct a building comprising three flats for a commercial developer. Clause 13 of the contract gives the builder 50 days to complete the work; Clause 14 provides for the payment of liquidated damages in the event of delay. The wording of the contract is not clear as to whether the 50-day period applies to the construction of just one flat or of the whole building. The builder finishes the first flat after 40 days but takes a further 30 days to complete work on the other two. An expert opinion given by an engineer (which is admissible

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[89] Supreme Court Decision No 5151/2543. See also Supreme Court Decision Nos 2393/2537 and 6955/2538.

[90] Supreme Court Decision No 199/2545. See also Supreme Court Decision No 8604/2544.

[91] Section 224 CCC.

under the relevant rules of procedure) states that the construction of a single flat of the kind agreed would normally take no more than 15 days. The question arises as to whether the developer can claim liquidated damages. The builder may cite section 11 CCC to reap the benefit of doubt, while the developer may resort to the principle of good faith under section 368 CCC to insist that the 50-day period applies to the construction of the whole building. It is likely that the developer would win the case and be awarded liquidated damages.

5. Conclusion

Since its two main rules of interpretation, sections 171 and 368 CCC, were copied from the German Civil Code, Thai law may be expected to follow in the footsteps of German law. However, while German legal scholars are enthusiastic about conceptualizing contractual interpretation, this aspect has so far received little attention in Thai legal literature. It is the Thai courts that provide the many examples that allow us to make some observations and comparisons. Unfortunately, they provide no indication as to a possible 'Thai' brand of contractual interpretation reflecting particular national or societal values or a particular outlook on standards of reasonableness that might differ from such standards in Germany. In Thailand, good faith has universal applicability in identifying and interpreting contracts. It assists the courts in implying a contractual duty into a contract and is the main tool used to interpret a contract. Despite being products of two conflicting theories, namely intention and expression theories, sections 171 and 368 CCC are often cited collectively when a contract is interpreted. Thai courts have combined these two provisions to establish common guidelines for interpretation to the effect that in interpreting a contract, the common intention of the parties must be ascertained in accordance with the dictates of good faith in relation to good commercial practice. Thai courts neither define nor distinguish between these two concepts. Their collective citation has become a pattern in the application of sections 171

and 368 CCC. Although we have yet to obtain clear criteria for invoking good faith and good commercial practice by the courts, it is clear that we cannot rely on the literal meaning of the words used in the contract to interpret contractual terms. Thai courts can revoke a term even if is written in the clearest possible manner. This may improve the debtor's chance of relief from a contractual obligation.

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