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English Contract Law after Brexit

Development of the Duty of Good Faith

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I Introduction

In 2020, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) came into effect, creating the regional economic zone of eleven Pacific countries, i.e., Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and Japan. In 2021, other countries, including the UK and China, applied for membership, which is certain now that the UK will join soon, probably in early 2023. After the UK's joining, the CPTPP would have the world's most significant economic alliance with member countries on five continents. It would provide the private sector with, in addition to an opportunity for free trade within the member countries, a chance to set up a strategic business collaboration for worldwide marketing based on a contractual relationship.

For commercial lawyers, it is noteworthy that seven of the members (Australia, Bru-

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nei, Canada, New Zealand, Malaysia, Singapore and the UK) are common law countries, while the other five (Chile, Mexico, Peru, Vietnam and Japan) adopt civil law systems. Accordingly, we should care more than before about the difference between common law and civil law. In cross-border strategic commercial transactions, generally, governing law of the contract is not a big issue because the parties define most terms of business in a detailed written contract drafted by skilled commercial lawyers. Nonetheless, there may be a dispute concerning the interpretation of the written contract or matters not clearly stated in it. In such a case, courts in most jurisdictions will resolve the dispute by the general rule of law, such as the duty of good faith that supplements incompleteness and ambiguity of the contractual terms. Accordingly, it is critical to understand how the rules concerning good faith in common law countries differ from those under civil law.

In Japan, like in other civil law countries, the principle of good faith overrules the conduct of people in every transaction.¹⁾ It imposes both negotiating and contracting parties to act honestly, trustfully, fairly and equally. It restraints or qualifies any rights and remedies, and it releases liabilities under contracts and statutes by way of interpretation.²⁾

In England, on the contrary, there is no general duty of good faith. The courts have held that the duty to act in good faith is not required when performing obligations or exercising rights in ordinary commercial contracts.³⁾ However, since the beginning of this century, a legal concept of “good faith” is gradually gaining ground, and judgments, recognising the existence of a duty of good faith, have started to appear in the UK court

1) Civil Code art. 1 para. 2.; Tomohiro Yoshimasa ‘Shingi Seijitsu no Gensoku [Principle of Good Faith]’ in Akira Yamanome (ed), *New Commentary of the Civil Code of Japan Vol 1* (Yuhikaku 2018) 138.

2) Shuichi Miyashita ‘Kihon Gensoku [Basic Principle]’ in Yoshihisa Noumi and Shintaro Kato (eds), *Ronten-Taikai Hanrei Minpou Vol 1 [System of Issues on the Civil Code Cases]* (3rd edn, Dai-ichi Hoki 2018) 27.

3) *Chitty on Contracts* (33rd ed, Sweet & Maxwell 2020) 1-044; Edwin Peel, *Treitel The Law of Contract* (15th ed, Sweet & Maxwell 2020) 1-004; *White & Carter (Councils) Limited v McGregor* [1963] AC 413, 430.

cases.

This paper examines recent UK cases where the court decided the issues concerning the existence and application of a duty to act in good faith in contracts. Based on the case analysis, the paper then identifies the current state of rules concerning the duty of good faith in the UK compared to the Japanese principle of good faith to suggest some tips for drafting a contract between the UK and Japanese parties.

II Express duty of good faith

1 Duty to act with the utmost good faith

In some recent cases, High Court judges held that clauses specifying the duty of good faith were enforceable. In *Berkeley Community Villages v Pullen*,⁴⁾ the claimant, a property developer, undertook to develop a property owned by the defendant. The contract between the parties provided that the claimant should obtain a development permit from the government, implement the development project, and sell the property on the market. It also provided that the parties should split equally the profit from such a sale. However, before the claimant obtained a development permit, the defendant attempted to sell the property. The claimant brought an action seeking an injunction restraining the defendant from selling the property. The claimant contended the defendant's breach of a clause in the contract, stipulating that "in all matters relating to this Agreement, the parties will act with the utmost good faith towards one another". The High Court judge (Morgan J) interpreted that clause as obliging both parties to comply with reasonable commercial standards of fair-trading practice in their conduct concerning the contract, act faithfully to the agreed common purpose, and meet the other party's legitimate expectations.⁵⁾ The judge held that the defendant breached such obligations in the clause.

4) [2007] EWHC 1330 (Ch).

5) *ibid* [97].

2 Scope of Good Faith Duty

Subsequent, a few cases followed this decision. However, generally, the courts do not easily find a breach of such a duty.⁶⁾

In *Gold Group Properties v BDW Trading* (*Gold Group case*),⁷⁾ the claimant and the defendant entered into a property development agreement. The claimant agreed to build a dwelling on land owned by the defendant, sell that property, and split the profit from the sale equally between the parties. However, the property market deteriorated after the development project started, making the project unprofitable. The claimant, therefore, proposed postponing the implementation of the project for two years. But the defendant refused to negotiate with the claimant to amend any contractual terms. The contract provided for an “obligation to act in good faith with each other and make all reasonable efforts to comply with the contract terms”. The claimant claimed that the defendant’s refusal to negotiate was a breach of this obligation and sought termination of the contract and compensation for damages. The High Court judge (Furst J), citing an Australian Supreme Court decision (*Overlook v Foxtel* [2002] NSWSC 17), held that the duty of good faith ‘does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract,’ and rejected the claimant’s claim.⁸⁾

3 Comparison with Japanese Good Faith

In the above *Gold Group* case, the judge decided that the claimant’s freedom to choose whether to negotiate a deal was not deprived by the duty of good faith. In one case of Tokyo District Court,⁹⁾ the judge decided the opposite in a dispute under similar circumstances. The case concerns a joint business project under a contract whereby the defendant produced and sold aluminium printing plates under the technology of the

6) Chitty (*ibid*), 1-053; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch).

7) [2010] EWHC 323 (TCC).

8) *ibid* [91].

9) Judgment of Tokyo District Court of 24 April 2007 (H17 (wa) 11232) LLI/DB.

claimant. When the business became unprofitable due to difficult market conditions by the severe depression of the global economy, the defendant proposed to the claimant to resolve the joint project. However, the claimant refused to negotiate. Then, the defendant stopped the business operation to stop a continuous deficit. The claimant claimed damages for the defendant's breach of the contract. The court decided the claimant's attitude, refusing any discussion with the defendant, was against the duty of good faith and rejected the claim.

Comparing this case with the decision in *Gold Group* case indicates that the meaning of good faith in England is not the same as in Japan. A duty to negotiate may be enforceable in the UK only if the contract expressly provides such an obligation regarding a specific matter.¹⁰⁾ In Japan, the obligation to negotiate in good faith arises without agreement.¹¹⁾

III Implied duty to act in good faith

1 *Yam Seng* case

In the judgment of *Yam Seng Pte Ltd v International Trade Corp Ltd* (*Yam Seng* case),¹²⁾ Justice Leggatt first decided that a specific type of contract, which he named a relational contract, would imply a general duty of good faith. In that case, the claimant is an exclusive distributor of branded perfumes in the duty-free zone in Singapore. When the claimant inquired about the retail price of the same products in the domestic market, the defendant supplier gave incorrect information, the amount higher than the actual price. Relying on that false information, the claimant set the duty-free price and suffered damages. Justice Leggatt says that in a relational contract, such as a long-term distributorship in question, a duty of good faith is implied based on the par-

10) *Walford v Miles* [1992] 2 WLR 174; *Petromec Inc v Petroleo Brasileiro SA Petrobras* (No. 3) [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121.

11) Judgment of Tokyo District Court of 16 April 2013 (H25 (wa) 28776) LLI/DB; Judgment of Tokyo District Court of 19 August 1959 Hanji 200-22; Takashi Uchida, *Minpo II* [*Civil Law II*] (3rd ed, University of Tokyo Press 2011) 77.

12) [2013] EWHC 111 (QB).

ties' presumed intention.¹³⁾ He then decided that the defendant breached an implied good faith duty by giving false information knowing that the claimant would rely on it. Following the *Yam Seng* case, there are ten High Court cases where the good faith duty implied in a relational contract was disputed. In the first four cases, judges admitted a breach of good faith duty, adopting the same approach suggested by Justice Leggatt in the *Yam Seng* case.¹⁴⁾ However, in the more recent six cases, judges did not accept a violation of implied good faith duty for the reasons explained below.

2 Cases denying claims on a breach of the good faith duty

There are four hurdles to deciding on a violation of an implied good faith obligation. First, the contract involving such a duty must be relational. Second, the court finds such an implied term only when the tests for ascertaining terms implied in fact (fact tests) are satisfied. Third, there is no such duty if the express terms exclude it. Last, the court only admits a breach of such a duty if it considers a party's conduct dishonest or commercially unacceptable. Details of each hurdle with cases denying a violation of the good faith duty are dealt with below.

(1) Relational Contract

A relational contract is dependent on context. In *Bates v Post Office Ltd* (*Bates* case), Justice Fraser listed the nine matters to consider to find that a contract is relational.¹⁵⁾ Those matters include that (i) an express agreement excluding the duty of good faith is absent; (ii) the parties intend to continue the contract over a long period; (iii) the fulfilment of each party's role is intended as an essential obligation in the transaction; (iv) mutual co-operation between the parties in the performance of the contract is agreed

13) *ibid* [142].

14) These are *Bristol Groundschool v Intelligent Data Capture* [2014] EWHC 2145 (Ch), *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), *Sheikh Tahnoon Al Nehayan v Kent* [2018] EWHC 333 (Comm), and *Bates v Post Office Ltd (no 3)* [2019] EWHC 606 (QB). However, in the *Bristol Graoudschool* case, the judge decided that a breach of the duty was not serious enough to repudiate the contract.

15) [2019] EWHC 606 [725].

upon; (v) the spirit and objectives of the contract are difficult to state in writing entirely; (vi) the parties rely on a different kind of relationship of trust to each other than a relationship of fiduciary duty (in trust or agency); (vii) the contract requires close liaison and co-operation based on a relationship of trust between the parties; (viii) one or both parties are expected to invest substantially, and (ix) the contract is one in which an exclusive relationship exists. None of the matters, other than (i) below, is a decisive factor, and obviously, not all long-term contract is relational.

In *Cathay Pacific Airways Ltd v Lufthansa Technik AG* (*Cathay case*),¹⁶⁾ the claimant, an airliner, commissioned the defendant, an aircraft maintenance company, to provide maintenance and management services regarding aircraft engines. The agreement for such services (Service Agreement) contained a clause that the claimant may voluntarily exclude any engines from the services by notifying the defendant. To save unnecessary expenses, the claimant gave notice of excluding some engines under this exclusion notice clause. However, the defendant contended that the claimant could not unilaterally exclude engines without reasonable grounds, such as disposal or sale, arguing that both parties owed an implied duty of good faith because the Service Agreement was a relational contract. The High Court (Kimbell QC), referring to the lack of (v), (vi), (vii), and (viii) of the eleven factors listed in the above *Bates* case, held that the Service Agreement was an ordinary contract for commercial services that did not amount to a relational contract with an implied good faith duty.¹⁷⁾

In another case, *Zymurgorium v Hammonds of Knutsford* (*Zymurgorium case*),¹⁸⁾ the parties agreed to sell gins and gin liqueurs for resale to specific customers of the buyer orally. Still, the supplier sold its products to the buyer's customer directly. The buyer argued that the supplier violated the implied good faith duty. However, the judge denied such an argument, holding that the contracts for sale were not relational.¹⁹⁾ In so deciding, he considered lack or insufficiency of (iii), (iv), (v), (vi) and (vii) of the

16) [2020] EWHC 1789 (Ch).

17) *ibid* [225]-[237].

18) [2021] EWHC 2295.

19) *ibid* [168].

above factors in the Bates case.

(2) Fact Tests of Implied Terms

The Supreme Court ruled that a court should not find an implied term in a contract unless satisfied with either or both of the following fact tests. The first test is whether or not such a term is necessary to achieve the purpose of the business contemplated by the contract (the business efficacy test).²⁰⁾ Alternatively, such a term must be the one that a reasonable person considers naturally involved in the contract without express provision (the officious bystander test). These fact tests must be satisfied to admit an implied duty of good faith in a contract, even though it is relational.

In *UTB LLC v Sheffield United Limited* (UTB case),²¹⁾ the claimant, a company owned by a Saudi Arabian prince, agreed with the defendant, the manager of a UK football club, Sheffield United (Club), to invest in and jointly hold the Club by purchasing 50% of the Club shares from the defendant. The defendant owned the football ground and other property, letting them to the Club. The contract between the parties contained a clause that if the claimant acquired the controlling shares, i.e., over 75%, the Club should purchase the football ground from the defendant (Property Purchase Clause). The contract also provided that in the event of a deadlock, either party may offer to buy the other's shares at the proposed price (Deadlock Clause) and that, in such a case, the other may give the notice to buy the former's shares at the same price (Roulette Notice). When a dispute occurred between the parties, the defendant made a purchase offer under the Deadlock Clause. The claimant wanted to make a Roulette Notice, but if it did so, it would own the controlling shares, which would trigger the Club's obligation to purchase the football ground under the Property Purchase Clause. To avoid such property purchase obligation, the claimant's owner incorporated another company and had the claimant transfer 40% of the Club's shares so that the claimant owned only

20) *Arnold v Britton* [2015] UKSC 36; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Wood v Capita Insurance Services Limited* [2017] UKSC 24; *Chitty* (n 3), 1-056; *Treitel* (n 3) 6-049; J Beatson and others, *Anson's Law of Contract* (Oxford 2020) 179-184.

21) [2019] EWHC 2322 (Ch).

10%. Then the claimant made a Roulette Notice to purchase the defendant's shares. The defendant contended that such acts to avoid the obligation under the Property Purchase Clause breached the good faith duty implied in the contract, which should be relational. The High Court judge (Fancourt J) held that whether an agreement contained an implied duty of good faith should be ascertained by the business efficacy test or the officious bystander test set out by the Supreme Court, rather than whether the contract was relational.²²⁾ The court found that the detailed agreement was drafted by commercial lawyers for the common benefit of the parties and that it contained individual clauses specifying obligations of good faith. The court rejected the defendant's argument, finding no implied clause establishing a duty of good faith in light of the above findings.²³⁾ The judgement of the above referenced Cathay case also applied these fact tests. As mentioned above, the judge (Kimbell QC) ascertained that the Service Agreement was not relational. Still, he also held that, even though the Service Agreement was relational, a mutual obligation of good faith was not considered objectively obvious to be what the parties intended, nor was such an obligation necessary to give business efficacy to the agreement.²⁴⁾ To reach that decision, he took into account that two commercial parties carefully drafted the Service Agreement with the assistance of skilled commercial law firms and that carefully balanced risks and rewards in explicit formulas and matrices.

(3) Express Exclusion

Because a good faith duty is merely the parties' presumed intention, there is no such duty if the express terms exclude it.

According to the judgment in *Taqi Bratani Ltd & Ors v Rockrose UKCS8 LLC* (Taqi case),²⁵⁾ a clause expressly providing one party's absolute and unconditional right will exclude the duty to exercise such right in good faith. In this case, the five companies, including the four claimants, entered into a joint operating agreement (JO Agreement)

22) *ibid* [203].

23) *ibid* [213].

24) [2020] EWHC 1789 (Ch) [222]-[224].

25) [2020] EWHC 58 (Comm), [2020] 2 Lloyd's Rep 64.

for oil-producing blocks in the Blair field in the North Sea and managed each block as an unincorporated joint venture. The four claimants provided the necessary funds for the mining concessions and blocks' operation to receive profits in proportion to their share of the investment. The other company was appointed as the operator of the blocks (Original Operator) to carry out all operational and commercial activities. The JO Agreement had a clause that the Original Operator was to be dismissed by unanimous consent of the four claimants (Dismissal Right Clause). Subsequently, when the defendant, having no experience in the mining business, announced acquiring and controlling the Original Operator, the claimants decided to remove it by the Dismissal Right Clause. Then, one of the claimants became the new operator (New Operator). The defendant disputed the validity of this dismissal, arguing that since the JO Agreement constituted a relational contract, the claimants owed an implied duty of good faith. It contended that the New Operator instigating the other three claimants to remove the Original Operator to benefit from being the operator itself was a breach of its duty of good faith. The High Court (Pelling QC) rejected the defendant's argument. Although the JO Agreement may be relational, no implied duty of good faith was presumed because the Dismissal Right Clause expressly empowered the claimants with an absolute and unconditional right of dismissal.²⁶⁾

Further, in *Russell v Cartwright* (*Russell case*),²⁷⁾ the court construed a contract having an express provision concerning a good faith duty for a specific matter as excluding a general good faith duty. In that case, the claimant and three defendants entered into a joint venture agreement (JV Agreement) for a property development business. Each party owned 25% of the shares in the joint venture company (JVC) and served in the office of a director. A few years later, the claimant has ceased contributing to the JVC's business. Then, the claimant expressed that it would withdraw from the JVC and began negotiating withdrawal terms with the defendants. Following several months of discussion, the defendants agreed that the claimant would step down as director and transfer

26) Ibid [56].

27) [2020] EWHC 41 (Ch), EGLR 11.

its shareholding in the JVC to the defendants. In return, the claimant would receive a share of the proceeds of any ongoing projects. In parallel with the withdrawal discussion with the claimant, the defendants were talking with a third party for the JVC to take on a new property development project. Shortly after the claimant withdrew from the JVC, the new project commenced. The claimant sought damages based on the breach of the duty of good faith implied in the JV Agreement, contending that the defendants' nondisclosure of the planned new JV business to the claimant, a JV partner, was against that duty. The court took into account that the JV Agreement contained express provisions specifying the duty of good faith concerning specific matters, such as "duty to act in good faith as regards the procurement of business", and held that no other implied terms specifying a general duty of good faith, including the duty of disclosure in question, were implied in it.²⁸⁾

(4) Breach

Even if a court finds an implied duty of good faith in a contract, it does not decide on a breach of such duty easily.

In *Essex County Council v UBB Waste (Essex) Ltd (Essex case)*,²⁹⁾ the claimant, Essex County Council, entered into a 25-year contract with the defendant to design, build, finance, commission, operate and maintain a mechanical-biological waste treatment plant to treat waste in the county. Under the contract, following the facility's completion, a commissioning period was to be followed by an acceptance test to ensure the facility met the contract's performance requirements. However, the defendant failed to design and build the facility properly and could not pass the acceptance test by the contractual deadline. The claimant, therefore, terminated the contract. The defendant disputed the validity of the termination, arguing that the claimant had breached its implied duty of good faith. According to the defendant, when the defendant offered the claimant to ease the requirements for passing the acceptance test, the claimant should have

28) *ibid* [89].

29) [2020] EWHC 1581 (TCC).

discussed the defendant's proposal in good faith. The High Court (Pepperall J) held that the contract in question was a relational contract and contained a duty of good faith. However, the judge decided that the defendant was not in breach of that duty. According to the judge, the nature of the responsibility was not to engage in conduct that would be "unacceptable as a commercial activity to a reasonable, honest layperson". The duty of good faith does not extend to an obligation to give up contractual rights acquired.³⁰⁾

3 Comparison with Japanese good faith duty

Under Japanese law, the principle of good faith is the overriding rule that applies to all types of contracts and negotiations without regard to the nature or characteristics of any contractual provisions. The principle may even amend or exclude express terms by way of interpretation.³¹⁾ Accordingly, the above-mentioned first three hurdles for good faith duty under England law (i.e., the contract must be relational, satisfy the fact tests for implied terms, and have no provision to exclude such duty) do not exist in Japan. However, it does not indicate that the Japanese court may freely use the good faith principle in all cases. The doctrine only applies to specific categories of disputes under particular types of factual situations according to the rules established by cases, like case law in common law countries.³²⁾ Based on those 'court-made' rules, in most cases, the Japanese court's decision would not be so different from those of English courts. The categories of disputes that the court would apply the good faith principle include those concerning (i) unilateral termination of a continuous contract, (ii) nondisclosure or false statement of important facts, (iii) conducts against the objectives of the law or contract, (iv) inconsistency with the previous conduct or undertaking, (v) delay in exercising rights, (vi) refusal to negotiate under certain circumstances, etc.³³⁾ Among the

30) *ibid* [116], [283].

31) Judgment of Supreme Court of 27 November 2012 Saimin 242-1, Hanta 1384-112.

32) See Makoto Shimada 'Termination of a Continuous Contract and Good Faith under Japanese and English Law' *Keio Law Journal* No 38 (2017) 13, 16.

33) Yoshimasa (n 1), 144; Miyashita (n 2), 31.

above six UK cases that the courts denied violation of a good faith duty, the disputes in the *Cathay* case, the *Taqa* case and the *Essex* case are categorised as (i) above (i.e. disputes concerning unilateral termination of the contract). The issue in the *Russell* case appears to be included in the category (ii) above (i.e., nondisclosure of facts). The situations in the *UTB* case and the *Zymurgorium* case are within the class (iii) (i.e., a party's conduct against the objective of the contract). Below are analyses of possible decisions of a Japanese court in the same circumstances as in these UK cases.

(1) *Cathay, Taqa and Essex cases*

According to a rule derived from Japanese cases that applied to the category (i) disputes, a commercial agreement between parties having equal bargaining power may be terminated with an event reasonably foreseeable, expected and agreed upon.³⁴⁾ Applying such a rule to the facts of these three cases, a Japanese court would likely reach the same conclusions as the UK courts if claims in the same factual situation were brought before it. In these cases, the reasons for exercising the rights of exclusion, dismissal and termination under the express terms of the contract were reasonably foreseeable and expected by the parties when they executed the contracts.

(2) *Russell case*

Under the good faith duty, a contracting or negotiating party, having superior knowledge or experience, shall disclose information that would affect the decision making of the other party.³⁵⁾ In a contract between the parties having expertise, or the same level of information accessibility, the court rarely finds a breach of the duty of disclosure.³⁶⁾ In the *Russell* case, the claimant was one of the JV partners who could have accessed the information if it had contributed to the JV business but failed to do so. Accordingly,

34) Shimada (n 32), 31, 35, 37.

35) Judgment of Supreme Court of 16 July 2009 Minshu 63-6-1280; Judgment of Supreme Court of 18 December 2009 Hanta 1318-90.

36) Hiroyasu Nakada *Keiyakuho* [*Contract Law*] (new ed, Yuhikaku 2021) 130; Judgment of Tokyo High Court of 16 April 2009 Hanji 2078-25.

a Japanese court would most likely deny the breach of the duty to disclose.

(3) *UTB and Zymurgorium cases*

In these cases, the Japanese court would likely apply the rule of good faith differently from the UK judgments. Still, in the end, both courts would reach the same conclusion. In the *UTB* case, the UK court examined the fact tests and found no implied clause establishing a duty of good faith. However, the court decided that the claimant breached another implied obligation. In this case, the owner of the claimant set up another company and used it to evade the contractual obligation (i.e., the property purchase requirement). Considering this fact, the court ascertained by applying the officious bystander test an implied term not to willfully obstruct or hinder the contractually agreed deal pursuant to the Property Purchase Clause.³⁷⁾ Under Japanese law, this is a typical example where the court would apply the good faith principle. In one Supreme Court case where the claimant leased its property for the defendant's nursing home operation, the property lease contract provided that if the lessee (the defendant) had substantially changed the identity, the lessor (the claimant) was entitled to terminate the lease and demand a penalty. To avoid the defendant from the penalty payment, the owner of the defendant set up another company and merged it with the defendant's nursing home business divided from its other businesses. As a result of the merger, the nursing home business and the property lease contract were duly transferred from the defendant to the new company. When the claimant claimed the penalty against the defendant in breach of the contract, the defendant contended that it was discharged from the lessee's obligation because it was no longer a party to that lease contract. The Supreme Court did not permit the defendant's assertion, holding that conduct of evading an express term of the agreement was unlawful as against the good faith principle.³⁸⁾

In the *Zymurgorium* case, the court denied the implied good faith duty because the contract was not relational. Nonetheless, the judge decided that, according to the business

37) n 21 [218]-[224].

38) Judgment of Supreme Court of 7 March 2013 (H23 (ju) 1493) Hanta 1389-95; Decision of Supreme Court of 19 December 2017 (H21 (kyo) 10) Minshu 71-10-2592.

efficacy test, the sales contract included the seller's obligation not to sell to the buyer's customers directly because the parties agreed on the sale of gins and gin liqueurs for resale to specific customers of the buyer.³⁹⁾ In Japan, that situation is another typical example of applying the good faith principle, under which an agreement shall be construed to accord with the parties' agreed objective.⁴⁰⁾ In a Supreme Court case, the parties entered into a dispute settlement agreement whereby the claimant agreed to pay the settled amount to the defendant promptly after the defendant cancelled the registration of a seizure on the property, and the defendant agreed to transfer the property to the claimant upon receipt of the payment. The agreement did not provide the defendant's obligation to cancel the seizure registration. Nonetheless, the Supreme Court decided that the defendant was obliged by the agreement to cancel the seizure registration promptly, taking into account that the objective of the agreement was to settle the dispute concerning the property concerned.⁴¹⁾ The court held that a contract should be interpreted in accordance with the good faith principle.

The above analysis indicates that good-faith rules in Japan appear more prominent than in England. However, the UK courts that denied good faith duty reached the same conclusion applying another implied duty.

IV Conclusion

UK courts admit a duty of good faith if expressly provided in the contract. However, generally, the court does not find a breach of such duty so easily unless a party acted dishonestly. The court may also find an implied duty of good faith in a contract, but only under limited circumstances, i.e., if the contract is relational, satisfies the business efficacy test or the officious bystander test, and contains no express exclusion clause. And a breach of such a duty is admitted solely if a party's acts were commercially un-

39) n 18 [159], [160].

40) Sakae Wagatsuma, *Shintei Minpou Sousoku*. [*General Provisions of Civil Code*]. (Yuhikaku 1965) 34, 255.

41) Judgment of Supreme Court of 5 July 1957 Minshu 11-7-1193.

acceptable. However, UK courts that deny good faith duty may resolve unfairness by applying other implied terms using the business efficacy test, etc. In other words, regarding the issues where Japanese courts decide by using the good faith principle, English courts would reach the same conclusion ascertaining a breach of a specific implied term without finding a general duty of good faith.

Based on these analyses, there are some tips for drafting a contract between parties in civil law and common law countries. Firstly, in principle, it is desirable to specify the contents of duties to the extent practically possible. Secondly, if you need to rely on the general duty of good faith, you should list provisions requiring such commitment and state expressly. Also, if you would like to avoid good faith duties implied in respect of the performance of specific obligations in the contract, list such provisions and exclude good faith duties expressly. Lastly, you should carefully draft other explicit provisions to avoid loopholes in contractual responsibilities, deal with hardship, etc.