MINISTRY OF EDUCATION AND TRAINING MINISTRY OF JUSTICE
HANOI LAW UNIVERSITY

NGUYEN ANH THU

# THE PRINCIPLE OF GOOD FAITH UNDER THE CONTRACT LAW OF VIETNAM AND SOME SELECTED COUNTRIES IN COMPARATIVE PERSPECTIVE

SUMMARY OF LAW THESIS

HANOI – 2020

MINISTRY OF EDUCATION AND TRAINING MINISTRY OF JUSTICE
HANOI LAW UNIVERSITY

# THE PRINCIPLE OF GOOD FAITH UNDER THE CONTRACT LAW OF VIETNAM AND SOME SELECTED COUNTRIES IN COMPARATIVE PERSPECTIVE

**Specialization: Civil Law and Civil Procedure**
**Code: 9 38 01 03**

**SUMMARY OF LAW THESIS**

**HANOI – 2020**

# PREFACE

The principle of good faith is the fundamental principle of almost all legal systems in the world, including Vietnam. However, Vietnamese legal scholars do not seem to have paid due attention to this principle. This fact is reflected in the quantity and the depth of researches referring to this principle as well as practice application of Vietnamese Courts to resolve contractual disputes.

With the introduction of the Civil Code 2015 (CC), the scope of good faith principle adjusts contractual relations in Vietnam has been extended to all stages of contract: pre-contractual, performance and termination. However, while the provision acknowledges the principle of good faith is highly generalized, other provisions considered as concretization of this principle still have drawbacks. This leads to the fact that good faith principle has not been fully and consistently understood, thus significantly affecting the protection of parties' legitimate rights and interests as well as failing to reflect the true value of the rule of law that Vietnamese government pursuits. Meanwhile, the principle of good faith is considered an effective tool to protect legitimate rights and interests in modern legal systems that recognize this principle as in Germany, even legal systems which do not recognize the general principle of good faith as in England also applies this principle or its variations to protect the legitimate rights and interests of contractual parties.

For the above reasons, studying the principle of good faith in Vietnamese contract law is an objective requirement both in theory and in practice, especially in the context of Vietnam's increasingly extensive international economic integration. Therefore, the study of *"The principle of good faith under the contract law of Vietnam and some selected countries in comparative perspective*" will bring both theoretical and practical value.

The research scope of this study is the theoretical basis of good faith principle in German, English and Vietnamese contract law, in which the Civil Code 2015 will be used as the main research subject for Vietnamese contract law. In addition to the theoretical research, the thesis also studies courts' judgments of the three legal systems to illustrate the results of theoretical research. The research purpose of this study is to illuminate theoretical issues, issues on regulation as well as the practical issues in applying this principle under Vietnamese contract law on the basis of comparison with German and English contract law. On that basis, the thesis proposes to perfect regulations in the CC which are concretization of good faith principle in a modernization way of thought, which will in turn thereby enhance the efficiency of this principle in Vietnamese contract law. For this purpose, the thesis has the following tasks: Clarify theoretical issues of the principle of good faith, Compares the principle of good faith and its concretization under Vietnamese contract law with German and English contract law (represent civil law and common law traditions), Proposes guidelines and specific solutions to perfect regulations manifest the principle of good faith in the CC. To achieve its goal, the thesis uses the methodology of dialectical materialism, historical materialism. For Vietnamese contract law, the thesis uses the above mentioned methodologies on the basis of the Communist Party of Vietnam's perspectives, objectives and guidelines on economy, politics, culture and society.

**New contributions of the thesis include:**

***First,*** the thesis systematizes theoretical issues of the principle of good faith in contract law, including the concept of this principle in Vietnamese contract law, the characteristics and meaning of this principle in contract law as well as its scope of application under German, English and Vietnamese contract law.

***Second,*** the thesis analyzes theories related to the principle of good faith worldwide as well as perspectives of famous scholars in the world on the concept of good faith in contract law. From that the thesis introduces suggestive concept of good faith principle for Vietnamese contract law.

***Third,*** the thesis analyzes and evaluates objectively and comprehensively current legal regulations and practice in applying this principle in pre-contractual stage in a comparative perspective between German, English and Vietnamese contract law. In specific, the thesis analyzes in depth the manifestations of the principle of good faith in regulating bad faith behavior which prevent the consummation of contract and which lead to void contracts.

***Fourth,*** the thesis analyzes and evaluates objectively and comprehensively current legal regulations and practice in applying this principle in performance and termination stage in a comparative perspective between the three legal systems along with the study of a number of judgments. Specifically, the thesis analyzes the manifestations of the principle of good faith in adjusting contract contains unclear terms or absent some non-essential terms, as well as in case of unfair contract terms, hardship and abuse of termination rights.

***Fifth,*** the thesis points out shortcomings of CC's provisions which are the manifestation of good faith principle in all stages of contract and proposes to complete the CC base on the experiences learned from German and English law which are in compliance with Vietnamese contract theory and judicial practice in Vietnam.

In addition to the preface, overview of research topic, conclusion, references, the thesis includes 3 chapters:

Chapter 1. General overview of the principle of good faith in contract law

Chapter 2. The principle of good faith in pre-contractual stage

Chapter 3. The principle of good faith in performance and termination stages

# CHAPTER 1. GENERAL OVERVIEW OF THE PRINCIPLE OF GOOD FAITH IN CONTRACT LAW

## 1.1. The notion of good faith and good faith principle

Based on the typical approaches to the notion of good faith worldwide, the author agrees with the dominant point of view that it is not necessary to bring out an exact definition for the principle of good faith due to its open and flexible nature. Therefore, the content of this principle cannot be framed in a definition. Due to its open and flexible nature that allow flexible application of the principle of good faith to regulate contractual relations, the content of this principle should be determined by Courts and gradually improved through court practice.

However, in order to have an initial step in building the content of good faith principle in Vietnamese contract law, the author introduces the concept of good faith principle suggestive for Vietnamese contract law on the basis of the first three approaches as follows:

*The principle of good faith is fundamental principle of Vietnamese civil law that governs the relationship between parties during the pre-contractual, performance and termination stage of contract. Good faith principle creates standards of behavior for parties in a contractual relationship based on criteria such as honest, reasonable in the spirit of cooperation and take account rights and interests of other party, eliminates any acts with bad intentions as well as any behavior contrary to reasonable expect of the other party.*

## 1.2. Characteristics and meaning of the principle of good faith

Five characteristics of the principle of good faith include: the principle of good faith is the fundamental principle of contract law that contains ethical values; The principle of good faith is a tool to convey good values of the Constitution into contract law; The principle of good faith has flexible content; The principle of good faith is one source of contract law; The principle of good faith is one source of obligation.

The above characteristics are factors that determine the important meaning of good faith in contract law, including: An effective tool to ensure the balance of rights and interests between parties in a contractual relationship; An effective tool to ensure that the civil and economic human rights recognized in the Constitution are protected in harmony with the interests of the nation and public interests; A flexible tool that can adapt to all situations arising in social life in the absence of direct legal provisions; An orientation for the development of legal provisions and allowing Courts to contribute to the development of new legal regulations through adjudication activities; Guideline for Courts to resolve contract disputes accurately and fairly; A tool to ensure the long-term vitality of the Civil Code.

## 1.3. Development history of the principle of good faith in contract law

The principle of good faith is a principle firstly formed and developed based mutual trust between people in society, it was then heavily influenced by religious ideas, ethics, philosophy, and socio-economic development. Thus, the development of the legal principle of good faith is inseparable from ethical, religious and philosophical aspects. Although initiate as a moral concept, the principle of good faith gradually been fostered and enriched to become a legal concept along with

the development of human society. Today the principle of good faith is regarded as the fundamental principle of almost all legal systems in the world.

### 1.4. Adjustment scope of the principle of good faith in contract law

Among the three legal systems, the scope of good faith principle in English contract law is the most modest as English contract law only recognize this principle in regulating unfair terms in consumer and insurance contracts. Unlike English contract law, the principle of good faith is one of the fundamental principles of Vietnam and Germany private law in general and contract law in particular. Although there is a difference in the recognition of adjustment scope, both the Vietnamese and German law recognize that good faith principle has a wide scope of adjustment throughout all stage of a contract, including pre-contractual, performance and termination.

### 1.5. Relation between the principle of good faith and the principle of freedom of contract

The principle of freedom of contract and the principle of good faith are two main pillars of contract law. The relationship between these two principles is manifested in the fact that the principle of good faith overcomes negative effect of excessive freedom of contract, ensures parties' freedom of contract coexist reasonably and balance between parties' legitimate rights and interests. It can be seen that not only does the principle of good faith assists the principle of freedom of contract (as well as principles growth from the principle of freedom of contract) to achieve its goal but also overcomes reserve side of the principle of freedom of contract to ensure fairness between parties to a contractual relationship, protect ethical values, public order, legitimate rights and interests of parties as well as that of third parties.

## CHAPTER 2. THE PRINCIPLE OF GOOD FAITH IN PRE-CONTRACTUAL STAGE

### 2.1. The degree of recognition of the principle of good faith in pre-contractual stage under German, English and Vietnamese contract law

Although Vietnamese and German contract law both acknowledge the principle of good faith in pre-contract negotiations as well as impose legal liability for the violations of good faith obligations, good faith principle in pre-contract negotiations under Vietnamese contract law is narrower than that of German law. While German contract law recognizes good faith obligations as soon as parties enter into pre-contract negotiations, Vietnamese contract law only recognizes good faith obligations in pre-contract stage when the parties have entered into the period of offer and acceptance. English law hesitates to recognize a general principle of good faith as well as good faith obligations between parties in pre-contractual negotiations, and therefore generally does not impose liability in contractual negotiation. However, English contract law also imposes liability for blameworthy conducts in pre-contractual stage based on independent doctrines (piecemeal solutions). In other words, although there is a difference in the level of recognition of the principle of good faith in pre-contract stage, all three legal systems manage to regulate bad faith conducts through different methods.

### 2.2. Bad faith conducts preventing the consummation of contract

#### 2.2.1. Bad faith conducts preventing the consummation of contract under German contract law

Due to uphold the principle of freedom of contract, German contract law in principle allows parties to end pre-contracts negotiation without the burden of liability. In other words, German contract law gives negotiating parties the right to choose between continue negotiations to conclude a contract and end the negotiation without liability. However, due to the ethical and social approach to the principle of freedom of contract, German contract law considers that the freedom of negotiating parties must be in harmonization with social ethical values, to put it another words, the result of party autonomy (the contract) must be harmonized with the interests of society and pre-contractual negotiation is a form of friendly cooperation. On that basis, German contract law recognizes that there is a special relationship between negotiating parties (pre-contractual obligations) based on reasonable trust, so that the parties must not violation their good faith obligations (fault). The party in breach of good faith obligations must bear pre-contractual liability under German law base on the principle of good faith. The conducts considered as violation of good faith obligations might include: (1) Sudden and unjustified rupture of negotiations; (2) Initiate negotiations with no real intention to contract; (3) Continue to negotiate when no longer intend to enter into a contract.

#### 2.2.2. Bad faith conducts preventing the consummation of contract under English contract law

Due to its hesitation in acknowledging the special obligation relationship between negotiating parties, English contract law does not recognize pre-contractual liability even if one party terminate negotiations in bad faith. However, English contract law also has mechanism to protect the rights and interests of negotiating parties. Accordingly, based on the doctrine of unjust enrichment and

restitution, the unjust enriched party has to return the benefit they have received under English contract law.

In addition, based on the doctrine of misrepresentation, English contract law also imposes liability for damages to the party who acts in bad faith that prevent the consummation of contract if this party intentionally or neglect causing misrepresentation. Which means a negotiating party shall be liable for damages if she intentionally or neglect making statements that are inconsistent with reality causing damage to the other party for believing in the wrongful statement.

**2.2.3. Bad faith behavior preventing the consummation of contract under Vietnamese contract law**

Similar to German contract law, Vietnamese contract law recognizes the principle of good faith in the pre-contractual stage or recognizes the obligation act in good faith of parties when participating in pre-contract negotiations. Although recognizes good faith principle in pre-contractual stage, the scope of this principle in pre-contractual stage under Vietnamese law is somewhat limited compared to German contract law. That is while German contract law recognizes good faith obligations as soon as parties enter into pre-contract negotiations, Vietnamese contract law only recognizes good faith obligations in pre-contract stage when the parties have entered into the period of offer and acceptance. Consequently, Vietnamese contract law has not fully protected the rights and interests of the aggrieved party due to bad faith conducts preventing the consummation of contract of the other if it does not fall in either of the two cases: (1) The offeror terminates negotiation and enters into contract with a third party while awaiting for the offeree's reply, (2) Violate the duty of inform.

**2.3. Bad faith behavior lead to void contracts**

**2.3.1. Bad faith behavior lead to void contracts under German law**

Under German contract law, bad faith conducts lead to void contract can be intentional conduct such as fraud, duress or can be careless conducts such as negligent misrepresentation. Fraud during pre-contractual stage is action of one party, who, despite being aware of the misleading information or is not determine about the truthfulness of the information, gives out such information to create or to maintain other party's mistake which leading to her wrongful decision to enter into a contract based on inaccurate or incomplete information. The deceived party has the right to claim the contract as void even in case the bad faith conducts performed by a third party if this party acts for the benefit of one negotiating party and that third party's conducts have significantly affected the decision to enter into the contract of the aggrieved party, regardless of the awareness of the other party to the contract.

Although the German Civil Code has specific provisions governing fraud in pre-contractual stage, there is a lack of specific provisions for negligent misrepresentation. Stemming from this reality, the German Federal Supreme Court based on the principle of good faith and the principle of *culpa in contrahendo* in order to develop mechanism to protect legitimate rights and interests of the aggrieved party due to its reasonable belief in the neglect misrepresentation performed by the other party.

Under German contract law, duress is an act of pressure by one negotiating party to influence the free will of the other party, causing this party to conclude a contract contrary to his free will. On

the basis of Article 123 of the German Civil Code and courts practice, German legal scholars generalize duress leading to void contract, including: (1) the nature of the duress is illegal, (2) the nature of the coercive act is legal but the result (contract) is illegal, or (3) there was no strong connection between the coercive act and the result. Stemming from the point of view that the will of the coerced party is affected more strongly than the will of the deceived party, German contract law grants the right to claim the contract as void for the coerced party for contracts concluded under the influence of a third party, even in case where the other party does not know and is not obliged to know about the coercive acts committed by the third party.

**2.3.2. Bad faith behavior lead to void contracts under English law**

Besides the use of misrepresentation doctrine to regulate bad faith behavior preventing the consummation of contract, English contract law also use this doctrine to adjust misrepresentation in pre-contractual stage that lead to contract invalidation. Tradition English contract law did not acknowledge the obligation to inform in pre-contractual stage based on the doctrine of *caveat emptor* and therefore did not consider silent as misrepresentation. However, English contract law over the time has recognized exceptions of *caveat emptor*, under which, parties to pre-contract negotiations are obliged to provide information to their counterpart in a limited number of cases to protect her legitimate rights and interests. In these cases, if a party keeps silent and does not provide necessary information to the other party, their action of not providing information will be regarded as the act of misrepresentation and she will bear liability. Although expressing personal opinion in principle is not considered misrepresentation, the opinion maker shall bear liability if she is someone with a position, qualification or skill that makes the other party who reasonably trust the neglect misrepresentation to wrongfully enter into a contract contrary to their reasonable expectations.

Although neither admitting nor using the general principle of good faith to regulate cases where contracts are entered into under the impact of improper pressure in pre-contractual negotiations, English contract law also achieved similar results to German contract law through the use of the doctrine of duress and the doctrine of undue influence – doctrines regarded as alternatives for the principle of good faith. In which, the doctrine of undue influence acts as a complementation to the doctrine of duress in order to reduce the rigidity of the doctrine of duress and ensure fairness between negotiating parties. In addition, in order to protect the rights and interests of the coerced party, English contract law uses the doctrine of unjust enrichment to force the unjust beneficial party to return what they have received, therefore overcome the consequences of the coercion.

It can be seen that the doctrine of undue influence reflects partially the content of good faith principle through the assumption of the existence of improper influence in trust relationships (moral relations), thereby requiring the advantageous party to take into account the legitimate interests of the disadvantaged party and all actions of the advantageous party that do not take into account the disadvantaged party's legitimate interests are considered as act of undue influence or in other words, act of bad faith.

**2.3.3. Bad faith behavior lead to void contracts under Vietnamese law**

Vietnamese as well as German and English contract law all have mechanisms to regulate misrepresentation in pre-contractual stage to eliminate injustices. Similar to the other two legal systems, Vietnamese contract law also based on the perception of the misrepresent party in pre-contractual negotiations to distinguish two types of misrepresentation, including duress (intentionally) and negligent misrepresentation. However, Vietnamese contract law protects deceived party more strongly than German contract law against bad faith conducts which lead the deceived party to enter into a contract against her will. In addition, the Civil Code 2015 has a direct provision to regulate negligent misrepresentation while the German Civil Code lacks of direct provision to regulate this issue. Although both the German Civil Code and the Civil Code 2015 give the contracting party due to the impact of misrepresentation the right to choose between acknowledging the validity of the contract and claiming the contract as void, the Civil Code 2015 seems to recognize the principle of good faith to a large extent, allowing the balance of interests between parties as well as protect the common economic interests of society, as a result the CC not only recognizes the principle of good faith in granting rights to claim contract as void but also recognizes this principle through restricting the right to claim contract as void.

Similar to German and English contract law, Vietnamese contract law does not recognize value of contracts entered into due to the impact of improper pressure (duress, coercion). However, Vietnamese contract law does not seem to regulate behavior with improper pressure that is legal in nature but is used to achieve an improper purpose.

**2.4. Recommendations for legal improvement in Chapter 2**

*First, construct "Pre-contractual negotiations" subsection.* In order for the provisions of Vietnamese contract law governing the conduct of individuals participating in pre-contractual negotiations to be more compatible with the contract law of modern legal systems, it is necessary to add a subsection on "Pre-contractual negotiations" before the subsection on "Entering into civil contracts" in Section 7 Chapter XV of the Third Part of Civil Code 2015.

*Second, building a general provision on good faith obligations in pre-contractual negotiations.* In the subsection on "Pre-contractual negotiations", there should have an additional provision on good faith obligations in pre-contractual negotiations with the following contents:

"Article… : The obligation to negotiate in good faith

(1) Nature and legal persons are free to negotiate as long as complying with the principle of good faith.

(2) The party violating the obligation of good faith is liable for losses caused to the other party. Damages does not include benefits that would have been received by the aggrieved party if the contract was entered into.

*Third, amend the provision on "Information in entering into contracts".*

It is necessary to move the provision on "Information in entering into contracts" to the subsection on "Pre-contractual negotiations" and rename this provision to "Information in pre-contractual negotiations" with the following revised content:

"Aritcle… : Information in pre-contractual negotiations

(1) The party who knows information which is of decisive importance for the consent of the other must inform him of it where the latter legitimately does not know the information or relies on the contracting party.

(2) …

(3) The aggrieved party due to the violation of clauses 1 and 2 of this Article has the right to claim damages and claim as void according to Articles 126 and 127 of this Code."

*Fourth, instructions to clarify regulations on invalid contract due to duress and coercion.* If Vietnamese legislator chooses to protect coercion party more strongly than deceived party as in German contract law, paragraph 3 of Article 127 CC should be interpreted as the party coerced by a third party has the right to claim the contract as void even in case where the other party does not know or is not required to know about the third party's coercion. If Vietnamese legislator chooses to balanced protect rights and interests of both parties then paragraph 3 of Article 127 CC should be interpreted as the party coerced by a third party only have right to claim the contract as void in cases where the other party knows or is required to know about the third party's coercion. Therefore, paragraph 3 of Article 127 CC should provide guidance on this issue in order to uniform the understanding and application of law.

# CHAPTER 3. THE PRINCILE OF GOOD FAITH IN PERFORMANCE AND TERMINATION STAGES

## 3.1. The principle of good faith in the stage of performance of contract

Contract performance is the stage of realizing the rights and obligations of the parties based on content of the legally concluded contract. In practice, not in all cases the performance of the contract can go smoothly due to cases where the contract contains unclear terms or absent some non-essential terms, as well as in case of unfair contract terms and hardship. In these cases, the three legal systems apply the principle of good faith or piecemeal solutions to ensure the performance of contract and balanced protect legitimate rights and interests of the parties. Therefore, when analyzing the principle of good faith in contract performance, it is necessary to analyze the principle of good faith expressed through the solutions used by German, English and Vietnamese contract law for the following issues: (1) Contracts contain unclear terms; (2) Contracts absent some non-essential terms; (3) Contract with unfair content; and (4) Hardship.

### 3.1.1. Contracts contain unclear terms

In case the parties entering into a contract disagree on the meaning of one or more contract terms, traditionally legal systems may choose subjective or objective method for contract interpretation. Nowadays, due to social and commercial factors, all legal systems recognize that reasonable expectation needs to be protected, thus most modern legal systems combine both subjective and objective method in contract interpretation. German contract law regulates contracts with ambiguous content through the interpretation of contract. Contract interpretation traditionally stemmed from subjective method but after the 2002 reformation, the starting point to interpret contract change from subjective method (finding mutual intentions of parties) to objective method ("reasonable person in similar circumstance" criterion). However, it is still possible to see subjective factors in the objective approach because the meaning of contractual term is not only determined by the understanding of a reasonable person but rather interpreted according to the understanding of a reasonable person in a similar circumstance.

Basis of the objective approach to contractual interpretation of German contract law is to ensure balance between parties in a contractual relationship and is expressed in two aspects. Firstly, by interpreting contracts based on the understanding of a reasonable person, this approach warns the contracting parties to be cautious in using words because they are responsible for their declaration and the law protects the legitimate belief of the person who put trust in the objective meaning of contractual terms. Second, by interpreting contracts based on the understanding of a reasonable person placed in similar situation to the parties, this approach will prevent the Court from using abstract elements such as fairness or reasonable to arbitrarily explain the contract.

In English contract law, contract interpretation is used to regulate contracts with ambiguous content. Although traditionally follow parol evidence rule in interpreting contract, with the development through time English contract law has adopted a more open approach to interpret unclear contract terms, accordingly, the unclear contract terms will be interpreted in the formation context of the contract. Nowadays English contract law mainly uses objective approach in interpreting contracts.

Through the use of objective approach in contractual interpretation – the approach using "reasonable person in similar circumstance" criterion, it can be seen that English contract law has indirectly applied the principle of good faith in contractual interpretation because "a reasonable person is generally taken to act and react in a good faith manner".

In Vietnamese contract law, contract interpretation is also used to regulate contracts with ambiguous content. Vietnamese contract law prioritizes subjective approach to contract interpretation – the approach that seek mutual will of parties as the starting point for contract interpretation. Although inheriting subjective method as a starting point for contract interpretation, in comparison with the Civil Code of 1995 and 2005, the CC are more clearly in combine objective factors into subjective approach to determine the common will of parties to a contractual relationship. Thus, although the starting point to interpret contract in Vietnamese contract law is subjective method, other objective factors are incorporated in interpreting contract to seek parties' common will because factors like "purpose", "nature" or "custom", and in certain aspect these factors are the manifestations of good faith principle. Furthermore, the combination between subjective and objective method is also reflected in the provision that oblige parties to comply with the principle of good faith and fairness in the CC.

Thus, although there is a difference in the starting point for contractual interpretation, Vietnamese as well as German and English contract law combine both subjective and objective method as well as apply the principle of goodwill in contract interpretation.

**3.1.2. Contracts absent some non-essential terms**

To fill gaps in contracts which do not contain some non-essential content, German contract law bases on the principle of good faith to supplement the absent contractual terms through contract interpretation (supplementing function) to define rights and obligations of parties and to ensure the performance of a contract. Accordingly, contractual supplementation is first of all based on default rules. In cases these default rules are unable to provide solution for the unexpected issue, contractual supplementation will be based on the purpose of contract and parties' conduct consistent with conduct of a reasonable person who comply with the principle of good faith and commercial practice. Supplement interpretation is to identify sub-obligations that are not clearly shown in content of the contract. If the sub-obligations are obligations that were implicitly agreed between parties based on the nature, purpose and formation circumstance of a contract, the German Court will clarify these obligations based on parties' mutual will expressed through their conducts. If it does not allow to seek parties' mutual will based on their behavior, the German Court uses the principle of good faith to speculate the real intentions of parties, which is to base contractual supplementation on objective factors as the nature, purpose or the formation circumstance of a contract.

If the situation belongs to none of the above scenario, the Court will determine sub-obligations that were shown in the contract base on default rules. This means that if the parties do not have clear agreement on the non-application of a default rule or agree to an obligation inconsistent with a default rule then the default rule will have automatic force and the sub-obligations recorded in that default rule will be automatically added to the contract, thus, this kind of sub-obligation is also known as

implicit legal sub-obligation. It can be seen that based on default rules, German Court has supplemented absent contract terms objectively – not base on subjective will of parties but on default legal rules to determine contract content.

In the event that specific default rules cannot govern the disputing matter, German Courts shall determine sub-obligation base on the principle of good faith recorded in Articles 157 and 242 of the German Civil Code. Accordingly, German Courts apply the principle of good faith to add into the contract obligations such as duty of care, duty of protection, duty to inform,... based on the requirement that the parties to a contract must act according to the spirit of good faith principle.

In English contract law, if contract lacks of a non-essential clause to govern the matter of dispute, the doctrine of implied terms will be used to overcome this shortcoming. English contract law divides implied clauses into two main categories: terms implied by statute and terms implied by the courts. Terms implied by statute are supplemented to a contract by based on specific statute provisions or public policy. In case where terms implied by statute clause cannot be determined, English Courts will determine the implied term based on custom or the facts of the given case. On the basis of different types of implied terms as well as the conditions of application and the purpose of implied terms doctrine, it can be seen that English contract law also tends to recognize the principle of good faith through implied terms.

The Vietnamese Civil Code 2015 does not recognize the supplementation of non-essential clause in the contract as a case of contract interpretation. However, in general the Civil Code 2015 also uses the same solutions as in German and English contract law to regulate situations that parties do not anticipate or intentionally ignore at the time of entering into a contract. The Civil Code 2015 not only indicates the application priority of applying legal provisions but also indicates the order to applicate in case where contracts absent some non-essential terms. Accordingly, if parties did not agree on certain issue (absent in the contract), the Court will first rely on legal provisions to supplement the missing content of the contract because the content of contract includes not only terms expressed parties in the contract but also includes default rules (recognized in legal documents), which will be applied automatically unless otherwise agreed by the parties. In case legal documents do not have regulations governing the disputed situation, contract supplementation will be done based on custom. In case odd absent of custom, contract supplementation will be based on basic principles of civil law including the principles of good faith, case law and fairness.

On the basis of the provisions of Civil Code 2015, one can affirm that besides the use of legal provisions to determine the rights and obligations (sub-obligations) not expressed by the parties in the contract, Vietnamese contract law also applies the principle of good faith and fairness to define sub-obligations based on the assumption that contracting parties are obliged to act in good faith in accordance with the nature, purpose as well as formation circumstance of the contract similar to German contract law.

Thus, in spite of using different technical solutions, in general, all three legal systems aim to a common goal on filling contractual gaps that parties do not anticipate or intentionally ignore at the

time of entering into a contract to ensure the performance of the contract as well as to protect the rights and interests of parties based on default rules and the principle of good faith.

**3.1.3. Contracts with unfair content**

In German contract law, contracts that have unfair content are mainly governed by interpretative function and restrictive function of the principle of good faith regulate from Article 305 to Article 310 of the German Civil Code. Accordingly, the first test to determine the validity of a standard term is tested whether it is a part of the contract, if yes, the standard clause with be examined if it has unfair content or not. If the standard clause is unclear, it will be interpreted. To determine whether the model clause is part of a contract or not, German contract law bases on conditions specified in Article 305(2) and Article 305c(1) of the German Civil Code. To determine whether a standard clause contain unfair content or not, German contract law bases on general requirement specified in Article 307 of the German Civil Code that principle standard terms must not contrary to good faith principle, which means it must not cause unreasonably detriment to the party who do not draft the model term. In other words, a model clause would be considered unfair if the drafting party uses her advantages to pursue interest regardless of the other party's interest. In addition, the injustice of model clause is controlled based on two open lists specified in Article 309 of the German Civil Code (the list of terms is always considered unfair and therefore are absolute invalid) and Article 308 of the German Civil Code (the list of articles will be considered unfair if the drafting party cannot prove the contrary). To interpret standard clause, German contract law uses *interpretatio contra proferentem* principle, thus standard clause with unclear content must be interpreted in favor of the non-drafting party.

Under English contract law, the mechanism to control unfair clause is governed by The Unfair Contract Terms Act (UCTA) 1977, The Consumer Rights Act (CRA) 2015 and case law. It is worth mentioning that although English law does not acknowledge general principle of good faith in pre-contractual negotiations, it has approached the principle of good faith to a certain extent in performance stage through the above two documents. While The UCTA 1977 only used "reasonable" - a relatively close notion to the notion of good faith to evaluate the injustice of a standard clause, the CRA 2015 goes further to directly use the notion of good faith in evaluating the injustice of a standard clause. Accordingly, a contractual clause drafted by one party will be considered unfair if it is contrary to the requirement of good faith, which means if it creates excessive imbalance in rights and interests and cause negative effects on consumers.

Based on the above analysis, it can be seen that the mechanism to control unfair clause under English contract law also reflects interpretative function and restrictive function of the principle of good faith as in German contract law. Accordingly, the first test to determine the validity of a standard term is tested whether it is a part of the contract, if yes, the standard clause with be examined if it has unfair content or not. If the standard clause is unclear, it will be interpreted.

Under Vietnamese contract law, the mechanism to control unfair clause is governed by the Civil Code 2015 and the Consumer Protection Law 2010. In analyzing provisions of the Civil Code 2015 and the Consumer Protection Law 2010 on standard terms, it is shown that the mechanism to control unfair clause in Vietnamese law is similar to the two other legal systems. Accordingly, the first test

to determine the validity of a standard term is tested whether it is a part of the contract, if yes, the standard clause with be examined if it has unfair content or not. If the standard clause is unclear, it will be interpreted. As in German and English contract law, Vietnamese contract law also uses the *interpretatio contra proferentem* principle to interpret term drafted by one party in general and standard terms in particular.

**3.1.4. Hardship**

In German contract law, the performance of contract in case of fundamental change of circumstances governed by Article 313 of the German Civil Code, which is the codification of the doctrine of contractual basis theory – the doctrine that was renewed and applied by the German Courts along with the principle of good faith will to resolve disputes due to a change in basic circumstances. Article 313 of the German Civil Code provides the objective and subjective basis of contract and cases where contract adjustment is inappropriate. This article allowing the affected party to request renegotiation if the continued performance of the contract is unreasonable because the circumstance which is the basis of contract have changed significantly from the time concluding the contract, and that the contracting party would not enter into the contract or enter into the contract with completely different content they could foresee the change of circumstances. Determining whether a party has the right to request renegotiation depends on the circumstances of specific case, in particular the allocation of risks identified by the parties in contract as well as in law. Article 313 of the German Civil Code also states that if the parties both mistakenly understand the basis of the contract and this is only discovered by the parties after the conclusion of then it is also considered that there has been a change of circumstances. In addition, Article 313 indicates the legal consequences when the basis of contract ceases to exist. Accordingly, the parties must first attempt to renegotiate the contract. If parties cannot reach agreement on contract modification, the affected party may request termination of contract. Although Article 313 of the German Civil Code does not specify the restriction on the application of this clause, court practice has proved that the application of this clause is extremely rare. Therefore, in principle, even if the performance of one party's obligations becomes more onerous than she originally expected due to a change of the circumstances, the obligor must still perform the contract.

Article 313 of the German Civil Code is of paramount importance to legal systems around the world because it has inspired international and regional legal documents related to the field of contracts such as the PICC, PECL, and these soft law continue to inspire contract laws of many countries including Vietnam.

In English contract law, the performance of contract when a fundamentally change of circumstances occur are governed by the doctrine of frustration. Initially, the doctrine of frustration is limited to cases where the contract cannot be performed due to the death of one party or the property that is the subject of the contract is destroyed but the scope of this doctrine has been extended to cases where even though the contract can still be performed, the parties fail to achieve the purpose set out in the beginning (frustration of purpose).

It can be seen that English contract law only allows exemption of contract performance in case of force majeure and frustration of purpose. Accordingly, even economic changes will not lead to the application of frustration doctrine and even when it does, the consequence of applying this doctrine is that the contract is terminated - which in many cases is undesirable. This is partly due to the fact that English contract law that does not recognize general good faith obligation in contractual relationship. The positive aspect of this tough approach to the doctrine of frustration is that parties must pay more attention in drafting contractual terms in order to respond to hardship circumstances.

In Vietnamese contract law, the performance of contract when a fundamentally change of circumstances occur are governed by Article 420 of the Civil Code 2015. The general rule of this article is that it allows the affected party to require contractual renegotiation when there is a change in basic circumstances in order to reinstate the balance of rights and interest under the contract. Article 420 Civil Code 2015 contains many positive factors such as: (1) Provides a general legal basis for Vietnamese contract law to regulate hardship circumstances; (2) Granting the affected party with the right to request renegotiation under hardship circumstances; (3) protect the affected party excessive damage caused by hardship circumstances; and (4) help regain the balance of parties' rights and interest under the contract.

Although Article 420 Civil Code 2015 does not directly recognize parties' obligation to act in good faith when there is a fundamental change of circumstances, bases clause 3 Article 3 of the Civil Code 2015 - the provision governing all stages of contract, the dominance of good faith principle can be seen in this regulation. The recognition of Article 420 Civil Code 2015 shows that Vietnamese legislators have officially recognized adaptive function of the principle of good faith, thereby ensuring the balance of rights and interests between parties to a contract as well as ensuring the balance between parties' interests and public interests, creating stability in contractual relationships, promoting socio-economic development through encouraging parties to continue to perform contract. It can be said that Article 420 of the CC is an effective guideline for parties' behavior in a contractual relationship as well as an important legal basis for Courts to modify contract in case of hardship.

### 3.2. The principle of good faith in the stage of termination of contract

#### 3.2.1. The principle of good faith in the stage of termination of contract under German contract law

In principle, termination of contract according to German contract law is a declaration of will of the aggrieved party, however the exercise of this right also subject to a number of limitations:

*One, notice of extension for the contract performance.* This mechanism in German contract law restricts aggrieved party from arbitrarily exercise her termination rights or exercise this rights in bad faith. The aggrieved party's termination right is also restricted by the requirement related to the reasonable length of extension time, under which if length of extension time is too short, the Court will base on the principle of good faith in Article 242 of the Civil Code of Germany to reasonably extend this period or require that the extension period must be in consistent with the principle of good faith. The restriction on aggrieved party's right to terminate in relation to notification of extension is

also reflected in the fact termination right will be invalid if this rights stem from a contractual term drafted by the aggrieved party.

*Two, the seriousness of contractual breach.* Although German contract law does not require on the seriousness of the breach of contract to give rise to the right of contract terminate, it does not allow the aggrieved party to terminate the contract if the breach of contract is too trivial. Therefore, if the aggrieved party terminate the contract while the breach is too trivial, her action will be considered contrary to the requirement of good faith.

*Three, fairness and reasonableness.* The aggrieved party may not terminate the entire contract if the nature of contractual obligations is to be performed in parts and the aggrieved party has received benefits from the partial performance, or the breach of contract is entirely or mainly due to the aggrieved party's fault, or the aggrieved party did not exercise her termination right in time.

*Four, mitigation of loss.* Under German contract law, the aggrieved party's termination right does not exclude her right to claim damages resulting from the breach of contract, nevertheless the amount of damages that the aggrieved party may received depends greatly on whether this party react in accordance with the principle of good faith or not. That is, the amount of damages received by the aggrieved party will be determined based on the assessment of whether this party was at fault or not in allowing the damage to occur or increase. If the aggrieved party fails to take any measures within its capacity to minimize damage caused by the breach of contract, the aggrieved party is deemed to have partial fault to the damage and the amount of damages that this party can receive will be reduced equal to the amount of avoidable damage if this party takes measures that a reasonable person in similar circumstances would have taken to minimize losses.

It can be seen that the provisions directly restricting termination right in German contract law reflect the spirit of the principle of good faith in the stage of contract termination because they all aim at limiting the possibility of abuse of rights as well as require the aggrieved party to pay attention to the interests of the defaulting party on the basis of a reasonable assessment and consideration.

**3.2.2. The principle of good faith in the stage of termination of contract under English contract law**

According to English contract law, contracts do not automatically terminate when there is a breach of contract, the breach only gives rise to the right of contract termination of the aggrieved party, meaning that the aggrieved party has the right to choose between confirming the validity of contract and terminating the contract, but when a choice has been given, the aggrieved party cannot change its decision. The rise of termination right in English contract law depends on the nature of the term in breach or the consequences caused by the breach of contract to the aggrieved party, in other words, the right to terminate in principle arises only when the contractual breach is serious.

In order to eliminate the aggrieved party's discretion or bad faith in exercising termination right, English contract law uses a number of direct or indirect solutions to limit the right of termination.

*One, the seriousness of contractual breach in case of termination by law.* The aggrieved party's termination right only arises if it satisfies the essential condition that the obligor's breach is serious enough (determined on the types of contractual term in breach). If the term in breach is a conditions,

the right to terminate will arise and the aggrieved party may claim damages (if any). If the term in breach is an innominate term, the aggrieved party will has the right to terminate contract only if the breach causes severe consequences.

*Two, the seriousness of contractual breach in case of termination by agreement.* The right to terminate according to agreement does not require the breach to have a serious nature, to put it another words, English contract law does not have a restriction on termination right under agreement even when the breach is trivial if parties had made clear in the contract. However, English Courts might intervene to eliminate the injustice that the terminating clause may cause if the term is intentionally interpreted literally by the aggrieved party.

Thus, although not acknowledge good faith to be a general principle, English contract law still more or less uses the element of good faith to restrict termination right of the aggrieved party such as require the seriousness of breach in case of termination by law or interpret term in case of termination by agreement.

*Three, the autonomy the choose between confirmation or termination.* When the aggrieved party chooses to terminate the contract, the possibility that the defaulting party can prevent the aggrieved party from exercising this right is very low or English contract law generally will respect termination right of the aggrieved party once it is made. This means that the party in breach basically does not have a second chance to correct the breach and cannot require the aggrieved party to act in good faith in exercising her termination right. Although neither acknowledges the defaulting party's right to correct the breach nor does it acknowledge the aggrieved party's good faith obligations during termination stage, English contract law restricts termination right based on the doctrine of election and the doctrine of estoppel.

*Four, mitigation of loss.* In addition to direct solutions in restricting termination right, English contract law uses the doctrine of mitigation to indirectly limit the right of the aggrieved party by reducing the damages that the aggrieved would normally upon a breach of conditions. In fact, the doctrine of mitigation somewhat limits the autonomy of aggrieved party in choosing between termination and affirmation of the contract (restricts the aggrieved party's right to terminate). This is because through a significant reduction in damages, this doctrine has encouraged the aggrieved party to accept the defaulting party's request to correct the error (affirm the validity of contract).

**3.2.3. The principle of good faith in the stage of termination of contract under Vietnamese contract law**

Similar to German and English contract, Vietnamese contract law also gives the aggrieved party the right to choose remedies when the breach satisfy conditions to give rise to the right to terminate. To help the parties to achieve the maximum purpose of entering into a contract, Vietnamese contract law directly or indirectly restricts the aggrieved party's right to terminate in the following respects:

*One, the seriousness of contractual breach.* With regard to termination by agreement, Vietnamese contract law does not impose conditions on the seriousness of the breach, but Vietnamese law require that the breach must be serious if termination by law. The restriction on aggrieved party's termination right is also demonstrated through the requirement that the aggrieved party will be liable

if the contract is unreasonably terminated. Thus, the provision on the "seriousness" of the breach in case of termination by law and the provision that restrict contract termination without legal grounds shows that Vietnamese law has had a mechanism to restrict arbitrarily and bad faith termination of contract.

*Two, extension for the contract performance.* In principle, Vietnamese contract law does not force the aggrieved party to give the defaulting party a second chance to correct the breach as under German contract law but in certain cases, Vietnamese contract law also forces the aggrieved party to extend the performance of without being allowed to terminate the contract immediately, the law also request aggrieved party to give the other party the opportunity to repair the violation within a reasonable period of time, the aggrieved party only has the right to terminate when the extension period has expired and the defaulting party still fails to fulfill their obligations.

*Three, scope of exercise termination right.* The aggrieved party's restriction on the right to terminate is also reflected in provisions restricting the scope of this right on the basis of reasonableness and fairness - one of the manifestations of the principle of good faith to protect one party in sale contract and the obligor.

*Fourth, restriction on termination agreement.* When considering termination by agreement, Vietnamese contract law not only determines whether the breach of contract is a condition of contract termination but also considers if the agreed term violate the prohibition of law, contrary to social morality as well as consider whether the aggrieved party's exercise of termination right is in accordance with the principle of good faith. Thus, even if the parties agree to terminate on basis of contractual breach, the court still needs to have control over these terms to ensure that the right to terminate is exercised "in good faith". In addition, if the term regulate contact termination is unclear, this term must be interpreted in accordance with the nature of contract as well as the parties' will, and especially in accordance with the principle of good faith, as a result, the aggrieved party's termination right by agreement will be restricted through contract interpretation.

*Five, notification on termination of contract.* Vietnamese contract law only considers the obligation to notice on termination of contract as a basis for determining liability for damages, not as a basis giving rise to the right to terminate. Moreover, Vietnamese law also does not consider the aggrieved party's obligation to notify as a basis for losing termination right in case the aggrieved party fails to perform this obligation within a reasonable period of time as in German and English contract law.

Though the "notification on contract termination" obligation in does not directly limit the aggrieved party's termination right but with the provision that failure to perform this obligation may lead to damages liability on the side of the aggrieved party, Vietnamese contract law has indirectly limits termination right because the failure to notice poses a risk of causing great damage to the defaulting party. Therefore, requiring the aggrieved party to immediately notify the defaulting party is a factor that helps eliminate indifference and disregard for the interests of the other party, which contributes to the protection of legitimate interests of the defaulting party and ensuring the aggrieved party's obligation to notify in good faith.

*Six, mitigation of loss.* Similar to German and English contract law, termination under Vietnamese contract law may be applied concurrently with damages. The amount of compensation that the aggrieved party can receive depends greatly on whether the aggrieved party has performed her mitigate obligation. This means that the amount of damages the aggrieved party can receive will be reduced in proportion to any damage that this party can prevent or limit if she took reasonable, necessary measures determined by the criterion of a reasonable person in similar circumstances. The fact that the aggrieved party chooses to terminate the contract and enter into a contract with a third party at higher costs means this party has failed to mitigate damage, then the aggrieved party will not be compensated for all damage she has suffered. Thus, the provision on mitigate obligation in Vietnamese contract law not only contribute to minimizing damage to the aggrieved party but also contribute to reducing the financial impacts of the breach to the defaulting party, thereby contributing to reduce bad impacts to the society.

### 3.3. Recommendations for legal improvement in Chapter 3

#### 3.3.1. Amend provision on contract interpretation

The provision on contract interpretation of the Civil Code 2015 still have some limitations such as the principle for contract interpretation is not generalized, the grounds for contract interpretation are duplicated and unclear leading to the fact that some important factors should be taken into account when interpreting a contract includes the principle of good faith are missing. To overcome such limitations, Article 404 Civil Code 2015 should be amended as follows:

*"Article 404. Contract interpretation*

*1. A contract with unclear content will be interpreted according to the common intention of the parties rather than base only on literal meaning of its terms.*

*Where common intention cannot be discovered, a contract will be interpreted a accordance with the meaning that a reasonable person placed in the same circumstances would give to it.*

*2. Factors should be taken in contract interpretation:*

*a. Parties' conduct before and after the conclusion of the contract*

*b. The circumstances in which the contract was concluded*

*c. Practices that had been formed between the parties*

*d. The nature and purpose of the contract*

*e. Usages in the place where parties entered into the contact*

*f. The principle of good faith*

*3. Terms of a contract must be interpreted in relation to each other so that the meaning of those terms is consistent with the entire contents of the contract.*

*4. In case of ambiguity, a contractual term is interpreted against the person who put it forward."*

#### 3.3.2. Amend provisions on standard terms

Article 405 and Article 406 of the Civil Code 2015 on standard terms have some drawbacks such as contain risk for the non-drafting party, the ability to eliminate injustice of these clauses are

somewhat limited and duplicated, ... Therefore, Article 405 and Article 406 Civil Code 2015 should be restructured as follows:

*"Article 405. Standard form contract*

*1. Standard form contracts are contract that containing terms and conditions which are prepared by one party for the other party to reply within a reasonable period of time; If the offeree accepts, it shall be deemed to have accepted the entire contract provided by the offeror.*

*2. The drafting party shall clearly instruct the other party on the standard terms and reasonably give the other party the opportunity to take notice of the contents.*

3. *Any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is invalid."*

*"Article 406. General trading conditions*

*... 3. Any term of* general trading conditions *which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written".*

*"Article 406a. Unfair standard term*

*A standard term is considered unfair if, contrary to the principle of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the drafting party"*

**3.3.3. Amend provision on hardship**

Although Article 420 Civil Code 2015 on hardship bring numerous positive aspects in terms of legal science as well as socio-economic, it still contains certain limitations such as not specify hardship as the exception of *pacta sunt servanda* rule, not require the affected party to provide basis for contract renegotiation.

To overcome these limitation, according to the author, it is necessary to supplement a clause right in front of clause 1 of Article 420 Civil Code 2015 to emphasize the sanctity of contract and to specify the exceptional nature of Article 420 Civil Code 2015 as follow: *"Parties to a contract are bound to perform their obligations even when the performance of the contract becomes more onerous due to the increase in the costs of performance or the decrease in the value of performance."* In addition, clause 2 of Article 420 Civil Code 2015 should add a requirement that the affected party must provide basis for the exercise of her right, under which clause 2 of Article 420 Civil Code 2015 should be amended as: *"In case of hardship, the affected party has the right to request the other party to renegotiate the contract. The affected party must provide basis for its request and must exercise its rights within a reasonable time".*

**3.3.4. Amend provisions on restricting termination right**

Basically, the provisions of Vietnamese contract law related to the restriction of termination right have some limitations that need to be overcome as follows:

*First,* it is necessary to use uniform terminology in the Civil Code and the Commercial Law.

*Second,* the aggrieved party's obligation to give extend period for the party in breach in case of minor breach should be generalized as a general provision applicable to all types of contracts to create

a basis for parties to achieve their original purpose when entering into a contract as well as ensuring that the aggrieved party will act in good faith, prudence and care for the interests of the other party.

*Third,* it is necessary to add a general provision governing all contracts that obligations are in nature performed in parts and only allow the aggrieved party to terminate part of the contract if such party has received benefits from previous performances, however, the aggrieved party will have the right to terminate the entire contract if the breach in one certain time is so serious that it loses all meaning to keep the contract alive.

*Fourth,* provision on the aggrieved party's obligation to notify the termination of contract should be revised in such a way that from the time of knowing about the breach of the contract, the aggrieved party must perform its notify obligation toward the other party within a reasonable time. If the aggrieved party breaches this obligation, this party must be liable for damages.

## GENERAL CONCLUSION

The principle of good faith is an important principle of private law in general and contract law in particular. The principle of good faith has a long history and the birth of this principle stemmed from the inevitable requirement of human society, and during its development the principle of good faith has been enriched by human knowledge through the ages. In recent decades, the recognition of the principle of good faith in modern contract law systems has been increasingly broadened. However, legal systems still have certain difference in the recognition of this principle due to different views on the scope of the principle of freedom of contract. Consequently, German contract law and Vietnamese contract law consider the principle of good faith as a general principle governing every stage of contract while English contract law does not consider good faith to be a general principle and instead used several doctrines to adjust contractual life as piecemeal solutions to the principle of good faith.

The thesis focuses on building and systematizing general theoretical issues related to the principle of good faith as well as analyzing and comparing specific manifestations of this principle in all contractual under three legal systems include German, English and Vietnamese law, thereby pointing out drawbacks of provisions in the Civil Code 2015 considered as concretization of this principle in three stage from pre-contractual, performance to termination. In addition, the thesis also analyzes and comments on decisions that apply good faith principle or piecemeal solutions as replacement to this principle in three legal systems to clarify the role and importance of the principle of good faith in these legal systems.

Base on the analysis and comparison between three legal systems, the thesis has shown that despite certain differences, the approach to the principle of good faith of Vietnamese contract law to adjust contractual stages in general are quite modern and consist with modern trend, however, Vietnamese contract law (specifically the Civil Code 2015) still needs certain modifications to maximize the adjustment effectiveness.