

An Overview of Good Faith as a Principle of Contractual Interpretation with Special References to the Albanian Law

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Abstract

Good faith is one of the most discussed topics in the jurists' circle, seen as a key argument in European contract law. Though it is an accepted concept, there is no consensus regarding the role of good faith in modern civil contractual obligations. The purpose of this paper is to analyze the principle of good faith, shedding light on the concept and the description of this principle on Albanian legislation.

Good faith is dealt with in its two meanings; subjective and objective, where in the objective sense of good faith is perceived as a method used to dress with moral contractual relations and to mitigate the inequalities that may result from the dogma of parties autonomy. While in the subjective view, good faith may refer to the situation in which a person acts with the confidence that he is acting in accordance with the applicable law or in a situation where a third party seeks protection. The aim of this paper is also to treat the principle of good faith under the optics of Albanian legal system. It is concluded that the doctrine in Albania is not very developed. It should be noted that there is no uniformity in jurisprudence and the debate if good faith can be excluded from the contract remains open.

Keywords: Good faith, definition, contract law, arbitration, good faith application.

The meaning of good faith principle

The incentive for the introduction of such a principle has come from the "good faith stream" flowing throughout the civil law systems of European Union member states and is very likely to become part of English law. In particular, since the implementation of the Directive on unfair terms in consumer contracts, any legal system within the European Union, but not

only, now faces practical challenges arising from the general notion of good faith. Significantly, Whittaker and Zimmermann³¹ have stressed, *inter alia*, that "*in exercising their rights and carrying out their duties the parties must act in accordance with good faith and fair treatment*". Good faith is a concept rooted from the roman law, for which there is still no commonly accepted definition. It can be said with full confidence that good faith is an unclear concept, which seems to be at the epithets used for it. It is said that it is a norm, a principle (very important), a rule, an obligation, a standard of conduct, a source of an unwritten law, a general clause.³² So, in the doctrine it is often said that good faith is an open norm, a contentious norm of which can not be abstractly determined, but depends on the circumstances of the case in which it applies and which should be determined by concretization.³³

Despite the lack of a concrete definition, good faith is used in two meanings, namely in the objective and subjective sense. In a subjective sense, it refers to a lack of knowledge or the inability to recognize an event or the fact as being unlawful. Expressed in affirmative form, subjective good faith concerns the wrong belief of a party that the situation is legitimate when in reality it is illegal. The classic case is buying something in good faith, foreseen in all contemporary civil codes. In an objective sense, good faith refers to a standard of conduct according to which the parties must act in good faith. In this second sense, this principle is perceived as a method used to cling to moral contractual relations and to mitigate the inequalities that may result from the dogma of the parties autonomy.³⁴

However, if we do a deeper analysis, the view is less ambiguous than it looks. It is generally accepted that a general good faith clause is not a rule, at least not an equivalent rule with others in a code. It is not like other rules, since neither the facts for which it applies, nor the legal effects it sets can not be established *a priori*. Therefore, good faith is usually considered as an open norm whose content cannot be abstractly defined, but which depends on the circumstances of the case in which it should be applied and which should be set by concretization³⁵. Most lawyers who are part of systems that good faith play an important role, agree that these theoretical changes to the

³¹ Whittaker, S., Zimmermann, R., (2000) "*Good Faith in European Contract Law*", Cambridge University Press, Ch. I, p. 699

³² Hesselink M.W., (2010) "*The concept of good faith*", në "*Towards a European Civil Code*", Fourth revised and expanded edition p. 622

³³ Ibid

³⁴ *European Contract Law. Materials for a Common Frame of Reference: Terminology, guiding principles, model rules* (2008) .Produced by Association Henri Capitant des Amis de la Culture Juridique Française and Societé de Legislation Comparé, Munchen, Sellier p. 156

³⁵ Hesselink M.W., (2010) "*The concept of good faith*", në "*Towards a European Civil Code*", Fourth revised and expanded edition p. 619

concept do not matter much. What matters is, in fact, the way in which good faith is applied by the courts, in other words, the good faith character is best illustrated by the way it operates.

Good faith principle interpretation in Albanian legislation

In Albanian law, the doctrine of good faith is not developed as in other countries. Article 166 of the Albanian Civil Code sanctions: *“A person who, on the basis of a legal action for the transfer of ownership has obtained towards a good faith reward a movable good, becomes the owner of this good even if the alienator was not available to him”*. However, the winner, even in good faith, does not become the owner of the good when it is stolen. The winner becomes the owner of coins and securities in the leasing company, even if these have been stolen or lost to the owner or public legal person.

The above provisions do not apply to movables that are listed in public records. Property is acquitted of the other's rights over the item if these rights are not derived from the title and the trust of the winner. Although the aforementioned article does not enter into the field of contract law as stated, constitutes the classic case of trust in its subjective meaning.

While Articles 674, 675 and 682 of the Civil Code sanction trust in contract law, more specifically Article 674 states: *“The parties during the negotiation of the contract drafting should behave in good faith to each other. The party who knew or ought to know the cause of the invalidity of the contract and did not disclose it to the other party is liable to reimburse the damage suffered by the latter because he believed without fault in the validity of the contract”*.

Whereas Article 675 sanctions: *“In the event that a contracting party has professional knowledge and the other party gives rise to that trust, the first is obliged to give it in good faith, information and guidance.”* The framework becomes even more complete by Article 682, which among others is emphasized that the contract must be interpreted in good faith by the parties.

For the above, we conclude that although incomplete, the legislative framework is treated both in the objective and in the subjective sense, and even its functions are emphasized (eg, the interpretive function article 682). It applies both to the pre and post-contract stage. As far as domestic doctrine is concerned, it should be emphasized that good faith is a very little tackled subject.

Regarding jurisprudence, the number of decisions dealing with good faith is relatively small, among the most important we stress: Unifying Decision no. 932, dated 22.06.2000, the United Colleges of the Supreme Court use the term "economic and moral factors" to limit contractual

freedom, terms which imply good faith. In some other decisions, the Supreme Court has explicitly mentioned good faith as a principle³⁶ and as a contractual obligation³⁷. The importance of this decision lies in that, it serves as a "base" where good faith is elaborated as a doctrine on its own.

Practical application of good faith

The principle of good faith has had great success in many European legal systems during the 20th century. In most countries, the number of cases where the good faith clause has been applied has been progressively increased over the last few decades. Also the application field has been growing considerably in many systems. In various systems it is applied in almost all areas of the contract law and sometimes even outside of it. In the following, there are considered some examples by looking at the way how good faith is applied.

Good faith application in the contract law

1. Formation - Many systems recognize a general pre-contractual good faith obligation. Some codes contain a specific provision for pre-contractual good faith³⁸ and in other systems, it is established by the courts. On the basis of this general obligation, which usually relates to the pre-contractual obligation to inform, even sanctioned that the party may be responsible if it interrupts negotiations contrary to pre-contractual confidence. Article 674 of the Albanian Civil Code states: *“the parties during the negotiation of the contract drafting must behave in good faith to one another. The party who knew or ought to know the cause of the contract invalidity and did not disclose it to the other party is liable to reimburse the damage suffered by the latter because he believed without fault in the validity of the contract.”*

2. Validity - The infringement of the good faith obligation can lead to invalidity. For example, in many systems, before the statutory rules were introduced, the standard conditions could be considered invalid on the basis of the general confidentiality clause. Even today, the test of the fairness of a term is often based on good faith.³⁹ Further, a breach of the pre-contractual obligation to inform, on the basis of trust, can lead to invalidity for error or fraud. In some other cases, trust may limit the invalidity.

³⁶ Decision no. 270, dated 24.11.2011 of the Civil College of the Supreme Court

³⁷ Decision no. 231, dated 08.05.2012 of the Civil College of the Supreme Court

³⁸ Hesselink, M. W., (2002) *“Precontractual Good Faith”*, Beale H., et. al. (1990) *Cases, Materials and Text on Contract Law, Oxford and Portland, Oregon*, Chapter 2, Section 2 (p. 237-293).

³⁹ See Article 157 of the German Civil Code; Article 1366 of the Civil Italian Code; Article 200 of the Greek Civil Code

3. Interpretation - In most systems, good faith plays an important role in contractual interpretation, based on the interpretative function of good faith. Many systems contain a legal provision for the foregoing.⁴⁰ In other systems, the role of good faith interpreter is established by the courts. Especially objective methods of interpretation are often based on good faith. In addition to objective interpretation, a special function of good faith also plays its complementary function. If a contract does not contain any specific provision regarding a question that may arise, the "gap" in the contract is resolved by relying on the complementary function of good faith. In Albanian Civil Code the interpretive function is sanctioned in Article 682⁴¹.

4. Non-compliance- On one hand, in many systems, some of the remedies for non-performance of the contract are based on good faith. On the other hand, the exercise of a vehicle can be confined by good faith, it is sufficient to recall here that in many systems a party is not allowed to terminate the contract or limit its performance only to a minor failure on the part of the other party. It is often conceived of as an exception to the general right to complete or not to rely on good faith.

Refusal of an internal good faith system

Practice has shown that the courts have developed many new rules and doctrines based on good faith, which, in the first instance, do not seem to have much in common. It should be noted, that all these rules are usually linked to confidentiality sub-rules as part of the content of a good faith rule. However, if good faith is not a norm, and if its functions in reality are the normal duties of a judge, there is no sense in linking these new rules to the content of the good faith. Good faith rules have nothing special to distinguish them from other rules adopted by the courts when they have referred to the general clause of good faith as their legal basis. In particular, as Schmidt rightly points out, the rules of good faith are no longer fair, more equal or more moral than other rules. Hence, the amount of the good faith rules and doctrine does not have internal coherence.

It is often assumed that good faith rules are necessarily or usually more altruistic, implying solidarity and counterweight to the principle of autonomy.⁴² However, this is not necessarily the case. True, it is very interesting to ask what is the rule and what is the exclusion?! Most civil codes, especially those adopted in the 19th century, are based solely on the idea of autonomy.

⁴⁰ HR, 20 May 1994, *NJ* 1995, 691

⁴¹ Furthermore, Albanian Civil Code

⁴² Maitland, F.W., (1920) *Equity; also The Forms of Action at Common Law ; Two Courses of Lectures*, Cambridge, p. 18-19

As a result, most of the concretizations, supplements and corrections were inspired by the concerns of solidarity. However, to the extent that contemporary private law is always grounded in solidarity courts, it may decide to concretize, supplement and correct these rules on the basis of good faith, in a way that is more autonomous. The principle of good faith shows the weaknesses of a legal system that the courts feel reasonable to overhaul by fostering and correcting them.⁴³ In this regard, the content of good faith is very similar to the old English laws and *ius honorarium* in The Roman law.⁴⁴ To accept the existence of equity as a separate system by law, in my opinion it was a reactionary delayed measure. Nowadays good faith content can be considered as a new *ius honorarium* or as an equity of Civil Law.

In many countries, there will soon be a practical need for eliminating the internal good faith system. As a result of a large number of good faith cases will not be more manageable. However, this number will inevitably continue to grow in all systems where law enforcement duties will be considered as good faith functions. More and more lawyers will question the distinction between code rules and rules that are said to be a content of good faith. Therefore, it seems likely (and indeed desirable) that the same will happen with good faith as it happened with equity in *ius honorarium*: when the difference is no longer justified and as such it will be ineffective.⁴⁵

However, the refusal of an internal good faith system does not mean that efforts made by legal doctrine over the last century have been useless. First of all, it was of utmost importance that scholars have formulated the rules or doctrines that were adopted in cases when the general clause of good faith had been applied. Secondly, many parts of the internal good faith system may have been transferred directly to the code system, particularly in the general provisions and contract law in the content chapter (eg the obligation to be faithful, to protect, to cooperate, to inform). This is not true only of the rules, but of all doctrine. This is most noteworthy in the countries that have adopted a new code, where many doctrines that have been adopted on the basis of good faith according to the previous codes, have been replaced in the new code, for example: *culpa in contrahendo*. If good faith would really be a norm, it would be far more logical for these legal systems to put everything under trust rules in a section titled "good faith concretization".

⁴³ Whittaker, S., Zimmermann, R., (2000) "*Good Faith in European Contract Law*", Cambridge University Press, Ch. I, p. 677

⁴⁴ Ibid p. 675

⁴⁵ Goldman, B., (1979) "*La lex mercatoria dans les contrats internationaux: réalités et perspectives*", JDI, 475

Good faith as a principle of contractual interpretation

The idea that a contract should be interpreted in accordance with the principle of good faith goes through all the laws relating to commercial contracts. It has been developed especially within *lex mercatoria* to such an extent that it has become one of its basic principles.⁴⁶ In fact, the requirement of good faith comes directly from a number of international arbitration decisions, which create a "*general principle of the good faith under which agreements should be implemented in good faith.*"⁴⁷

In international arbitration, the interpretation in accordance with good faith is seen as another way of favoring the interpretation of the parties' true purpose, more than a literal interpretation in other words, in cases of the contested clauses interpretation, the terms of the contracts must be interpreted in their context, taking into account the contract as a whole, in order to bring the true purpose of the parties. When a term triggers controversy, it must be interpreted in accordance with the principle of good faith. The bad faith of a party, who claims to benefit from the rigor of the law and the contract for himself, it is called upon against that party.

Good faith has a special place in doctrinal codification projects, both international and European. The definition given by Mr Ole Lando demonstrates this best, he points out, *inter alia*: "*The principles of European Contract Law and UNIDROIT Principles attach great importance to the principle of good faith under the influence of certain laws, mainly German, Dutch and American. In each of these legal instruments, good faith is promoted in the range of the general principle which covers all stages of a contract.*"⁴⁸ This high status changes the good faith function from the role of interpreter in the one to expand the content of a contract.

Article 4.8 of the UNIDROIT Principles states that "*Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied*". The second paragraph of the article provides that in determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness.

⁴⁶ Fouchard, Ph., Gaillard, E., Goldman, B., (1996) "*Traité de l'arbitrage commercial international*", Litec p.1470

⁴⁷ Mayer, P., (1993) "*Le principe de bonne foi devant les arbitres du commerce international*", *Etudes de droit international en l'honneur de Pierre Lalive*, ed. Helbing et Lichtenhahn, p.654

⁴⁸ Lando, O., (2006) "*L'avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences*", RDC, p. 167

The term is close to equity at least in part, and recalls Article 1135 of the French Civil Code according to which: "*Agreements are binding not only for what is expressed in them, but also for all the consequences, which equity, custom or status are based on its nature.*" Thus the principles of European contract law follow the French tradition: they do not distinguish between consensual agreements and formal agreements (formal principles of equality and good faith were not recognized in the old law). Nowadays, even with regard to a formal and written contract, good faith remains the principle of interpretation.

Good faith is not just a guide to interpreting the purpose of the parties but also a tool that affects the content of the contract. Judges are reluctant to go beyond simply clarifying the purpose of the parties, they seem prepared, encouraged by a large number of academics and numerous international texts, to use good faith as a realistic interpretation rate as a source of the obligation.

Conclusion

Good faith is an unclear concept, which seems to be at the epithets used for it. It is an open norm, a contentious norm of which can not be abstractly determined, but depends on the circumstances of the case in which it applies and which should be determined by concretization.

Despite the lack of a definition, trust is used in two meanings, namely in the objective and subjective sense: In a subjective sense, trust refers to a lack of knowledge or the inability to recognize an event or the fact as being unlawful

If in a legal system, the role of the judge as a rule maker is fully recognized, there is no need for a code-based clause. However, if there are still doubts about the court's power, a good faith clause would be needed to ensure that the judge could create new rules, especially for a new continental code where the ECJ and other courts may need extensive powers. Despite the idea of some professors that the term of good faith should be used for the sake of tradition, it would be more appropriate to expressly sanction that the court may interpret, supplement and corroborate the code when necessary.

The doctrine of good faith in Albania is not very developed, even there are a few discussions about it. This requires a development of judicial practice as well as discussions between lawyers and academics.

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