

GOOD FAITH IN GREEK CIVIL CODE

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Abstract: *The study examines the most important articles of Greek Civil Code regarding the concept of good faith. The Greek Civil Code adopted a verbatim translation of the German good faith provisions which was inserted at the same place within the structure of the code. From the perspective of good faith provisions Greek Civil Code fits into modern European civil codes. Moreover, the article seeks to provide a comparative and comprehensive analysis of the concept of good faith in Greek Civil Code and in Romanian Civil Code. Also, good faith is analyzed in the United Nations Convention on contracts for the international sale of goods (1980) and in Unidroit Principles, with reference to the provisions of the Greek Civil Code.*

Keywords: *good faith, civil law, international sales, Greek Civil Code, Romanian Civil Code, the United Nations Convention on contracts for the international sale of goods (1980).*

1. INTRODUCTION

The introduction of the notion of good faith in Roman contract law would undoubtedly have been impossible without inspiration from the Greeks. This new concept opens the contractual system to the ethics of what is just and equitable, the latter, according to Cicero's dream, linking all men, citizens or pagans, in a universal society of *boni viri*, of good men (Rampelberg, 2005). Cicero has left the most complete definition of good faith: these words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance (De Off, 3, 17).

Although Roman law in its beginnings, does not distinguish between moral and legal norms, eventually, after delimitation between law and morality, Roman law separated the legal concept of good faith (*bona fides*) from the notion of honesty (*honestum*); in this way the concept of good faith falls under the law, becoming a concept with its own legal content (Dobrilă, 2012: 180).

The components of good faith, as a notion belonging to the matter of law, is based on honesty, as a manifestation of conscience within moral norms, translated as a value that entails the compliance of individual life with the moral norms. In order to invoke good faith, all its attributes must be found both anterior and simultaneous with the moment when the agreements meet to perfect a legal act, and subsequently for its execution (Dobrilă, 2014: 231).

Most European civil codes contain general provisions on good faith, as a concept and, also, as a concrete application in contractual relations. Good faith is provided by these codes in both objective and subjective meaning (Dobrilă, 2014). Unidroit Principles and the Principles of European Contract Law establish a objective version of the concept of good faith in contractual relations, considered close to the classical Roman vision of *bona fides*.

2. GOOD FAITH IN GREEK CIVIL CODE

In Greek civil law the provisions of good faith are firmly grounded in the Germanic tradition. The Greek Civil Code adopted a verbatim translation of the German good faith provision which was inserted at the same place within the structure of the code. In German law, the concept of good faith is governed by the German Civil Code (*Bürgerliches Gesetzbuch*) in Article 242 which states that the debtor has to perform his obligation according to the requirements of good faith, taking customary practice into consideration. The correspondent article in Greek Civil Code is Article 288 which stipulates that the debtor shall be bound to fulfill the performance in accordance with the requirements of good faith taking also into consideration business usage. Even if the source of inspiration of Article 288 is German law, this article goes further than Article 242 of German Civil Code, stating that the debtor shall be bound to fulfill the performance in accordance with the requirements of good faith. In other words, this means that the contractual obligations are not to be only interpreted in good faith, but, moreover, each contractual obligation has to be adapted according to the demands of good faith. Therefore, the provision of Article 288 is mandatory law. Consequently, the observance of good faith in the performance of obligations cannot be limited or excluded in advance by a waiver or an agreement. According to Article 174 of Greek Civil Code such a waiver or an agreement is null and void.

The definition of good faith, as is stated in Article 288, is equivalent to the meaning of objective good faith. Objective good faith, which is used as a behavioral standard, is distinguished from subjective good faith, which refers to the conviction of the contracting party that his action is based on the existence of a right that he has. That is to say, subjective good faith refers to the contracting party's inner disposition, whereas objective good faith refers to the objectively honest behavior of the contracting party, regardless of what his inner frame of mind might be (Agallopoulou, 2005: 181).

Article 288 can be found after the first article on the Law of Obligations of the Greek Civil Code, exactly after Article 281 which provides that the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right. The position of Article 288 in the structure of

the code shows both capital importance of the provision and its binding character. Article 288 can be regarded as a general and basic rule concerning good faith. Article 281 of the Civil Code is a general provision preventing abuse of right in any field of the law. Article 281 has been inspired by the doctrinal developments in France since the beginning of the twentieth century. But the significance of Article 281 is also in accordance with the German doctrine of *Verwirkung*. The German correspondent of Article 281 is Article 226 of German Civil Code (prohibition of chicanery) which states that the exercise of a right is not permitted if its only possible purpose consists in causing damage to another. Greek Civil Code follows the objective doctrine of abuse of right, which means that a right should not be exercised in a unreasonable manner in order to harm others. In the light of Article 281 abuse of right is not dependent on the existence of fault. In order to invoke abuse of right there is only necessary to prove the objective harmful effects.

Taking into account the place of Article 281 and Article 288 in the Greek civil code structure it is important to underline the connection between the notion of abuse of right and the concept of good faith. Nevertheless, this connection is only apparently, because in most cases the concept of abuse of right goes beyond the principle of good faith. The concept of abuse of right it is stronger than the principle of good faith and it has a broader meaning. As mentioned above, abuse of right is not dependent on the existence of fault. The breach of principle of good faith means bad faith. And bad faith is considered to be a form of guilt, expression of deception, fraud and serious misconduct.

While the abuse of right is equivalent with objective harmful effects, good faith can mean different things depending on the context of the contract. In order to be abusive, the exercise of the right needs to exceed the limits set by good faith, this meaning that the abuse of right, as a concept, embodied the principle of good faith.

Article 288 also refers to business usage, which will be taken into account when it is not contrary to morality. In fact, good faith is the only binding criterion in assessing the conduct of the contracting parties. In case the business usage leads to a solution unacceptable by good faith, the court follows solely the principles of objective good faith, given the fact that the latter has greater force (Stathopoulos & Karampatzos, 2014).

Greek civil code recognizes the requirement of good faith during the pre-contractual phase. According to Article 197 of the Greek Civil Code in the course of negotiations for the conclusion of a contract the parties shall be reciprocally bound to adopt the conduct which is dictated by good faith and business practices. Article 197 represents a statutory version of theory of *culpa in contrahendo*. Good faith, as provided in Article 197, concerns the objective good faith and constitutes fair standards in negotiations. In stage of negotiations, good faith not only protects the parties, but especially reinforces the contractual freedom of negotiating parties.

According to Article 200 of the Greek Civil Code, article complementary to Article 288, contracts shall be interpreted in conformity with the requirements of good faith taking into consideration business usage. This provision, using objective good faith and business usage as criteria, offers a balanced interpretation method where both the true will of the parties and the objective meaning of the contract wording are taken into account. Objective interpretation means that in every concrete case it should be examined

what the average honest man could and should have gathered from a declaration of will made by the declarant.

Article 388 states that an unforeseen change of the circumstances on which the formation of a contract has been based may allow the reduction of the debtor's performance or dissolution of the contract. This article, which represents a special application of the principle of good faith (Article 288), originates from the classic theory *clausula rebus sic stantibus*. For Article 388 to apply some requirements must be met: the contract must be a reciprocal one; a chance must have occurred in the circumstances on which the parties based their original agreement taking into consideration good faith and business usage; the change in circumstances must have taken place after the conclusion of the contract; the change in circumstances must have been due to exceptional and unforeseen causes; the performance of the contract must have become excessively onerous for the debtor. Besides these conditions, it is necessary to mention that Article 388 takes effect through judicial intervention and not by operation of law. If these requirements are met, then the court may, at the request of the debtor, reduce his obligation to perform to the appropriate extent or rescind the contract (Gordley *et. al*, 2001: 208). It seems that the judge has an option, either to adjust the contract or to rescind it, but he is not obliged to adjust the contract in such a way that the prejudice is fully covered.

When the conditions stated in Article 388 are not met, there is still the possibility to recourse to the provisions of Article 288, when the fulfillment and the maintenance of the contract breach the principle of good faith. It is important to underline that Article 288 would not eclipse the practical value of Article 388 and applying Article 288 would not lead to the same solution that would be achieved if the requirements provided by Article 388 would be fulfilled. Article 288 is less drastic than Article 388 and has a broader application.

3. DISTINCTIONS BETWEEN GOOD FAITH IN GREEK CIVIL CODE AND GOOD FAITH IN ROMANIAN CIVIL CODE

Good faith, traditionally analyzed as a principle specific to civil law, is elevated to the rank of constitutional principle as it finds its place in the Constitution of Romania revised in 2003, in Article 57 (respectively in Article 54 before revision), article which states that Romanian citizens, foreign citizens, and stateless persons shall exercise their constitutional rights and freedoms in good faith, without any infringement of the rights and liberties of others. The principle of good faith had been enshrined in the constitutional texts even before it received specific regulation in the new Civil Code, although the principle of good faith has always been recognized as a general principle applicable to the whole system of law. In addition to the express consecration of the principle of good faith, Article 57 of the Constitution establishes an outward limitation regarding the exercise of rights and constitutional freedoms by the express enshrining of the principle of respecting the rights and liberties of others. It may be inferred that the principle of good faith acquires a social dimension, by relating a person's own behavior to society in general and to other individuals in particular (Dobrilă, 2014: 180-181).

In Greek Constitution, in Article 5 paragraph one; there is a similar provision with Article 57 of Romanian Constitution. Thus, the article of Greek Constitution provides that all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good morals. But the article of Greek Constitution does not expressly refer to good faith. The concept of good morals, embodied in Article 5 of Greek Constitution, refers to a code of conduct which was outlined in the consciousness of a society and whose observance was imposed by necessity, through experience and long practice. The content of this concept varies in time and space. Good morals have a broader meaning than good faith, but almost the same power in law field, because good faith is based on the equity, being some certain psychological facts of moral conscience with the external manifestations under the form of words and commitments, asserting that honesty, form of manifestation of the conscience, within moral norms, enters the structure of bona fides; there were materialized a number of four virtues (moral values) components of honesty: loyalty, prudence, order and temperance (Gherasim, 1981: 9-10). Consequently, there is no difference between Article 57 of Romanian Constitution and Article 5 of Greek Constitution, the application of these articles will lead at the same results.

The Romanian Civil Code, as an innovative element brought to the Romanian civil law system, provides in Article 14 paragraph one, that any natural or legal person shall exercise their rights and perform their civil obligations in good faith, in accordance with the public order and good morals, good faith being presumed until proven otherwise. Article 970 of former Romanian Civil Code (Civil Code of 1864) provided that agreements must be performed in good faith and oblige not only to what it is expressly stated, but to all the consequences that equity, custom or law can give to an obligation, according to its nature. The actual Civil Code does more than to transpose the text of Article 970 of the former Civil Code into an equivalent text, because by express regulation, as a text of general application (Article 14 of actual Civil Code), the principle of good faith, which, based on broad interpretation, was already admitted as a general rule in the Romanian system law before the entry into force of the actual Civil Code, acquires autonomy and the value of a general rule (Dobrilă, 2015: 69).

Starting from bona fides praesumitur principle already applicable in our legal system, following the model of the provisions set by Article 2805 of the Civil Code of Quebec according to which good faith is always presumed, unless the law expressly requires that it be proved, the new Romanian Civil Code in Article 14 paragraph (2) expressly provides that good faith is presumed until proven otherwise (Dobrilă, 2013: 147).

Neither Greek Civil Code nor Romanian Civil Code defines the concept of good faith. But the enshrinement of good faith does not automatically imply its definition. Good faith relates to all types of contractual relationships and contracts; it can take different forms, depending on the specifics of each contract. By simply enshrinement the principle of good faith is raised to the level of public order.

In the Romanian Civil Code, the counterpart of Article 288 of Greek Civil Code is Article 1170, which defines the notion of good faith and the effects it has on a contractual

level. According to Article 1170 the parties must act in good faith both regarding negotiation and conclusion of such contract and throughout its execution, without being able to remove or limit this obligation. Article 1170 contains a mandatory rule, without the ability of the parties to cancel or bring amendments to it. Moreover, Article 1170 outlines a certain type of good faith conduct, during the performance of contracts, the imperative of good faith requiring an obligation for initiative, cooperation or collaboration, in order to allow an efficient contract performance, and behaviours that affect these aspects are forbidden. However, the obligation of good faith does not require the protection of someone else's interests to the detriment of their own. As in Greek civil law, by the regulation of Article 288, in Romanian civil law the general principle of good faith becomes an important governing principle of the contract theory through the provisions of Article 1170. At a first glance one can note that Article 1170 is more restrictive and powerful than Article 288, because the first one expressly provides that the parties are not able to remove or limit the obligation of good faith. But this is only a natural consequence of the fact that the principle of good faith is mandatory to the parties. In fact, as legal force Article 288 of Greek Civil Code and Article 1170 of Romanian Civil Code are equal. But there is still a difference between these two articles, a difference which does not change the legal power of Article 288 and Article 1170. In Greek Civil Code, pursuant to Article 288 the performance must be fulfilled in accordance with the requirements of good faith taking also into consideration business usage. Article 1170 of Romanian Civil Code requires to the parties to perform only in good faith, being silent regarding business usage. This difference means that the scope of Article 288 is broader than its Romanian counterpart.

As Greek Civil Code does in Article 197, Romanian Civil Code recognizes good faith during the contractual negotiations. Thus, a special innovative element of the Romanian Civil Code regarding good faith in negotiations is the provision contained in Article 1183. The text of Article 1183 is an application of the more comprehensive principle of good faith, which aims at the exercise of rights and performance of obligations (Article 14) and contractual relationships in general (Article 1170). According to Article 1183 the parties have the freedom of initiation, performance and termination of negotiations and cannot be held responsible for their failure. The party who undertakes a negotiation is required to comply with the requirements of good faith. The parties cannot agree the limitation or exclusion of this obligation. It is contrary to the requirements of good faith the conduct of a party initiating or continuing negotiations with no intention of concluding the contract. The party who initiates, continues or terminates negotiations contrary to good faith is liable for the damage caused to the other party. To establish this damage the costs incurred in the negotiations, the waiver by either party of the other bids and any similar circumstances shall be taken into account.

Good faith in contractual negotiations is mandatory for parties in both Greek Civil Code and Romanian Civil Code. In this regard Article 1183 of Romanian Civil Code is more explicitly than his Greek counterpart. Thus, Article 1183 states that the parties cannot limit or exclude the obligation of good faith, provision which does not exist in Article 197 of Greek Civil Code. Moreover, unlike Article 197, Article 1183 relatively outlines the concept of good faith by indicating what standards of conduct are excluded

from the notion of good faith (it is contrary to the requirements of good faith the conduct of a party initiating or continuing negotiations with no intention of concluding the contract). Also, Article 1183 refers in the last paragraph to a situation which is contrary to the principle of good faith. Thus, the party who initiates, continues or terminates negotiations contrary to good faith is liable for the damage caused to the other party. In this case, the damages caused to the other party may consider the expenses incurred for the negotiations, any waiver by the damaged party from other offers or any other similar circumstances, which determine the existence of an injury. It is to be noted that Greek Civil Code does not contain any provision regarding the situation when if the aspects required by good faith for the initiation, continuation or termination of negotiations are breached, the guilty party may be liable in tort for the caused damage.

From the perspective of Article 1183 the pre-contractual negotiations are grouped around two main principles, good faith and contractual freedom. Such a regulation regarding the negotiations stage is inspired from both the Principles of European Contract Law and the Unidroit Principles and does not exist in Article 197 of Greek Civil Code, which requires in the contractual negotiations a conduct in accordance with good faith and business usage. The duty of good faith must always be subsumed to the principle of contractual freedom.

4. DISTINCTIONS BETWEEN GOOD FAITH IN GREEK CIVIL CODE AND GOOD FAITH IN THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AND IN UNIDROIT PRINCIPLES (2010)

The United Nations Convention on contracts for the international sale of goods provides in Article 7 paragraph one that in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. This is the only article which expressly refers to good faith. The placement of the good faith principle in the context of an operative provision dealing with the interpretation of the Convention creates uncertainties as to the principle's exact nature, scope, and function within the Convention.

The reference in Article 7 paragraph one to the observance of good faith in international trade does not carry a normative value. It is addressed to the interpretation of the Convention's provisions and seeks to describe good faith in international trade as it is used. The mentioned article does not give any further details on what the concept of good faith should mean.

In international trade the principle of good faith must not be applied according to the standards ordinarily adopted within the different national systems and must be observed in light of the special requirements of international trade. Nevertheless, it should be noted that the articles of Greek Civil Code concerning good faith, which are pure domestic regulations, are more comprehensive and efficient than Article 7 paragraph one of the United Nations Convention on contracts for the international sale of goods. Unlike Greek Civil Code, Article 7 paragraph one does not refer to the application of

good faith in negotiation, conclusion and performance of the contract, but only to the interpretation in good faith of the Convention. Also, in the United Nations Convention on contracts for the international sale of goods good faith is neither a general principle, nor a general obligation, like it is stated in Greek Civil Code. This means that the United Nations Convention on contracts for the international sale of goods does not impose a positive duty of good faith on contracting parties in order to be observed in the negotiation, conclusion and performance of the contract.

The provisions of Article 288 of Greek Civil Code resemble more with some articles of Unidroit Principles. It is true that under Unidroit Principles no specific national good faith concept can be applied but only one which fits for international trade relations. The most important article regarding good faith is 1.7 of Unidroit Principles, which states that each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty. Limited to the negotiations, art.2.1.15 states that a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. Moreover, paragraph 3 of the same article is indirectly referring to good faith by defining its opposite, bad faith. Thus it is bad faith for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

4. CONCLUSIONS

Good faith is a general principle with an important role in every contractual phase in both Greek Civil Code and Romanian Civil Code, although the last one is more comprehensive and, even, more restrictive.

Good faith can mean different things depending on the context of the contract and, consequently, there simply cannot exist a global doctrine of good faith. The positive role of good faith in contractual relations depends both on the interpretation and application of the concept of good faith by the courts.

Good faith remains an open concept, subject to interpretation, which will strengthen and will protect the contractual relations.

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