

RECENT TRENDS REGARDING GOOD FAITH IN CONTRACT LAW

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Abstract

The purpose of this article is to highlight the newly convergences between the Romanian legal system and that of other Member States of the European Union in the field of good faith.

In the first part of the article, we try to establish the core values of good faith in general and subsequently in the field of contract law, as perceived by the national scholars and researchers. While good faith had merely the role of a general rule which was rather simplistically associated with fairness and morale, in light of the recent developments brought upon by the enactment of the new Civil Code, good faith has become a focal point in several institutions in the field of contract law.

The second part of the article aims to identify the origin of the rules set out in the Romanian legislation, by investigating the motifs behind the adhering to the line of thought as set out by the Principles of European Contract Law.

In the last part we will illustrate the recent trends and goals of the European Union in the field of contract law and also try to correlate how these actions will translate to the Romanian national legal system in theory and in practice in the years to come.

Keywords: *good faith, contract law, Principles of European Contract Law, Romanian Civil Code, European private law.*

Introduction

The notion of good faith has been perceived as a principle of law, but one that too often has been used in practice as a vague norm by which judges were enabled to rule in just. However, the recent enactment of the Romanian Civil Code has placed it as a centerpiece in several institutions in the field of contract law. Given the recent trends in the academic field and practices in different member states of the European Union, Romania has adapted from a legislation standpoint in order to accept good faith as a fundamental concept of contract law by regulating good faith prominently in the new Civil Code.

1. Good faith in the former and current Romanian Civil Code

Originally, the previous Romanian Civil Code, as enacted in 1864, contained several applications of the notion of good faith, however most were applicable in the field of property law or were perceived as a broad behavior rule which would allow for a dispute to be judged in just or fairness. The reasoning behind this statement is that although good faith was present in legislation, it did not benefit from an express regulation or provision which would back up the existence and importance of good faith. Thus, the only express norm which regulated good faith was article 970 Romanian Civil Code, which pointed out that agreements between parties must be executed with good faith. Given that law makers at the time chose not to define this notion, its components or how it relates with other institutions, it remained the task

of legal doctrine and case law to fill in the aforementioned theoretical law gaps in order for good faith to become a practical and efficient institution.

Over the course of time, scholars have put effort in differentiating¹ good faith, as a practical institution, from other vague philosophical and justice related principles, which served little purpose in solving disputes related to civil contracts, even more so to complex commercial and economic related cases which require more certainty and practicality if they would up to be decided based on good faith.

2. The components of good faith

From a theoretical stand point we deem important to highlight the common ground between good faith, morale and honesty.

We support the opinion² that good faith, at its core and from a practical standpoint, is composed of the duty of loyalty and cooperation. These obligations reflect social and moral values which serve as the groundwork to any relations which guide individuals in their interactions in society. Law and morale are similar in that both dictate how one should behave³, but while morale does not impose its ideas the law enforces them by means of legislation. Good faith provides strong ties with both the law and morale, which leads to the discussion whether good faith is a moral or legal notion. The generally accepted theory⁴ is that good faith is a legal notion which combines morale elements or values which generate legal effects by means of legal provisions.

Until the recent change of legislation, the application of the aforementioned hypothesis was less present in contractual matters, but proved a proficient application in the field of (i) property law as a requirement in the case of usucaption of movable and immovable assets; (ii) family law as a limitation to the effects of the putative marriage; (iii) inheritance law as the basis for the theory of the apparent inheritor. All of these applications require that an individual has to have a given mental approach to the factual situation at hand and in order for his behavior or state of mind to produce positive legal effects in his favor, it is necessary that no legal, and to a lesser degree moral, provisions have been breached⁵.

As a conclusion, good faith has a generating role in areas of law where social relations require them, and in order for good faith to operate in compliance with ethic and morale values⁶.

From a psychological standpoint, honesty is composed of the following attributes⁷: loyalty, prudence, order and temperament. Over the course of time 'loyalty' has gained support and became a standalone value accepted by scholars⁸ as a requirement in contract dealings. Prudence represents a factor which guides the behavior of the individual in the sense that he will not act in a harmful manner to those around him. Order represents the awareness and obedience to the social and legal norms. Temperament represents the restriction and downing of desire. Temperament correlated with prudence form an ideal mind frame for a

¹ Gherasim, D., *Buna credinta in raporturile juridice civile*, published by "Editura Academiei Republicii Socialiste România", Bucharest, 1978; Oprisan, C., *Elementul de morala in conceptul de buna-credinta*, in Romanian Law Studies Review no. 1/1970; Anca, P.; Eremia, M., *Efectele juridice ale buneii-credinte in dreptul civil*, Justitia Noua no. 12/1965.

² Musy, A., *The good faith principle in contract law and the precontractual duty to disclose: comparative analysis of new differences in legal cultures*. Global Jurist Advances. Volume 1, Issue 1 February 2001 p.2.

³ Gherasim, D., op. cit. p.12.

⁴ Oprisan, C., op. cit p 50.

⁵ Cotea, F., *Buna-credinta. Implicatii privind dreptul de proprietate*, Hamangiu Publishing House, Bucharest 2007, p.27.

⁶ Oprisan, C., op. cit P.62.

⁷ Gherasim, D., op cit p.9.

⁸ Uliescu M., *Buna credinta in noul Cod civil, Justitie, stat de drept si cultura juridica*, p 365, Bucharest 2011; Gherasim D., op. cit. p. 23.

person to act in legal dealings with others by not harming other people's rights or via malfeasance.

All of the above represent psychological concepts, which do not have a standalone impact from a legal standpoint; however these concepts manifest themselves in different forms in order to be viewed as legal concepts. Thus, prudence manifests itself in the form of diligence, which in legal terms represents the minimum floor of attention and interest in all the actions to be performed by a normal individual with an average level knowledge (bonus pater familias). Order takes form of licit, in the sense of abiding the law. Whereas, temperament does not necessarily have a direct legal correlation, basically it's a requirement not to harm others which is necessary in all social interactions.

3. The origin of the rules set out in the Romanian legislation

The recent additions to the new Romanian Civil Code relating to contract law refer to confidentiality, behavior in regard to contract negotiations and change of circumstances. We found that these new provisions are similar to the ones of the Principles of European Contract Law ("PECL"), which proves to be the origin for the way of thought chose for the new Civil Code.

For example article 1:201 of the PECL states that "each party must act in accordance with good faith and fair dealing" and that "the parties may not exclude or limit this duty". The Romanian Civil Code provides the same rules at article 1170, with the addition that this obligation is applicable during the negotiations and concluding of the contract and also during the execution of the contract.

In regard to contract confidentiality, article 2:302 of the PECL provides that "if confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded". The Romanian legislation provides the same rules at article 1184 Civil Code.

In the case of negotiating contrary to good faith the Romanian provisions are identical to those of article 2:301 PECL:

1. a party is free to negotiate and is not liable for failure to reach an agreement⁹.
2. a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party¹⁰.
3. it is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party¹¹.

After taking a look at applications of good faith in the same fields of contract law, in the other legal systems¹², we can conclude that there are several key differences among them, however they all have in common the fact that in all systems good faith grants the legal practitioners a way out from the harshness of the strict application of the contract interpretation rules, by way of judicial discretion in the name of fairness¹³. Thus, good faith represents an example of existence of common points in approach among the national legal system.

4. Recent trends and goals in the field of European law

The harmonization of private law among the Member States has been an old goal for the European Union, dating back to 1989¹⁴ when The European Parliament requested the

⁹ Refer to art 1183 (1) Romanian Civil Code.

¹⁰ Refer to art 1183 (4) Romanian Civil Code.

¹¹ Refer to art 1183 (3) Romanian Civil Code

¹² Musy, A., op.cit, p.2-5

¹³ Musy, A., op cit p.7

¹⁴ Official Journal of the European Communities, 1989, N. C 158/400.

creation of a European civil code. This initiative paved the way for the Communication from the Commission to the Council and the European Parliament on European contract law¹⁵ which presented the Principles of European Contract Law as set out by the Lando Commission.

As recently as 2010, the European Commission presented its green paper on policy options for progress towards a European Contract Law for consumers and businesses¹⁶ ("Green Paper"). The scope of the Green Paper was not to raise a debate regarding the content of European private law, instead it marked the beginning of the process to further harmonize and unify legislation in the EU zone by presenting the main options available in order for individuals and legal practitioners across the EU to best make use of the provisions of the future legal instrument. Options under consideration included: model contract rules; a 'toolbox' for EU lawmakers; - a Contract Law Recommendation (in the style of the US Uniform Commercial Code); - an optional instrument for European Contract Law ('28th regime'); - harmonization of national contract laws by means of a Directive; - full harmonization of national contract laws by means of a regulation; and - a full-fledged European Civil Code¹⁷. Opinions have been expressed that "Europe must be harmonized, not homogenized"¹⁸. Thus we firmly believe that the role of the PECL is to set up a set of general rules which would provide great flexibility in order to facilitate the future development of the legal thinking in the field of contract law.¹⁹

We are of the opinion that the Principles of European Contract Law promote the concept of the good faith and tend to promote its role in contract matters, mainly because good faith is not just an interpretation instrument, but a fully functional legal institution²⁰ capable of (i) completing contract provisions with the additional obligations²¹ necessary for a proper execution of the contract, and (ii) limiting the rights which arise from the contract to a proper dimension or length in order to not give way to contractual imbalances which may occur.

Furthermore, we support the idea that a norm with a high occurrence in practice would be best served as being broad, and not excessively strict, in order to facilitate a bonding of legal institutions which would later lead to a smooth harmonization of European legal cultures.

Given that civil codes are very difficult to modify and implement, from a duration standpoint, we find it difficult to believe that a full-fledged European Civil Code will be in place in the ensuing decades. However it is expected that future directives and regulations to be enacted will further back up the PECL mechanisms which over the course of time will familiarize the law makers and individuals with this set of legal rules.

In regard to the Green Paper presented by the Commission, until January 31 2011 there was a consultation period during which any individual, organization or national authority, was able to submit its opinion and arguments regarding the options set forth by the Green Paper. The political opinions regarding the end result of the Green Paper - mainly

¹⁵ Official Journal of the European Communities, 2001, C 255, [COM\(2001\) 398](#).

¹⁶ Official Journal of the European Communities, 2010, [COM\(2010\) 348](#).

¹⁷ For further understanding of the contents and envisioned effects each option might have, please refer to <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:EN:PDF>.

¹⁸ Storme M., *Good Faith and the Contents of Contracts in European Private Law*, vol. 7.1 Electronic Journal of Comparative Law, March 2003, p. 11.

¹⁹ Lando Ole/Beale Hugh: *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXVII.

²⁰ Storme M., *op cit.* p. 9.

²¹ Hesselink, M., *Principles of European Contract law*, Kluwer, Dwyter, 2001, p.51; the author manages to distinguish additional duties in four main categories: duties of care, duties of loyalty, duties to cooperate and duties to inform.

supported by EU and member state officials - were optimistic, whereas legal scholars were more reserved in this regard mainly based on the effects a relatively sudden forced harmonization may have on national legal cultures.

Strictly related to the scope of the consultation regarding the Green Paper several of the submitted opinions have been published²². After analyzing the submissions, we found that from a practice standpoint some of the leading law firms which are present across several European jurisdictions, such as Linkletters, Allen Overy, Clifford Chance, have presented a reserved approach regarding the positive outcome and implementation of this initiative. While seemingly understandable that setting a strongly regulated common core of contract law may lead to a sense of short sightedness in relation to legal heritage and habits, it would also prove to be a real challenge for lawyers to adapt their understanding of how civil law should be applied. We find it very likely that in the near future such a harmonization would be negatively received. However, the reticence regarding harmonization is somewhat unfounded, mainly because the Green Paper offers solutions such as optional instrument contract law, publication of conclusions by the EU experts and the toolbox option. All of these are not binding and do not impose restrictions on the national law makers.

On this matter the Romanian authorities have submitted their opinion, through the Romanian Senate²³, and manifested their support for the solution of adopting a regulation establishing a European contract law. Even though this way seems to be among the least likely solutions among those proposed by the Green Paper, after studying the reasoning behind the Senates' opinion, we can safely conclude that the Romanian law makers are aiming for a legal thinking very close to that of the PECL. The reasoning being mainly to assure an easy transition, to what the Romanian authorities believe to be, the future in the field of civil legislation, one that is harmonized either by means of obligatory EU legislation or even a European Civil Code. In support of this assessment we allude to the new Romanian Civil Code provisions in the field of contract law, especially to the concepts of good faith, contract performance, hardship, and tort, which are similar or inspired from the PECL provisions.

Conclusions

Looking at the direction in which European legislation at a national level is heading we find the recent enactment of the Romanian Civil Code as being a step in a direction which converges with that of other EU member states. Strictly related to good faith, we deem that the newly added provisions in our legislation have enhanced the role of an institution which is able to facilitate and resolve more and more complex contractual legal matters which legislation cannot always cover.

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²² http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm.

²³ Decision no. 40 dated December 17, 2010 published in the Official Gazette no.890, dated December 30, 2010.

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