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THE PRINCIPLE OF GOOD FAITH IN CONTRACTUAL OBLIGATIONS IN THE CONTEXT OF THE MODERNIZATION OF CIVIL LEGISLATION OF UKRAINE

The article is dedicated to the principle of good faith in contractual obligations in the context of the update of civil legislation and its harmonization with European Union law. It explores the principle of good faith in contractual obligations in the Civil Codes of Ukraine, Germany, and France, as well as in international codifications of private law principles. The article concludes that in the Civil Codes of Germany and France, the principle of good faith is enshrined in general terms, similar to the formulations in the Civil Code of Ukraine. It is revealed that the principle of good faith in contractual obligations in the practice of the Supreme Court is often associated with the doctrine of «venire contra factum proprium» (the prohibition of contradictory behavior). Criteria for good faith conduct in contractual relations applied in judicial practice are identified.

Keywords*: good faith, general principles of civil legislation, principle of civil legislation, contractual obligations, contractual relations, update (recodification) of Ukraine's civil legislation, private law.*

Крутник Р.

Принцип добросовісності договірних зобов'язань в умовах оновлення цивільного законодавства України

Стаття присвячена принципу добросовісності договірних зобов'язань в умовах оновлення цивільного законодавства та його гармонізації із законодавством Європейського Союзу. В ній досліджено принцип добросовісності договірних зобов'язань в Цивільному кодексі України, Німеччини та Франції, міжнародних кодифікаціях принципів приватного права (Принципах, визначеннях і модельних правилах європейського приватного права - DCFR та Принципах міжнародних комерційних договорів УНІДРУА). Зроблено висновок, що в Цивільних кодексах Німеччини та Франції принцип добросовісності закріплений в загальних формулюваннях, подібно до формулювань у Цивільному кодексі України. Запропоновано в умовах рекодифікації цивільного законодавства узгодити п. 6 ч. 1 ст. 3 та ч. 3 ст. 509 Цивільного кодексу України, виклавши тріаду загальних засад цивільного законодавства – «добросовісність, розумність, справедливість» – у однаковій послідовності.

Попри вживання терміну «добросовісність» в Цивільному кодексі України, визначення поняття цього принципу в нормах кодифікованого акту цивільного законодавства не закріплено. Відсутність легальної дефініції створило ґрунт для плюралізму авторських визначень добросовісності в доктрині приватного права. На підставі аналізу наукових джерел зроблено висновок, що добросовісність є морально-етичним поняттям, яке передбачає необхідність сумлінної та чесної поведінки суб'єктів при здійсненні своїх суб'єктивних прав та виконанні своїх юридичних обов'язків та набуває конкретного змісту при застосуванні його у цивільних правовідносинах, зокрема договірних.

З'ясовано, що принцип добросовісності договірних зобов'язаннях в практиці Верховного Суду часто пов'язується із доктриною «venire contra factum proprium», що в перекладі з латинської мови означає заборона суперечливої поведінки. Ця доктрина базується на нормі римського приватного права «non concedit venire contra factum proprium», що означає «ніхто не може діяти всупереч своїй попередній поведінці».

Визначено критерії добросовісної поведінки у договірних правовідносинах, які застосовуються в судовій практиці: 1) очікуваність поведінки сторони договору; 2) врахування прав та інтересів інших учасників цивільних правовідносин; 3) законність поведінки сторони договору; 4) сприяння однієї сторони договору іншій стороні. Про добросовісність поведінки сторони договору можна стверджувати за умови відповідності її дій сукупно усім цим критеріям.

Ключові слова: *добросовісність, загальні засади цивільного законодавства, принцип цивільного законодавства, договірні зобов'язання, договірні правовідносини, оновлення (рекодифікація) цивільного законодавства України, приватне право.*

Problem statement. In the context of the ongoing update of Ukraine's civil legislation, the study of the fundamental principles of civil law and their alignment with European Union law is gaining increasing importance. One of these principles, which requires detailed analysis in light of the recodification of the Civil Code of Ukraine [1], is the principle of good faith in contractual relations. It is important to note that the study of this issue is crucial not only from a theoretical perspective but also from a practical one, as this principle is frequently applied by the Supreme Court in resolving disputes in contractual relations.

Analysis of recent studies and publications. The principle of good faith in civil law, particularly in contractual obligations, has been extensively covered in private law doctrine. Scholars such as I. Borovska, S. Burlakov, K. Valihura, S. Galkevych, O. Kot, V. Krat, I. Nazarova, D. Pavlenko, M. Stefanchuk, and others have addressed this topic in their academic works. However, the research of the principle of good faith in contractual obligations in the context of updating civil legislation and its harmonization with European Union law has not yet received adequate attention from scholars.

The purpose of this article is to explore the principle of good faith in contractual obligations amid the update of civil legislation and its harmonization with European Union law, based on an analysis of scholarly works, national and European legislation, and judicial practice.

Main Findings with Comprehensive Justification of Scientific Results. The principle of good faith in contractual obligations has a long history, rooted in Roman private law. Roman private law developed the doctrine of good faith (bona fides), which stood against malicious intent (dolus malus) and was reflected in moral precepts such as «live honestly, harm no one, and give each his due» (honeste vivere, alterum non laedere, suum cuique tribuere) [2, p. 615].

In the Civil Code of Ukraine (hereafter referred to as the CCU), the principle of good faith is enshrined in paragraph 6 of part 1 of Article 3, where it is included as one of the general principles of civil law: «justice, good faith, and reasonableness» [3]. Good faith is also mentioned in part 3 of Article 509: «An obligation must be based on the principles of good faith, reasonableness, and fairness». Interestingly, the order of this triad in Article 509 differs from that in Article 3, indicating a lack of precision in legal drafting. Therefore, in the process of recodifying Ukraine's civil legislation, it would be appropriate to harmonize these articles and present the aforementioned three general principles in the same order.

As one of the key directions in the development of Ukraine's private law, even during wartime, is the harmonization of Ukraine's civil legislation with that of the European Union, attention should be given to the concept of good faith in international codifications of private law principles. According to Article I.-1:103 of the Principles, Definitions, and Model Rules of European Private Law, behavior contrary to good faith and fair dealing includes conduct inconsistent with prior statements or behavior, provided the other party reasonably relied on them to its detriment [4]. Similarly, Articles 1.7 and 1.8 of the UNIDROIT Principles of International Commercial Contracts state: «Each party must act in accordance with the principle of good faith and fair dealing in international trade. Parties cannot exclude or limit this obligation. A party may not act inconsistently with a particular understanding that has arisen from the other party's reliance, reasonably acting to its detriment» [5].

The European integration vector of the development of civil legislation necessitates the study of the principle of good faith in contractual obligations through the lens of the modern recodification experience of the German and French civil codes, often regarded as the «bastions» of private law.

In the German Civil Code (Bürgerliches Gesetzbuch, BGB), as in the Civil Code of Ukraine, the principle of good faith is not explicitly defined. The only mention of good faith in contractual obligations is found in § 242 of the BGB, which pertains to the performance of contractual obligations: «The debtor is obliged to perform the obligation in good faith, taking into account the customary practices of civil commerce» [6]. Therefore, the specific manifestations of the principle of good faith in contractual obligations are not outlined in the German Civil Code. This principle remains a general moral and ethical concept upon which contractual relations are based, with its concrete meaning shaped by private law doctrine or judicial practice. On a doctrinal level, German civil law scholars differentiate between two approaches to understanding good faith: good faith in its subjective sense (Guter Glauben) and in its objective sense (Treu und Glauben), both of which are characteristic of German civil law and are consistent with the Roman law understanding of good faith.

In the French Civil Code, good faith is mentioned twice. Article 1134, paragraph 4, states that «contracts must be performed in good faith», while Article 1135 provides that «contracts bind not only to what is expressed in them but also to all consequences that fairness, custom, or law associate with this obligation, according to its nature» [7]. There are no other references to the principle of good faith in the section of the French Civil Code concerning obligations. However, in French civil law theory, good faith has been extensively developed. Since the

late 1970s, French doctrine has expanded the application of the principle of good faith to include pre-contractual relations and the interactions between parties in the performance of contracts.

Thus, in both the German and French Civil Codes, the principle of good faith is enshrined in general terms, similar to the provisions in the Civil Code of Ukraine. Despite the use of the term «good faith» in the Civil Code of Ukraine, the concept is not defined within the codified legislation. The absence of a legal definition has led to the development of various interpretations and scholarly understandings of good faith within the doctrine of private law.

For instance, O. Kot views good faith as a principle of exercising subjective civil rights, describing it as behavior expected (or predictable) under given circumstances, characterized by a reasonable degree of honesty, reliability, and consideration for the interests of other parties to the legal relationship. The actual actions of the legal subject must meet this criterion when exercising their rights [8, p. 96].

In contrast, M. Stefanchuk believes that the concept of good faith arises at the intersection of will, intent, and legal consciousness and is inherent to any individual who adheres to the legal norms established in society. Acting in good faith, a person refrains from committing unlawful acts, which is why it is essential to include the concept of good faith among the characteristics of lawful behavior [9, p. 142].

I. Borovska also expressed her position, noting that good faith is an evaluative category that implies conscientious and honest behavior by a party when performing subjective duties and exercising subjective rights. This is reflected in the unity of intentions (internal conviction of the necessity of such behavior) and actions (conduct aimed at achieving the legally established procedural goal), while considering the rights and interests of the other party – the subject of civil procedural legal relations. This is a necessary condition for the proper and timely consideration and resolution of a civil case [10, p. 123].

According to K. Valihura, any moral category enshrined in legal norms can be characterized from both objective and subjective perspectives. The objective aspect comes from its enshrinement in legal norms, while the subjective aspect involves the individual's internal perception of the law through their own notions of good and conscience. Good faith, in her view, is a balance between individual interests and the private interests of others and society as a whole [11, pp. 12-13].

In his research, S. Galkevich argues that good faith expresses a certain standard of behavior characterized by honesty, openness, and respect for the interests of the other party in a civil legal relationship [12, p. 15].

D. Pavlenko suggests that good faith should be understood in both a narrow and broad sense. In a broad sense, good faith is a complex, multi-faceted civil law category that goes beyond being simply a principle of civil law. It constitutes a system of various legally significant manifestations that have independent regulatory influence on civil relations, though they are closely interconnected. The complexity of this category lies in the fact that good faith simultaneously serves as: 1) an imperative of civil law; 2) a principle of civil law; 3) a norm of direct action; and 4) a presumption of civil law. In a narrow sense, each of these manifestations individually affects civil legal relations [13].

Thus, in private law doctrine, each Ukrainian scholar offers their own understanding of the concept of good faith as a moral-ethical category.

The aforementioned perspectives indicate that good faith is a moral and ethical concept that requires conscientious and honest behavior by subjects when exercising their subjective rights and fulfilling their legal obligations. It gains concrete meaning when applied in civil legal relations, particularly in contractual matters.

The concept of the principle of good faith has been formulated in the practice of the Supreme Court, the highest judicial body in Ukraine. In the decision of the Supreme Court's Civil Cassation Court from May 16, 2018, in case No. 449/1154/14, it is stated that «good faith (point 6 of Article 3 of the Civil Code of Ukraine) is a certain standard of behavior characterized by honesty, openness, and respect for the interests of the other party to the contract or legal relationship» [14].

The principle of good faith in contractual obligations is often associated in Supreme Court practice with the doctrine of «venire contra factum proprium», which, translated from Latin, means the prohibition of contradictory behavior. This doctrine is based on the Roman law norm «non concedit venire contra factum proprium», meaning «no one may act against their previous conduct». As V. Krat notes, the origins of the principle of contradictory behavior can be traced back to Ulpian's formulation (D.1.7.25): after the death of his daughter, who lived as a matron, emancipated as if by law, and passed away after making a will, her father was prohibited from disputing his own act, as if he had unlawfully emancipated her without witnesses (post mortem filiae suae... pater movere controversiam prohibetur). Over time, the «venire contra factum proprium» doctrine was developed by glossators and post-glossators [15].

The «venire contra factum proprium» doctrine, as a manifestation of the principle of good faith in contractual obligations, was substantiated in the Separate Opinion of the judges of the Supreme Court's Civil Cassation Court, V. I. Zhuravly and V. I. Krat, dated August 22, 2018, in case No. 596/2472/16-ts. In paragraph 6.4, it was stated: «It is obvious that the lessor took advantage of the fact that, for various reasons, he did not personally sign the land lease agreement. Therefore, the lessor's (landlord's) challenge to the land lease agreement contradicts his previous conduct (acceptance of payment for the use of the land plot) and is considered to be in bad faith» [16].

Since then, the doctrine of «venire contra factum proprium» has been frequently applied in the practice of the Supreme Court of Ukraine. For example, in the decision of the Supreme Court's United Chamber of the Civil Cassation Court dated April 10, 2019, in case No. 390/34/17, it was stated: «At the heart of the doctrine of venire contra factum proprium is the principle of good faith. Behavior that contradicts good faith and honest business practices includes, in particular, conduct that is inconsistent with previous statements or actions of a party, provided that the other party reasonably relies on them to their detriment. It is clear that the actions of the plaintiff, who signed an additional agreement to the land lease agreement on December 24, 2013, and later filed a lawsuit seeking to declare the land lease agreement of November 19, 2007, No. 61, as not concluded, contradict his previous behavior (entering into the additional agreement and receiving payment for the use of the land plot) and are in bad faith. The land lease agreement of November 19, 2007, No. 61, is considered concluded after all essential terms were agreed upon by the parties, which occurred on November 19, 2007, during the lessor's lifetime and with his signature, and there are no grounds to consider the disputed agreement as not concluded» [17].

Later, the Grand Chamber of the Supreme Court, in its ruling of May 25, 2021, in case No. 461/9578/15-ts, adopted this interpretation of the principle of good faith through the doctrine of venire contra factum proprium to form a unified judicial practice regarding the application of point 6 of Article 3 of the Civil Code of Ukrainem [18].

A further step in applying the principle of good faith to contractual relations in Supreme Court practice was the adoption of the Grand Chamber's ruling of November 29, 2023, in case No. 513/879/19, concerning the invalidation of a land lease agreement. Guided by the doctrine of venire contra factum proprium, the Grand Chamber outlined the following criteria for good faith behavior: it must be predictable and typical for other participants in civil legal relations under comparable circumstances; the conduct of a party in civil legal relations should not limit or deprive the rights of others and must consider the rights and legitimate interests of the other party; the behavior of the party must be lawful, particularly prohibiting actions with illegal intent or with the intention of harming another person; and participants in civil legal relations should assist their counterparties in various ways, including by providing necessary information. The conformity of actions to all these criteria allows for the assessment of such actions as being in good faith. Otherwise, there are grounds to assert bad faith and abuse of rights [19].

However, the application of the venire contra factum proprium doctrine to contractual relations is not always appropriate. This was highlighted in the ruling of the Grand Chamber of the Supreme Court on June 16, 2020, in case No. 145/2047/16-ts, regarding the invalidation of land lease agreements [20].

Thus, the above analysis leads to the conclusion that the principle of good faith in contractual obligations is applied in Supreme Court cases through the doctrine of venire contra factum proprium, indicating the strengthening of moral foundations in the civil-law regulation of contractual relations.

Conclusions. The aforementioned research provides grounds for concluding that good faith is one of the fundamental principles of civil law, upon which the legal regulation of contractual relations is based. Despite the use of the term «good faith» in the Civil Code of Ukraine, this concept is not explicitly defined in the provisions of the codified civil law.

A comparative analysis of the Civil Codes of Ukraine, Germany, and France suggests that the principle of good faith is enshrined in general terms in European civil codes, similar to the formulations in the Civil Code of Ukraine.

In the context of the recodification of civil legislation, it seems appropriate to align part 3 of Article 509 and point 6 of part 1 of Article 3 of the Civil Code of Ukraine by consistently presenting the triad of the general principles of civil law – «good faith, reasonableness, fairness» – in the same order.

In the practice of the Supreme Court, the principle of good faith in contractual obligations is often linked to the doctrine of venire contra factum proprium (prohibition of contradictory behavior). The criteria for good faith behavior in contractual relations, as applied in judicial practice, include: 1) the predictability of a party's behavior; 2) consideration of the rights and interests of other participants in civil legal relations; 3) the legality of a party's behavior; 4) the party's assistance to its counterpart. The good faith of a party's behavior can be asserted when its actions collectively meet all these criteria.

This research can serve as a foundation for further studies on the principle of good faith in specific contractual obligations, especially in the context of the ongoing modernization of Ukraine's civil legislation.

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