Jurnalul de Studii Juridice

Jurnalul de Studii Juridice

ISSN: 1841-6195 (print); ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC, EconPapers, Socionet, EBSCO

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Jurnalul de Studii Juridice, 2013, Volume 8, Issue 1-2, June, pp:95-100

The online version of this article can be found at:

http://www.journaloflegalstudies.info/

Published by:

Lumen Publishing House

GOOD FAITH AND ITS ROLE IN THE EVOLUTION OF CONTRACT LAW

Liviu Titus PAVELIU[1]

Abstract

The purpose of this article is to highlight the role which good faith has served in the ongoing development of contract law doctrine and legislation. The convergences between good faith as it was present in Roman law and in the modern Romanian legislation highlight a variety of ideas which, even to this day, prove to be a useful instrument in the quest to diminish contractual formalism.

In the first part of the article, we identify how good faith had gained legal status. In Roman law, the changes in the economy dictated the need for legal instruments which would better cater to the interest of the upper echelon of society. Thus came to force the good faith actions which at the time were considered innovative solutions which in turn would cover unforeseen circumstances that occurred in economic dealings.

In Romania the concept of good faith as it relates to contract law is a relatively new concept given that the previous legislation focused mainly on subjective good faith and labeled it as a general rule with little theoretical support and even less practical implications in contractual matters.

The second part of the article focuses on how the recent enactment of the Romanian Civil Code has transformed good faith into a key cog in several contract law institutions and why the similarities with Roman law provide interest in regard to present and future application.

In the last part we will try to correlate how the historical application of good faith presents the blueprint as to how this concept will translate in the Romanian national legal system in theory and in practice in the years to come.

Keywords: *Good faith, Romanian contract law, Roman law, contract interpretation*

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PAVELIU, L.T. (2013). Good Faith and its Role in the Evolution of Contract Law. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp. 95-100

1. Introduction

Good faith is an institution which has long been present in the main legal systems in the civil law countries and until the past century also in common law countries.

While the aim of this paper is to highlight how good faith helped the development of contract law in its quest to diminish formalism, the main focus will be on how this institution first came about and despite the changes in appearances, the core functions of good faith have remained intact.

2. The genesis of good faith and its role in Roman law

The formalism of the old Roman law matched very much so with the needs of the Romans, formed mainly of soldiers and farmers. However, the ever long expansion of the borders and the occurrence of political disputes have led to significant changes between the commercial dealings of citizens with foreigners. Given that the number of commercial transactions had increased, the changes brought upon the economic marketplace dictated the need for new legal instruments which would cater to the interest of the upper echelon of society (Dimitrescu, 1906, p.17). While the law, in a general sense, was rather inflexible towards change, the remedy to this problem was to improve the application of procedure in litigation instead of modifying the substantial law (Molcut & Oancea, 1991, p.36).

The origin of a notion similar to good faith can be credited to Zeno and Pythagora's need to find an instrument to facilitate social justice, which they described as being a "concept which 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 an universal society of boni viri, of good men" (Fauvarque-Cosson & Mazeaud, 2008, p.152).

The evolution of Roman law encountered different procedural systems which corresponded to three main time frames: the old, classical and post-classical periods. Given its importance in the development of good faith, for the purposes of this article we will focus on the formulary procedure which was in effect during the classical period.

The procedural systems specific to the old period assigned a rather limited role to the magistrate who was impelled only to verify if the parties

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who sought litigation had used the formulae proper to the subject matter at hand. After the introduction of the formulae procedure the role of the magistrate increased simultaneously with the geographic and economic expansion of the Roman Empire. As a result, the number of praetors increased which led to the creation of a new position, that of praetors perigrini, whose jurisdiction consisted of cases which involved foreigners.

From a procedural stand point the magistrate had the task to draft formulae which would serve to guiding the judge throughout the case. The newly created formulae, which were of Greek origin, were opposed to its predecessors mainly because they paved the way for new principles which would help solve unforeseen legal situations. Given that the praetors perigrini were called upon daily to solve such disputes, their experience and knowledge led to the creation of a new type of law, jus gentium, with the intent to modify and complete the jus civile. Following this classification, Dimitrescu (1906) concluded that the latter was inspired from previous Roman law, whereas the former was composed of customs, equity and good faith which freed the judge from the restrictions of the formulae and enabled him to rule as an arbitrator (iudex pron censore est).

In compliance with the formulae procedure the parties and the praetor would cooperate in such a manner that could lead to opposite solutions to the ones which would result from the application of the previous Roman law. Thus, by expanding the attributes of the praetor and diminishing the effects of formalism in regard to contract law, the functions of the jus civile had changed while enhancing the protection of the parties' rights before justice.

3. The role of good faith in the development of contract law

At the dawn of the formulae procedure, the benefits of good faith actions could be seen in the development of production and the sale of goods. A visible effect in this regard was highlighted in the case of the knights who gained riches through commercial and extorting transactions, and thus sought change of the legal procedure so that their new gained rights could be capitalized quicker (Molcut & Oancea, 1991, p.40). The overall reluctance of the previous legal procedure could be attributed to the economic interest of knights who played a major role in the upper echelon of society. As a result, in 150 BC Lex Aebutia de formulis came into force, which granted the parties the right to choose which procedural

legal system they wanted to apply in its case. Following the success of the formulae procedure Emperor Augustus set forth Lex Iulia Iudiciorum.

Beginning with Lex Aebutia, the praetor could create special formulae, and consequently a right of action, every time he deemed a special interest needed to be served. The removal of a quantitative limitation, correlated with the possibility of any person being allowed to ask for such formulae, gave rise to an increase in the number of civil actions brought before the praetor, by expanding the variety and field of application for the protected rights.

At the time, civil actions were divided in two main categories, actiones stricti juris and actiones bone fidae. The former involved a strict interpretation of the plaintiffs claim, whereas in the case of good faith actions the judge was free to establish the real intent of the parties by going beyond the letter of the contract. According to Fauvarque-Cosson & Mazeaud (2008) in order for a judge to evaluate a convention in good faith, the words "ex fida bona" had to be included in the formulae, thus during the second century BC this type of actions were featured prominently by the praetors urbani in the jus civile, being viewed as a continuation of the practice of the praetors perigrini before them. In further expanding the component of interpretation in a good faith action Dimitrescu (1906) highlighted three main types of obligations:

- essentialia, which consisted of obligations inherently necessary to the existence of the contract,
- naturalia, composed of terms included ex lege, unless the parties have agreed against their application, and
- accidentalia, which were the terms expressly agreed upon by the parties in order to supplement the law.

4. Good faith in modern Romanian legislation

Roman law sparked the creation of good faith and, while the appearance and functions have changed over medieval law, the codifications period and through modern day legislation, the role in the evolution of contract law cannot be left unnoticed. The current Romanian legislation is influenced by its heritage and, for the previous decade, by the EU acquis. However, several legal institutions provide similarities with the functions of good faith in Roman law. In the field of contract law good

faith helped develop the interpretation of the contract by analyzing the content of the convention not by the written letter, but by the real intent of the parties. In regard to the types of obligation, the previously presented classification laid the groundwork as to how nullity and contract performance should be applied in conjunction with the importance of the obligation, or to what extent implied terms may apply.

To some extent good faith displayed a moral component, which was used at first as a cover for the change in legislation and over the course of history had morphed into an instrument of social justice (Hesselink, 2008, p.49). Romanian civil law has continued on the roots of the Roman law, however, not until the recent enactment of the Romanian Civil Code was good faith perceived as a centerpiece to contract law. In the previous Civil Code, the dominant form present was subjective good faith, which related to the psychological component of individuals behavior (Gherasim, 1979, p.23). Within the current Civil Code objective good faith has been introduced in several institutions such as negotiations (art. 1184), pre-contractual liability (art. 1183), change of circumstances (art. 1271) and contractual performance (art. 1541). As a result of the comparative analysis as to how and to what purposes good faith served, the outline remains the same, namely that, good faith as an open norm grants (i) flexibility, to the judges where the law fails to regulate, (ii) social justice, where gaps in the law lead to unfair outcomes, and (iii) contractual balance, because the parties conduct has to comply with to requirements of good faith.

5. Correlation between the past and present functions of good faith.

According to a prominent researcher and writer in the field of good faith and European law, professor M. Hesselink (2002) argued that "the discussion as to whether good faith has a supplementing and correcting function has served as a facade for the question whether the judge may supplement and correct the law (first: the contract). In other words, the emancipation of the judge has taken place under the cover of the emancipation of good faith and equity". Thus, going back to the points previously discussed in the article, we can conclude that going back to the Roman Empire, lawmakers sought to grant judges the authority to rule in cases which covered unforeseen situations by setting up open legal norms.

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As we can see in the current Romanian legislation, mainly the recently enacted Romanian Civil Code, good faith aims to protect parties from harmful practices in areas such as negotiations, litigation procedure and exercise of rights and so on. Given that strict and rigorous legal provisions often provide escape routes for those who want to take advantage of them, consequently open legal norms provide a broader array of application which in turn enables the judge to sanction any type of behavior which he deems as harmful or unfair towards the other party in a contractual relationship. While we understand that open norms can lead to legal uncertainty given the empowered role of the judge in the application of the law, which is uncommon in conservative legal systems such as the Romanian one where the judge must comply with the law and not add to it, we find this line of thought to be a sign of progress in relation to legislation flexibility. However, we are of the opinion that, for open norms such as good faith to properly function in the Romanian legal system, a coherent and system based case law must be established, such as the case for Germany and Netherlands and also common law countries, so that the flexibility of this institution also provides legal certainty as to how it will be applied.

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