
The Purpose of the Principle of “Good Faith” in Civil Legislation and Judicial Practice of the Republic of Azerbaijan

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Abstract

This article examines the problem of application of the principle of good faith by the courts of the Republic of Azerbaijan, the definition of which is officially defined in the Civil Code of Azerbaijan. In particular, in cases where the actions of the parties do not fully coincide with the definition given in the Civil Code, the question arises as to how the courts should resolve this issue. Based on an analysis of the legislation and judicial practice of other countries, it is concluded that, based on the principle of freedom of contract, the parties can create their own criteria for determining good faith in a contract.

Annotasiya

Bu məqalədə tərfi Azərbaycan Respublikasının Mülki Məcəlləsinin ayrıca normasında müəyyən edilmiş vicdanlıq prinsipinin Azərbaycan Respublikası məhkəmələri tərəfindən tətbiqi problemləri araşdırılır. Xüsusilə, tərəflərin hərəkətlərinin Mülki Məcəllədəki normada verilən təriflə tam üst-üstə düşmədiyi hallarda məhkəmələrin bu məsələni necə həll etməsi barədə sual yaranır. Digər ölkələrin qanunvericiliyinin və məhkəmə təcrübəsinin təhlili əsasında belə qənaətə gəlinir ki, müqavilə azadlığı prinsipinə əsaslanaraq tərəflər müqavilədə vicdanlılığı müəyyən etmək üçün öz fərdi meyarlarından da yararlanı bilərlər.

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Introduction

Good faith rule in contractual relationships can occur in different situations. For example, Sarah insured her life and health from accidents during sport activities. But the insurance company didn't set, that this contract doesn't cover parachute related activities. As a result, after Sarah was injured while skydiving, she was denied insurance coverage by her insurance company. I suppose that in this specific situation the insurance company must have pointed at such terms and conditions or verbally provide the insured party about them in detail. Such actions can be assessed as unfair behavior.

The similar actions can happen during fulfillment of contractual obligations as well. For example, the supplier doesn't deliver the goods to the destination point, set in the contract, but to the more unsuitable point which results in the additional payment of the buyer. Such actions can also be assessed as unfair behavior of the party in contract. The question arises whether actions described in these examples would be considered a breach of good faith and, therefore, unlawful.

In the modern Civil Code of Azerbaijan, the main principle reflecting the essence of contracts is the principle of freedom of contract. Freedom of contract, together with other principles, is provided for in Art. 6 of the Civil Code, reflecting one of the basic principles of civil legislation. At the same time, one of the main criteria for assessing the behavior of the parties within the framework of a contractual relationship is the good faith of its participants. Failure by a party to an agreement to comply with the principle of good faith may serve as grounds for civil liability. For example, in this regard, one can refer to Article 448.4 of the Civil Code of the Republic of Azerbaijan. The debtor shall not be liable for the violation of the obligation, if he proves that the violation was caused by circumstances beyond his control and that he was not able to take account thereof at the time of entering the agreement or wait until he can exclude or eliminate the said circumstance and the consequences thereof.

The term good faith, although used in many civil code norms related to contracts, has in some sense vague boundaries. The current Civil Code of the Republic of Azerbaijan in Article 425.1 provides for a rule according to which each party to the contract, when exercising their rights and fulfilling their obligations, is obliged to act in good faith. According to this article, acting in good faith means acting at a specified time and in a specified place in an appropriate manner, in accordance with the terms of the obligation and the requirements of the Civil Code, and in the absence of such conditions and requirements in accordance with business customs or other usually imposed requirements.¹ Reading this norm, it can be concluded that the content of this

¹ Civil Code of the Republic of Azerbaijan, art. 425 (1999).

norm establishes the boundaries for determining the behavior of the parties to the contract as *bona fides*. But at the same time, the question arises: could individual cases arise in which the behavior of the parties to the contract does not coincide with the content of the above-mentioned Article but can still be qualified as in line with good faith principle?

I. Historical Overview: Development of the Institution of Good Faith in the Legislation and Judicial Practice of Different Countries

The legal term "*bona fides*" meaning good faith originates from ancient Rome. The term *bona fides*, which represented the normative framework of the contract was used in Roman private law. A particular phrase used by Roman lawyers of that era captures the essence of good faith principle: *Fidem sequi (habere)*. It means "to rely on someone's fidelity to an obligation".² The ancient Roman lawyer Tryphoninus noted that good faith, which is inherent in contracts, requires the highest justice.³ In other words, in ancient Roman private law the criterion for assessing good faith was fairness. Some researchers associate the emergence of some modern legal institutions with the ancient Roman legal term *bona fides*. For example, it should be noted that many of the typical fiduciary institutions recognized in modern law, such as trust, mandate, partnership or guardianship, were recognized in Roman law as relationships governed by good faith.⁴

During the Soviet period, the legislation of the former republics of the USSR did not use the term "good faith" because there were requirements of a planned economy, requiring all economic entities to fulfill their duties in accordance with exact figures. Since the 20th century, Azerbaijan, being part of the USSR, had already adopted two other Civil Codes: the first in 1923, and the second was adopted in 1964. But these Codes were adapted to the planned economy and the limited economic turnover that developed under the Soviet system. In the mentioned Codes there were no norms devoted to the freedom to conclude a contract, the form of private ownership was not recognized at all, and limited property rights were reflected within a meager framework. With the collapse of the USSR in the 90s, each of the former republics of the USSR began to introduce new Civil Codes that meet the requirements of a modern market economy.

The modern legislator of Azerbaijan, unlike the Soviet one, has a positive attitude towards the practical application of the principle of good faith. The

² Dmitriy Dozhdev, *Rimskoye Chastnoye Pravo*, 517 (1996).

³ Philip Thomas, *Wishful Thinking; The Role and Development of Good Faith in the Roman Law of Contracts*, 51 *Pravnehistoricke Studie* 19, 31 (2021).

⁴ Remus Valsan, *Fides, Bona Fides, and Bonus Vir: Relations of Trust and Confidence in Roman Antiquity*, 5 *Journal of Law, Religion and State* 48, 49 (2017).

main legal source regulating contractual relations in the Republic of Azerbaijan is the Civil Code of the Azerbaijan Republic, which has been in force since 2000. The content of Article 425.1 of the Civil Code of the Azerbaijan Republic, dedicated to the definition of the term good faith leads to the following conclusions: 1) The party to the contract should fulfill its obligations on time. 2) The party to the contract should perform his duties at the specified place. 3) The party to the contract should fulfill its obligations in accordance with the applicable conditions of the contract on which its participants agreed. 4) The party to the contract should fulfill its obligations in accordance with the requirements of the current Civil Code. 5) the party to the contract should fulfill its obligations in accordance with customs of a business turn or other general requirements applicable to a particular type of contract.⁵

In other words, non-compliance with the requirements with one of the above-mentioned conditions can be assessed as dishonesty in the conduct of the contracting party. Paragraph 2. Art. 425 also adds that in the course of the obligation's performance, the parties shall, with the purpose of creating preconditions for the contract to be carried out, act together and refrain from any actions, which may impede achievement of the contract's goals or endanger the obligations performance. In my opinion, this rule means that the parties to the contract should comply with all the requirements of good faith when performing their obligations.

Although it must be mentioned that failure to comply with one of the above conditions can sometimes be a consequence of some objective rather than subjective reasons. For example, force majeure circumstances or the conduct of the opposite party to the contract may affect non-compliance with one of the above-mentioned terms of the contract. In this case, force majeure circumstances, as well as the guilt of the opposite party, exclude the contractual liability of the party. For example, a debtor is not liable for a breach of obligation if the breach results from unforeseen circumstances beyond their control. Additionally, courts may reduce the debtor's liability if both parties are at fault or if the creditor's bad faith or negligence contributed to the damages or failed to take reasonable steps to mitigate them.

As it's known, after the collapse of the USSR, Azerbaijani civil legislation,⁶ like the legislation of most post-Soviet republics, was systematized and developed under the influence of the German Civil Code, which has more

⁵ *Supra* note 1, art. 425 (1999).

⁶ Natig Khalilov, *Codification of Civil Law in Azerbaijan: History, Current Situation and Development Perspectives*, 14 J. Civ. L. Stud. 323, 341 (2022). Available at: <https://digitalcommons.law.lsu.edu/jcls/vol14/iss1/10> (last visited Apr. 3, 2024).

than a hundred years of history.⁷ Therefore, it is essential to analyze the German approach to the good faith principle in order to understand its place in the Azerbaijani legal system. After examining the German approach, this section will also explore the significantly different stance of English law on the matter, as well as the position of the South African legal system.

A. German Civil Legislation

Some authors suppose that the doctrine of culpa in contrahendo, stemming from an article by the German jurist Jhering in 1861, is based on the notion that damages should be recoverable against the party whose blameworthy conduct during negotiations of a contract brought about its invalidity or prevented its perfection. The further development of this thesis in civil law countries such as Germany and Italy was directly related to Jhering's academic approach. It is also noted in legal literature that the principle of good faith originated precisely from the doctrine of culpa in contrahendo.⁸

The principle of good faith received resonance in Germany after the First World War, when, during the inflation and economic crisis, the fair resolution of legal disputes depended on the content of the concluded contracts. As noted in legal sources to avoid further disputes, everything should have been reflected in the content of the contract from the very beginning and in detail. Thus, the courts used the principle of good faith as a tool to “rewrite” contracts to eliminate injustices encountered in the field of debt repayment.⁹ But German judicial practice has achieved success in this direction precisely because practicing lawyers and academic lawyers jointly developed the rules for applying the principle of good faith in judicial practice.¹⁰ I assume that this practice can be applied to the Azerbaijani judicial practice. Academic lawyers, in collaboration with practitioners, could develop a more flexible norm regarding good faith principle. Courts could then use this norm to take into account specifics of individual cases rather than being guided by precise templates of legislative norms.

German lawyers, analyzing § 242 of the German Civil Code, note that the rule contained therein that the debtor is obliged to fulfill obligations in good faith, considering the customs of civil transactions, creates in some sense the false impression that it regulates only the conduct of the debtor (although

⁷ See Khaydarali Yunusov, *The Development of Legal Systems of Central Asian States*, 2 Studii Europene 23, 27 (2014). Available at: <https://nbn-resolving.org/urn:nbn:de:0168-ss0ar-413033> (last visited May. 3, 2024).

⁸ Emily M. Weitzenböck, *Good Faith and Fair Dealing in Contracts Formed and Performed by Electronic Agents*, 12 Artificial Intelligence and Law 83, 91 (2004).

⁹ Mark Snyderman, *What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 University of Chicago Law Review 1335, 1365 (1988).

¹⁰ *Ibid.*

always it was assumed that this would also apply to the creditor).¹¹ At the same time, the authors concluded that, oddly enough, it is precisely this ambiguity allows it to become a hook on which numerous values of German court judgments could be hung, gaining thus legitimacy in the eyes of lawyers who are used to justify their decisions with references to written texts of legal documents.¹² In my opinion, the provision in the legislation of a general norm establishing the boundaries of the principle of good faith can facilitate the work of the courts in making fair decisions. But such an abstract norm will always be interpreted differently by the courts.

In conducting a study of the principle of good faith in German legislation and judgment, some authors have concluded that this principle is characterized by three features: 1) Firstly, the principle of good faith creates a kind of secondary or additional obligation for the parties within the framework of an incompletely and unclearly formulated contract; 2) Secondly, the principle of good faith manifests itself as a means of limiting the legal rights of the parties to the contract when they abuse their position; 3) Thirdly, this principle serves to protect the interests of the economically weaker party to the contract.¹³

B. English Contract Law and Practice

On the contrary, in English contract law, the attitude to the principle of good faith is not stated as simply as in continental law. English contract law, guided by individualism in each case, usually denies some general principles, including the principle of good faith in contractual relations. Particularly in commercial contracts, the application of the principle of good faith has always been viewed with hostility.¹⁴ In *Walford v. Miles* in 1992, the court relied on the time test to find that even if the parties to a contract initially undertake to each other when negotiating that they will not negotiate with another third party on the same terms, it cannot be enforceable. It can only be enforceable if it sets out a specific period for compliance with the term.¹⁵

As can be seen in the above case, the UK court agreed that a certain promise between the parties to the contract should be valid for a specific time. In Azerbaijan, the legislator does not connect two parties who intend to conclude a contract in the future with a specific time. For comparison, if this happened in our judicial practice, the court, relying on Article 386.3 of the Civil Code of

¹¹ See more Sir Basil Markesinis et al., *The German Law of Contract: A Comparative Treatise*, 119-133 (2nd ed. 2006).

¹² *Id.*, 120.

¹³ Marietta Auer, *Good Faith and Its German Sources: A Structural Framework for the "Good Faith" Debate in General Contract Law and under the Uniform Commercial Code*, 30-31 (2001).

¹⁴ *Ibid.*

¹⁵ *Walford v. Miles*, 2 A.C. 128 (1992). Available at:

https://www.isurv.com/directory_record/4392/walford_v_miles (last visited Apr. 4, 2024).

Azerbaijan, would have made the opposite decision. Of course, for this it would be necessary to prove and clearly state in the court decision the guilt of the contracting party in not concluding the contract. Because, as stated in Article 386.2, the obligations provided for in the Civil Code can be formed not only with the conclusion of the contract but also sometimes during the preparation of the contract. A party in the negotiations, aimed at entering a contract and not completed due to a fault of the other party, shall be entitled to demand compensation of its expenses from such party. In other words, creating any hope for the future in any person, but later breaking this hope for no reason, cannot be regarded as honest behavior.

Moreover, there have been cases where it was concluded that the principle of good faith applies only to certain aspects of a contract explicitly specified by the parties. This position was upheld by the Court of Appeal in the case of *Mid Essex Hospital v. Medirest*.¹⁶ The parties in this dispute had a contract agreeing to “*co-operate with each other in good faith and take all reasonable action as necessary for the efficient transmission of information and instructions, and to enable Essex Hospital to derive the full benefit of the Contract...*” When the dispute came before the Court of Appeal, it concluded that the aforementioned clause did not impose a general obligation for the parties to act in good faith regarding the contract as a whole. Instead, a breach of good faith could only pertain specifically to either 1) a failure to cooperate with Medirest in transmitting information and instructions; or 2) a failure to enable the Essex Hospital to benefit from the contract. This case illustrates that, under English contract law, there is no universally accepted requirement for good faith. Rather, it is heavily conditioned by context and can be restricted to specific contractual obligations defined by the parties themselves.

Although there are opponents to this approach as well.¹⁷ In the court case *Yam Seng Pte Ltd v International Trade Corporation Ltd*, it was established that in 2009 ITC (International Trade Corporation) granted Yam Seng Pte Ltd exclusive rights to distribute Manchester United products in parts of the Middle East, Asia, Africa and Australia, but in July 2010 it withdrew from this agreement by threatening to use another distributor and breaching the implied terms of good faith by providing false information to a Yam Seng representative. The court in its decision in this case concluded that there is a

¹⁶ *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (t/a Medirest)*, EWCA Civ 200 (2013). Available at: <https://mcbridesguides.com/wp-content/uploads/2013/09/mid-essex-hospital-services-nhs-trust-v-compass-group.pdf> (last visited May 1, 2024).

¹⁷ Maud Piers, *Good Faith in English Law: Could a Rule Become a Principle?*, 26 *Tulane European & Civil Law Forum* 123, 131 (2011). Available at: <http://hdl.handle.net/1854/LU-1909498> (last visited May 4, 2024).

contractual obligation of honesty, which is part of good faith, and that ITC has breached this term.¹⁸

Moreover, in English contract law, in parallel with the term good faith, the term “*uberrimae fidei*” also arose. But this term was limited in application to insurance contracts¹⁹. English authors, for example, include an insurance contract among contracts in which relations between the parties are based on the principle of *uberrimae fidei*.²⁰ *Regal (Hastings) Ltd v. Gulliver*, one of the leading UK company law cases, discussed the rule prohibiting directors and officers from taking personal profit of corporate opportunities in breach of their obligation of loyalty to the companies. In this case, the court held that a director is in breach of his duties if he takes advantage of an opportunity for personal profit that the corporation itself would have an interest in and fails to take advantage of. In this case, the judge, Lord Russell of Killowen, relied on the term *bona fides* in his explanation.²¹

In English contract law, the principle of good faith is considered mainly in the context of consumer contracts. This is most likely aimed at providing additional protection for consumers. In particular, the court will grant such claims where unfair terms of the contract are found in the consumer contract. Such cases include, for example, the case between *Director General of Fair-Trading v. First National Bank plc*. English lawyers also have a positive attitude towards the application of the principle of good faith when concluding fiduciary contracts. Within the framework of such contracts, the parties are required not to hide from the other party the information that is necessary for the conclusion or execution of such a contract. Otherwise, the actions of the party may be considered as unfair.²²

I believe that limiting the application of the principle of good faith only to consumer contracts is an incorrect position and the introduction of such a position into Azerbaijani practice would be wrong. This limitation would be at odds with the comprehensive framework provided by Azerbaijani law. In Azerbaijan, the Civil Code is the sole legal source that governs not only consumer or simple contracts but also all commercial contracts. According to Article 5.1 of the Civil Code, the norms of civil law apply to all participants, regardless of whether they are engaged in commercial activities or are

¹⁸ *Yam Seng Pte Ltd v. Int'l Trade Corp. Ltd*, EWHC 111 (QB) (2013). Available at: <https://www.bailii.org/ew/cases/EWHC/QB/2013/111.html> (last visited Apr. 25).

¹⁹ An *uberrimae fidei* contract is a legal agreement, common to the insurance industry, requiring the highest standard of good faith during the disclosure of all material facts that could influence the decision of the other party. See more *Uberrimae Fidei Contract: Definition and Examples* (2023), <https://www.investopedia.com/terms/u/uberrimae-fidei-contract.asp> (last visited May 2, 2024).

²⁰ Paul Richard, *Law of Contract*, 186 (6th ed. 2004).

²¹ *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All ER 378(H.L). Available at: <https://vlex.co.uk/vid/regal-hastings-ltd-v-793012889> (last visited June 2, 2024).

²² Piers, *supra* note 17, 143.

ordinary consumers. Moreover, all the norms of the Civil Code are based on the equality of the parties.

C. South African Judicial Practice

A deeper analysis of the bona fides phenomenon gives us reason to conclude that many legal systems of the world are trying to create so-called general patterns to designate this legal term. Thus, in court decisions of the Republic of South Africa, the use of the ancient African philosophical term *ubuntu*, which means: “*I am because you are*” has become a frequent occurrence. Ubuntu is rooted in humanistic African philosophy, where the idea of community is one of the building blocks of society. *Ubuntu* is a *nebulous concept of common humanity*, unity.²³ It can be said that the term ubuntu has a broader meaning than the concept of good faith. It is more likely to represent a concept of humanity than good faith.²⁴

Some authors, analyzing the decisions of the courts of the Republic of South Africa, noted that until 1994, the courts undoubtedly preferred to be guided by the definition of fairness based on the context of the contract. But since 1994, the Constitutional Court has repeatedly stated that contract law must be imbued with the *constitutional values of fairness, good faith and ubuntu*. This is made clear in one of the Court’s statements: “*It seems that the performance of contractual obligations depends on the judicial sense of reasonableness, fairness and good faith rather than on the terms of the contract*”. This is contrary to the often-expressed view of the Supreme Court of the Republic of South Africa.²⁵

II. Institution of Good Faith in Judicial Practice and Legislation of the Republic of Azerbaijan

In this section, the role of the good faith principle in Azerbaijani jurisdiction will be thoroughly examined. Specifically, an analysis of the decisions of the Constitutional Court of Azerbaijan will reveal that, the Court recognizes the good faith principle as fundamental to the legal system, often basing its rationale on the presumption that individuals engaged in civil relations act in good faith toward one another. Furthermore, it will be demonstrated that similar to the Constitutional Court’s position, the legislation also establishes good faith as a central element of the legal system.

²³ What does ubuntu really mean? (2006), <https://www.theguardian.com/theguardian/2006/sep/29/features11.g2> (last visited June 4, 2024).

²⁴ For further information see T. W. Bennett, *Ubuntu: An African Equity*, 14 Potchefstroom Electronic Law Journal 29, 31. Available at: <https://www.ajol.info/index.php/pelj/article/view/68745> (last visited May 2, 2024).

²⁵ Hutchison Dale, *From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract*, 2019 Acta Juridica 99, 99-126 (2019).

Additionally, it is argued that Azerbaijani legislation allows parties to define the boundaries of good faith within their freedom of contract.

In recent years, in the judicial practice of the Republic of Azerbaijan, problematic aspects in the implementation of norms related to the good faith of the parties in contractual relations have been very often discussed. In decision of the Constitutional Court of the Azerbaijan Republic (hereinafter the Constitutional Court) dated July 14, 2015,²⁶ it was noted that although the principle of good faith is not among the principles of civil legislation listed in Article 6 of the Civil Code, this principle is provided in norms defining the limits of the implementation and protection of civil rights, in certain norms of the Civil Code. Thus, in the system of civil legislation of the Republic of Azerbaijan, good faith as a general principle presupposes the obligation of subjects of civil law to honestly fulfill their rights and obligations.²⁷

To this I can add the fact that the Azerbaijani legislator, in one of the articles of the Civil Code, directly calls good faith a principle of civil law. According to Article 420.2 of the Civil Code, a standard term in a contract, even if included, is void if it is detrimental to the other party and violates the principles of trust and good faith. In such cases, the circumstances under which the terms were included, the mutual interests of the parties, and other relevant factors should be considered.²⁸

In another Resolution of the Constitutional Court, which was related to the conflict between the norms of the Civil Code and the Tax Code, the good faith of the party to the agreement was interpreted as a presumption. Thus, the decision of Constitutional Court of dated March 12, 2012²⁹ noted that, among the elements that form the content of freedom of contract, it can be mentioned the freedom to conclude (or not to conclude) an agreement with a counterparty of one's choice, to determine its type and form, as well as the terms of the concluded agreement, including the appropriate prices. By granting these freedoms to participants in civil transactions, the legislator

²⁶ Azərbaycan Respublikası Mülki Məcəlləsinin 460.1-ci maddəsinin bəzi müddələrinin şərh edilməsinə dair Azərbaycan Respublikası Konstitutsiya Məhkəməsinin 14 may 2015 tarixli Plenumunun Qərarı (Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated May 14, 2015 on the interpretation of some provisions of Article 460.1 of the Civil Code of the Republic of Azerbaijan). Available at: <https://e-qanun.az/framework/30352> (last visited Apr. 4, 2024).

²⁷ *Ibid.*

²⁸ *Supra* note 1, art. 420.2.

²⁹ Azərbaycan Respublikası Vergi Məcəlləsinin 14-cü və Azərbaycan Respublikası Mülki Məcəlləsinin 390-cı maddələrinin şərh edilməsinə dair Azərbaycan Respublikası Konstitutsiya Məhkəməsinin Plenumunun 12 mart 2012 tarixli Qərarı (Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated March 12, 2012 on the interpretation of Articles 14 of the Tax Code of the Republic of Azerbaijan and 390 of the Civil Code of the Republic of Azerbaijan). Available at: <https://e-qanun.az/framework/23181> (last visited Apr. 5, 2024).

assumed that they were conscientious in accordance with the general principle of law. The presumption of good faith - as one of the fundamental legal presumptions, assumes that until proven otherwise, the actions of each subject are regarded as the correct one (*quivis praesumitur Bonus Dones Probetur Contrarium*).³⁰

Based on this presumption, Article 14.2 of the Tax Code of the Azerbaijan Republic determines that, unless otherwise stipulated by this article, the price of goods (work, services) for tax purposes is the price determined by the parties to the transaction (contract). Unless proven otherwise, this price is the market price. Therefore, Constitutional Court considered it inappropriate for the tax authorities to interfere in establishing the amount of rent within the framework of contractual relations.³¹

Carefully illustrating the content of the Civil Code of Azerbaijan, I can conclude that the category of good faith has a semantic meaning not only within the framework of contractual relations, but also within the framework of property rights. Art. 157 of the Civil Code of the Republic of Azerbaijan, dedicated to the protection of property rights, as well as the right of ownership, also uses the term good faith in several places. One of such court cases in Azerbaijani judicial practice, where the court used the principle of good faith to protect the plaintiff's ownership was as follows. In the decision of the Constitutional Court dated September 17, 2021, it was noted that: *"Honesty holds to be an essential element of the institution of good faith, which includes moral and spiritual qualities and is one of the basic principles of civil law. In civil law, it is assumed that individuals are honest, that is, each of the subjects is honest in the exercising of their rights and fulfillment of their obligations in civil legal relations. Protection of good faith is not only aimed at ensuring civil-law transactions, but also serves to protect the interests of subjects"*.³²

The similarity in the last two decisions of the Constitutional Court, which we mentioned above, is reflected in the fact that in both, the court presents the principle of good faith as a separate presumption when evaluating the behavior of the parties to the contract.

³⁰ *Ibid.*

³¹ *Ibid.*

³² X.Mirzəliyevin şikayəti üzrə Azərbaycan Respublikası Ali Məhkəməsinin Mülki Kollegiyasının 18 noyabr 2020-ci il tarixli qərarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitusiya Məhkəməsi Plenumunun 17 sentyabr 2021-ci tarixli Qərarı (Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated September 17, 2021 on the verification of the compliance of the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan dated November 18, 2020 with the Constitution and laws of the Republic of Azerbaijan on the complaint of Kh. Mirzəliyev). Available at: <https://constcourt.gov.az/az/decision/1243> (last visited Apr. 22, 2024).

The Constitutional Court not only establishes good faith as a fundamental principle of the legal system but also limits the assertion of a contract's invalidity if doing so would violate this principle. The decision of the Constitutional Court dated April 26, 2023³³ analyzing the principle of good faith in parallel with the principle of estoppel, demonstrates this approach. In this case, the dispute over the lease agreement was resolved in Court. According to this contract, the lessee was obliged to repair the leased object at his own expense before starting to use it, and it was agreed in the contract that these costs would be deducted from the rent later. However, after a few months, the lessor sold the object to another person before the lease term expired, citing the lessee's delay in paying the rent and repairing the object as the basis of his action.

To reclaim all rents and maintenance costs it has paid up to that date from the lessor, the lessee filed a lawsuit, arguing that the lease agreement between them was invalid. Lessee argued that the lease agreement is invalid because contract described leased object as a one story non-residential building, while in reality the object was 16 story residential building. Thus, the misdescription of lease object would make contract invalid. Lower courts, concluded that the contract was indeed invalid and costs incurred by the lessee in connection with the repair of the leased object shall be reimbursed by the lessor.

Despite this, The Constitutional Court decided otherwise. The Court emphasized that, when the contract was concluded, both parties were aware that the leased property was not a one-story non-residential building, as stated in the contract, but a 16-story residential building. Following this fact, Court noted that when considering the cases related to the invalidity of the contract, it is not enough to evaluate only the written and formal circumstances. The legal intentions of the parties, as well as true content of their expressions of will should also be determined. The invalidity of a contract in such claims can be established by considering not only the expression of will itself but also the circumstances and motives that underlie its formation. These may include pre-contract negotiations, the relationship between the parties, and their subsequent actions. In line with this reasoning, The Court noted that if the invalidity of the agreement has been abused,

³³ M.Şükürovun şikayəti üzrə Azərbaycan Respublikası Ali Məhkəməsinin Mülki Kollegiyasının 18 iyul 2022-ci il tarixli qərarının Azərbaycan Respublikasının Konstitusiyasına və qanunlarına uyğunluğunun yoxlanılmasına dair Azərbaycan Respublikası Konstitutsiya Məhkəməsinin Plenumunun 26 aprel 2023 tarixli Qərarı (Decision of the Plenum of the Constitutional Court of the Republic of Azerbaijan dated April 26, 2023 on the verification of the compliance of the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan dated July 18, 2022 with the Constitution and laws of the Republic of Azerbaijan on the complaint of M. Shukurov). Available at: <https://constcourt.gov.az/az/decision/1364> (last visited Apr. 8, 2024).

invoking the invalidity should be viewed as contrary to the principle of good faith.

In this case, the Constitutional Court also referred to the principle of promissory estoppel. The court concluded that the principle of estoppel aims to prevent a person from abusing the other party's bona fide reliance on legal conditions and obtaining advantages and benefits that harm his interests. In this case, the court investigated and concluded that when the contracts were signed between the parties in the lessee knew that he was renting a residential multi-story building and not a one-story building of a non-residential area. Therefore, lessee's assertion about invalidity should be deemed inconsistent with the purposes of good faith and estoppel. It is for this reason that the Constitutional Court did not support lessee's claim.³⁴

As noted above, even though the good faith principle is not explicitly provided among the principles laid out in Article 6 of the Civil code, legislator uses this principle in numerous norms of the Code and directly calls it a principle in specific norm.

For example, in some contractual relations, the Azerbaijani legislator relies on the term good faith as the basis for the emergence of civil liability. So, according to Article 824.1 of the Civil Code of the Azerbaijan Republic, if the storage agreement is carried out free of charge, then during the storage period the custodian is liable only for intentional and/or gross negligence. If storage is carried out for a fee, then the bailor is responsible for observing the agreed good faith, and in other cases for the good faith usual when storing such items.³⁵

A similar norm exists in the chapter governing the leasing contract. As stated in Article 748-1.4 of the Civil Code, lessor is not responsible for deficiencies of the leased object that the lessor stipulated when concluding the contract or that were known to the lessee in advance, or that could be discovered when the lessee was checking the leased object during the conclusion of the contract. According to this norm, the lessor should not be liable to the lessee for the conditioned defects in the leased object, and in such a case, the lessor will be considered as a bona fide party to the lessee.

What is interesting in the above norms, is that, using the term "agreed good faith", the legislator goes beyond the general concept of good faith. In other words, the legislator creates the basis for the parties to establish their own boundaries of good faith in a separate agreement. This approach can also be inferred from Article 425.1 of the Civil Code, which provides the general concept of good faith. This is because, under this norm, acting in a manner which complies with the conditions of obligations is established as a criterion for acting in good faith. Therefore, by analyzing Article 425.1 together with

³⁴ *Ibid.*

³⁵ *Supra* note 1, art. 824.1.

above mentioned norms of Civil Code, it can be argued that the principle of freedom of contract allows the parties to specify the boundaries of good faith by defining the conditions of their obligations within their agreement. The Azerbaijani legislator uses the term good faith in wide range of contracts such as agency,³⁶ brokerage,³⁷ commission,³⁸ and franchising as well.³⁹

The analysis of the Resolutions of the Constitutional Court of Azerbaijan, the judicial practice of other countries, legal literature, and provisions of Civil Code gives me grounds to conclude that no general definitions of good faith can be ideal for resolving individual disputes.

This is also proven by the results of the survey conducted among different groups of people. Some authors, to study the principle of good faith within the framework of a franchising agreement, conducted a sociological survey among persons who entered into such an agreement and received the following results: many respondents - franchisees, franchisors and lawyers saw a connection between good faith and transparency, while some respondents used the term "frank" to express their understanding. Others saw good faith as loyalty. Several interviewees linked the concept of good faith to the concepts of fairness, fair play, candor and equality. Still others saw the root of good faith as respect for oneself, respect for others, and keeping one's obligations, while some saw good faith as an ethics.⁴⁰ Such diverse approaches to good faith once again demonstrate that a specific definition of good faith is more effective in resolving disputes than a general, one-size-fits-all definition.

In recent years, the state has shown interest in implementing changes to the current legislation of Azerbaijan. Particularly, in 2023, a working group was established at the state level of Azerbaijan to introduce amendments and additions to the current Civil Code of the Azerbaijan Republic. As part of this project, a new version of the norm dedicated to the principle of good faith has also been drawn up. If accepted, the new norm will explicitly establish good faith as a principle and incorporate the legal approaches already established in the decisions of the Constitutional Court into legislation. Specifically, the presumption of good faith and the prohibition against abusing another party's bona fide trust, in accordance with the principles of promissory estoppel, will be codified into law.⁴¹

³⁶ *Id.*, art. 791.1.

³⁷ *Id.*, art. 788.3.

³⁸ *Id.*, art. 809.2.

³⁹ *Id.*, art. 725.1.

⁴⁰ Rozenn Perrigot et al., *Good Faith in Franchising*, 47 *International Journal of Retail & Distribution Management* 246, 253 (2019).

⁴¹ The Concept of Improving the Civil Code of the Republic of Azerbaijan,

<https://azranking.az/public/images/Konsepsiya%20-%20M%C3%BCiki%20M%C9%99c%C9%9911%C9%99%20%28%C3%BCmumi%20d%C3%B>

In short, a proposed article regarding good faith is as follows:

“Article 6-1. Principle of good faith:

6–1.1. Subjects of civil law, when exercising civil rights and civil obligations, are obliged to act in good faith.

6–1.2. The integrity of subjects of civil law is assumed.

6–1.3. No one will benefit from dishonest conduct.

*6–1.4. Abuse of civil rights will not be tolerated”.*⁴²

Conclusion

Based on an analysis of judicial practice and legislation of Azerbaijan alongside other countries, it is concluded that, the civil legislation of the Azerbaijan Republic not only establishes a general framework for the principle of good faith, but also allows parties to establish an individual framework for determining good faith in contractual relationships. Judicial authorities need to consider this approach in order to draw the correct conclusions when applying Article 425.1 of the Civil Code, which is devoted to the definition of the term good faith.

Additionally, good faith has a semantic meaning not only within the framework of contractual relations, but also within the framework of property rights. For example, Art. 157 of the Civil Code dedicated to the protection of property rights, as well as the right of ownership uses the term good faith in several places. Moreover, good faith is applied in norms regarding wide range of topics such as franchising, agency, brokerage and etc.

In civil relations, including all the aforementioned fields, the presumption of good faith—one of the fundamental legal presumptions—holds that, until proven otherwise, the actions of each party are assumed to be made in good faith. However, this presumption must be carefully managed by courts when dealing with legal disputes related to good faith. To ensure fairness and justice, courts should also apply the principle of estoppel, which serves to prevent a party from exploiting the other party’s bona fide trust under legal conditions to gain unfair advantages or benefits that are detrimental to the other party’s interests. This approach helps maintain the integrity of legal relations by balancing the presumption of good faith with safeguards against potential abuse.

[Cz%99li%C5%9F1%C9%99r%20v%C9%99%201-ci%20f%C9%99sil%29.pdf](#) (last visited Apr. 22, 2024).

⁴² *Ibid.*