

The Role Of The Principle Of Good Faith In Forming Contracts - An Analytical Legal Reading In Light Of Modern Contractual Relationships -

دور مبدأ حسن النية في تكوين العقود - قراءة قانونية تحليلية في ظل العلاقات التعاقدية الحديثة -

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Abstract:

In light of the rapid developments in contemporary contractual relations, the principle of good faith has emerged as a fundamental legal rule governing the conduct of contracting parties during the contract formation stage, while fostering trust and stability in contractual transactions. This study examines the effectiveness of this principle as a legal mechanism for regulating the parties' conduct during contract formation and identifies the appropriate legal remedies and enforcement mechanisms to ensure its effective application in addressing contemporary challenges. The study concludes that the principle of good faith has become a binding legal obligation from the very outset of contractual negotiations and that damages constitute the primary remedy for its breach, thereby maintaining a fair balance between the protection of legitimate reliance and the principle of contractual freedom. It further demonstrates the principle's adaptability to the challenges posed by digital and smart contracts.

Keywords: Good faith; Contract; Damage; Compensation.

ملخص:

في ظل التطورات المتسارعة التي تشهدها العلاقات التعاقدية المعاصرة، برز مبدأ حسن النية بوصفه قاعدة قانونية أساسية تنظم سلوك الأطراف خلال مرحلة تكوين العقد، وتعزز الثقة والاستقرار في المعاملات التعاقدية. وتهدف هذه الدراسة إلى استجلاء مدى فاعلية هذا المبدأ باعتباره آلية قانونية لتنظيم سلوك المتعاقدين في مرحلة تكوين العقد، مع تحديد الجزاءات والآليات القانونية الملائمة لضمان تطبيقه الفعال في مواجهة التحديات المعاصرة. وتخلص الدراسة إلى أن هذا المبدأ أصبح التزامًا قانونيًا أساسيًا لبدء المفاوضات التعاقدية، وأن التعويض يُعد الجزاء المترتب على الإخلال به، كما تؤكد الدراسة قدرة هذا المبدأ على التكيف مع التحديات التي تفرضها العقود الرقمية والذكية.

الكلمات المفتاحية: حسن النية؛ العقد؛ الضرر؛ التعويض.

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Introduction:

The principle of good faith constitutes an indispensable moral and legal cornerstone in contemporary legal systems; it permeates the rules governing transactions and delineates the acceptable framework of conduct between contracting parties, balancing contractual freedom with the necessity of preserving mutual trust. Historically, this principle shifted from its role as a flexible rule used to derive certain judicial decisions to a stronger normative status that treats the parties' objective conduct as a benchmark for assessing compliance or transgression. Its application is founded on concepts such as reasonableness and the prohibition of abusive conduct in practice. Practically, within the domain of contracts, the influence of good faith is especially evident during the stage of forming the contractual relationship: expectations crystallize, initial obligations are drafted, and preparatory decisions are taken which may ultimately determine the contract's fate. Therefore, applying the principle of good faith at this stage helps reduce opportunistic maneuvers and ensures that negotiations and preliminary agreements are built upon elements of cooperation and honesty that underpin the continuity and stability of the contractual relationship¹.

This requires beginning from a comprehensive framework that embodies the evolution of legal thought, starting with consolidating the general concept of the contractual principle before delving into its specifics at the contract-formation stage. The study explains the nature of this principle and its historical roots, then moves on to clarify its legal foundations and evolution. It subsequently examines the scope of its application and elucidates its practical limits in light of contemporary reality, particularly with the emergence of electronic contracts and modern commercial instruments that have posed new challenges. The study also details the effects of this principle by reviewing the legal sanctions resulting from its breach and how legislation has responded. Simultaneously, it addresses contemporary challenges arising from the digital revolution, such as adapting traditional concepts to suit online transactions. Thus, the study adopts a dual approach combining deep theoretical analysis with comparative legal review of different systems, presenting findings and conclusions to propose an integrated approach that employs the principle in a changing context requiring practical and intellectual adaptations².

We identify the core research question guiding this study as follows:

To what extent can the principle of good faith serve as an effective tool to control parties' behavior during the contract-formation stage, and what sanctions and appropriate mechanisms ensure its enforcement in modern contracts?

On this basis, we attempt to delineate and explain the contours of this question and to explore its various dimensions for understanding the principle of good faith in contract formation; this is done according to two principal topics, the concept of the principle of good faith in contract formation, and the effect of the principle of good faith in contract formation.

This study acquires clear scientific significance given the complexity of contemporary transactions and the need for rules that guarantee contractual trust and stability. It goes beyond theoretical exposition of the principle of good faith to investigate its practical applications in the contract-formation phase—a vital stage that lacks sufficient regulation. The originality of the research lies in its comparative methodology that reviews diverse legislative and judicial solutions, and in its identification of sanctions for breach of the principle, thereby equipping judges and practitioners with practical tools for resolving disputes of bad faith. The article also anticipates the impact of technological transformations and offers a forward-looking perspective on employing good faith to protect the weaker party and achieve contractual balance, making it a valuable reference in legal literature.

To achieve the study's objectives and address its central problem, this research adopted an integrated methodology in which the comparative method serves as a main pillar by balancing different legal systems and some divergent national legislations to clarify similarities and differences in handling the principle of good faith and to identify legislative and judicial solutions that can be emulated. In addition, the analytical method is employed to deconstruct legal texts, doctrinal opinions, and judicial precedents, and to derive the rules and decisions founded upon them. This methodological diversity and integration ensure depth and originality in the study and enable it to reach objective, precise, and reliable scientific conclusions.

Section I: The Concept of the Principle of Good Faith in Contract Formation

The principle of good faith is a fundamental pillar in contract theory, as it fosters trust and integrity and represents the spirit of the contractual relationship throughout all its stages—particularly during the formation phase, where implicit obligations such as honesty, truthfulness, and refraining from deceit or prolonging negotiations are imposed. Although certain legal systems, such as that of Egypt, emphasize its application during performance, modern jurisprudence and case law have tended toward extending it to the pre-contractual stage. This section aims to define the principle, trace its evolution, and determine the scope of its practical application in contract formation, thereby clarifying its role in achieving balance and safeguarding the stability of transactions.

A) Definition and Historical–Legal Development of the Principle of Good Faith

The principle of good faith constitutes the cornerstone of sound contractual relations. It is not merely a lofty moral value, but a firmly established legal rule embedded in the very core of modern legal systems. Any examination of this principle necessarily requires delving into its deep historical roots, which trace back to Roman law, where it emerged as a moral norm that later evolved into an influential legal rule³. The principle has undergone a long process of development, shifting from an implicit notion inferred from the spirit of the law to an explicit legal principle codified in major civil law systems, such as the French Civil Code, from which many contemporary legal systems have drawn inspiration. This subsection seeks to trace this historical and legal trajectory and elucidate the various concepts associated with it, in order to grasp its essence and its transformation into an effective instrument for ensuring trust and integrity in transactions.

1- Definition of the Principle of Good Faith

The principle of good faith lacks a unified statutory definition in most legal systems, as legislators have generally left its interpretation to legal scholarship and judicial discretion⁴. This legislative gap has given rise to two main approaches to defining its essence:

1.1- The Subjective (Personal) Concept of Good Faith:

This approach links good faith to the psychological and mental state of the contracting party. Under this perspective, a person is considered to be acting in good faith if they sincerely believe they are acting in accordance with the law, unaware of any defect in their action or of any third-party right that conflicts with it⁵. Here, good faith is synonymous with justified ignorance or mistaken belief in the lawfulness of one's legal position. Historically, this concept has prevailed in matters of possession and acquisition of real rights, where a possessor is deemed to be in good faith if unaware of infringing upon another's right.

1.2- The Objective (Material) Concept of Good Faith:

This approach goes beyond the contracting party's purely internal state, focusing instead on their external conduct measured against an abstract, objective standard—namely, the conduct of a reasonable person acting with honesty, integrity, and honor in dealings⁶. Accordingly, good faith under this view entails adherence to upright and fair behavior that accords with the honor of dealings and legitimate trust between parties. It is not limited to refraining from fraud or deception, but extends to positive obligations such as cooperation, disclosure, and providing advice. This is the concept embraced by modern legal systems as a general rule governing all stages of the contract, starting from negotiations.

Modern legal systems have generally settled on combining both concepts: good faith is presumed (subjective aspect) unless proven otherwise, while the conduct of the contracting party is assessed according to an objective standard—that of the reasonable person—to verify the truthfulness of the claim.

2- Historical and Legal Development of the Principle

The principle of good faith has undergone extensive development before attaining its current position in modern legal systems. Its evolution can be summarized as follows:

2.1- In Roman Law:

Rome was the cradle of the principle of good faith. The Romans recognized the notion of *fides*—faithfulness to one's word—as a supreme religious and social value, embodied in a deity bearing the same name⁷. With the expansion of commerce, particularly with foreigners, the praetor introduced new contracts called *bonae fidei* contracts, which granted judges broad discretion to determine the parties' obligations according to equity and fairness—unlike *stricti juris* contracts, which were subject to strict, literal application⁸. Thus, the principle evolved from a mere moral concept into an effective legal tool for balancing specific relationships.

2.2- In Canon Law and the Middle Ages:

Canon law emphasized the moral dimension of the principle, holding that keeping one's promise was not only a legal duty but also a religious obligation, and that any breach constituted a sin. Canon law reinforced the notion that the essence of a contract lies in the parties' intent and will (the internal aspect), rather than merely in words and forms (the external aspect). This paved the way for prioritizing genuine consent over rigid formalism⁹.

2.3- In Modern Civil Law Systems:

The French Civil Code of 1804 marked a turning point. Paragraph 3 of Article 1134 provided that "Agreements must be performed in good faith" (*Les conventions doivent être exécutées de bonne foi*). However, 19th-century legal scholars interpreted this provision narrowly, limiting it to the performance stage of contracts and viewing it as a moral guideline rather than a binding legal rule¹⁰. In the early 20th century, however, French jurisprudence and doctrine revitalized the principle, expanding its scope to cover the formation stage of contracts and recognizing it as a general principle of law imposing duties of honesty, integrity, and cooperation during negotiations¹¹.

Most Arab civil codes, including Algeria's, have followed the French and Egyptian models. Article 107 of the Algerian Civil Code stipulates that "The contract must be executed in accordance with its content and in good faith." Although this wording appears limited to the performance stage, Algerian jurisprudence and doctrine—like their French counterparts—have interpreted the principle broadly to encompass the pre-contractual phase, recognizing it as a general principle aimed at protecting legitimate trust and ensuring transactional stability¹².

In conclusion, the principle of good faith has traveled a long journey, evolving from a religious and moral notion in ancient Rome into a core legal rule within contemporary civil law. Its nature has crystallized through two approaches—subjective and objective—which modern systems have integrated. No longer a mere call for honesty, the principle has become a binding objective legal obligation imposing fair and prudent conduct throughout all stages of the contractual relationship, forming a solid foundation for contractual justice and striking a balance between freedom of will and the need for transactional stability.

B) Scope of Application of the Principle of Good Faith in the Contract Formation Stage

The principle of good faith constitutes the cornerstone of the modern legal framework governing contractual relations. Its influence is no longer confined solely to the performance stage of the contract; rather, it has forcefully extended to impose itself as a fundamental behavioral standard during the negotiation phase preceding its conclusion. Recent reforms in the French Civil Code have entrenched this orientation, defining a broad scope for the application of the principle—whether in terms of the parties bound by it, the timeframe it covers, or the substantive obligations it entails—reflecting the legislator's intent to establish an atmosphere of trust and transparency in transactions from their very inception.

1- The Personal Scope

The obligation of good faith in the contract formation stage is not limited to the prospective parties to the future contractual relationship; it also extends to "all those involved in the life cycle of international trade contracts"¹³. The principle addresses all participants in the negotiation process, whether ordinary individuals or professionals, and whether acting as principal parties or as their representatives.

French legal reforms have confirmed this expansion in the personal scope. The obligations arising from the principle of good faith—foremost among them the duty of disclosure—apply to any party to the negotiations, regardless of their professional status¹⁴. For example, in the context of complex mergers and acquisitions, this obligation extends beyond the seller and the buyer to include their financial and legal advisors, as well as members of the management of the target company. Any person in possession of information deemed by law to be essential and decisive for the other party's consent is bound to act in accordance with the requirements of good faith. In this way, the principle establishes a network of reciprocal obligations aimed at achieving informational balance among all participants.

2- Temporal Scope

The obligation of good faith takes effect from the moment the parties enter into serious negotiations with the aim of concluding a contract. Modern reforms to the French Civil Code have explicitly affirmed this temporal dimension: Article 1104 of the amended Code provides that "contracts must be negotiated, formed, and performed in good faith" and that this rule "is of public policy"¹⁵.

This provision codified established French case law, notably the *Manoukian* decision (*arrêt Manoukian*), which marked a turning point by extending the application of the principle of good faith to the pre-contractual stage¹⁶. The obligation continues throughout negotiations, covering their initiation, conduct, and termination. Every step taken by one party toward the other must be governed by this principle. It ends at the formation stage either with the conclusion of a final agreement—thereafter entering the performance stage, which is itself subject to good faith—or with the lawful termination of negotiations, free from any abuse.

3- Substantive Scope

The principle of good faith in negotiations is embodied in a set of core obligations designed to ensure fairness and transparency in the negotiation process. These may be summarized in two main pillars:

3.1- Qualified Freedom to Negotiate

As a rule, entering into negotiations does not oblige the parties to conclude the contract; each party is free to initiate, conduct, and terminate negotiations at will. Article 1112 of the French Civil Code explicitly affirms that “the initiation, conduct, and termination of pre-contractual negotiations are free.” However, this freedom is not absolute—the legislator, in the same paragraph, qualified it with the requirement that negotiations “must imperatively satisfy the requirements of good faith”¹⁷.

This qualification entails that the arbitrary termination of negotiations constitutes a breach of good faith and entails liability for the party acting abusively. Termination is deemed abusive when it occurs suddenly and without legitimate justification, especially when negotiations have reached an advanced stage, creating a legitimate expectation in the other party that the contract will soon be concluded. It is noteworthy that compensation in such cases does not aim to cover “the loss of expected benefits from the unformed contract,” but is limited to reparation for actual harm caused by the fault committed during negotiations¹⁸.

3.2- Duty of Disclosure

The duty of disclosure is one of the most significant manifestations of the principle of good faith at this stage. It is specifically provided for in Article 1112-1 of the French Civil Code. This duty requires that “a party who is aware of information of decisive importance for the consent of the other party must inform them thereof, provided the latter legitimately does not know it or relies on the contracting party”¹⁹.

This duty covers all information “directly and necessarily related to the content of the contract or the qualities of the parties,” with a clear exception for information relating to “the assessment of the value of the performance”²⁰. Its importance lies in ensuring that each party’s consent is informed and based on adequate knowledge of essential facts. More importantly, this duty is of absolute mandatory character: the law expressly provides that “the parties may neither limit nor exclude this duty,” making it a public policy rule²¹. Breach of this duty gives rise to civil liability and may even lead to the annulment of the contract if such breach results in a defect in consent (such as fraud or mistake).

It is thus evident that the scope of application of the principle of good faith in the contract formation stage is comprehensive and profound. It does not merely require refraining from

fraudulent conduct but imposes positive obligations aimed at creating a balanced and fair negotiation relationship, thereby fostering trust and legal security in transactions before they are even formed.

At the conclusion of this section, it becomes clear that the principle of good faith is no longer a mere abstract moral value, but a fundamental and flexible legal rule deeply embedded in the heart of contract theory. It has become the primary standard for conduct in transactions. Our study in the first section revealed the long journey of this principle—from its moral roots in Roman law, through its refinement in canon law, to its crystallization as an objective legal principle in modern legislation, where the conduct of negotiators is measured against the abstract standard of a reasonable person, thus transcending the narrow subjective concept tied solely to the mental state of the contracting party.

This conceptual evolution has had a direct impact on the expansion of the principle's scope, as detailed in this second section. Its application is no longer limited to the contract performance stage but extends forcefully to the formation stage, traditionally regarded as the domain of unfettered freedom of will. The obligation of good faith now binds all negotiating parties (personal scope), from the initiation of serious discussions until their conclusion (temporal scope). Most importantly, the principle has moved beyond generalities to take concrete operational form (substantive scope), particularly through the duties of disclosure and transparency, the obligation of seriousness in negotiations, and the restriction on the arbitrary termination of talks. Thus, the principle of good faith emerges as an effective legal instrument for achieving contractual balance, deterring opportunistic behavior, and protecting the legitimate trust between parties—paving the way for a sound and stable contractual relationship, and laying the foundation for the subsequent examination of the consequences and sanctions arising from the breach of these core obligations.

Section II: The Effect of the Principle of Good Faith in the Contract Formation Stage

After establishing the conceptual and practical framework of the principle of good faith in the preceding section, the true value and legal utility of this principle can only be realized by clarifying its actual effect in practice. The principle does not stop at the boundaries of ethical guidance; rather, it transcends them to become a source of genuine obligations whose breach entails tangible legal consequences.

Accordingly, this section aims to elucidate these effects from two complementary perspectives. The first subsection is devoted to examining the binding force of the principle through an analysis of the sanctions recognized by jurisprudence and case law to ensure its observance, ranging from civil liability for fault in negotiations to the potential annulment of the contract as a consequence of fraud and deceit. The second subsection explores the future of the principle by analyzing the challenges posed by the evolution of modern contractual patterns and assessing the prospects of its adaptation, thereby affirming its vitality as an indispensable tool for achieving contractual justice.

A) Sanctions Resulting from Breach of the Principle of Good Faith in the Contract Formation Stage

When one of the negotiating parties fails to act in accordance with the requirements of good faith—such as arbitrarily terminating negotiations without legitimate justification or concealing material information that would have influenced the other party's decision—such conduct constitutes a fault giving rise to civil liability. The sanctions flowing from such liability may take various forms, but monetary compensation remains the primary and most practical remedy in the

majority of legal systems, notwithstanding ongoing scholarly and judicial debate regarding its nature and scope.

1- Compensation as the Primary Sanction for Breach of Good Faith

The primary objective of imposing liability at the pre-contractual stage is to protect the parties' legitimate expectation and reliance interests arising during negotiations, rather than to compel the conclusion of a contract. From this perspective, both legal scholarship and judicial practice have consistently maintained that the appropriate remedy is not to compel the defaulting party to conclude the contract, a remedy commonly referred to as "specific performance". Compelling a person to enter into a contract that they no longer intend to conclude is fundamentally incompatible with the principle of freedom of contract and the essence of consent upon which contractual obligations are founded. Comparative Arab legal scholarship has likewise affirmed that a party who has terminated negotiations cannot be compelled to resume them, since negotiations are founded on mutual agreement. A judge cannot substitute their will for that of the negotiating parties by imposing a contract whose essential terms have not been mutually agreed upon²². Such an approach would transform the contract from an instrument of consensual exchange into a restriction on individual freedom, contrary to the underlying philosophy of private law.

Accordingly, comparative legal systems, including civil law jurisdictions such as France and Egypt, as well as legal systems influenced by them, encompassing Iraq and Lebanon, have rejected the notion of compelling a negotiating party to conclude a contract as a remedy for a breach of the duty of good faith. Instead, they recognize monetary damages, sometimes referred to as "damages in lieu of specific performance", as the most appropriate remedy for compensating the injured party for the loss suffered. This remedy strikes an appropriate balance between protecting the party who reasonably relied on the seriousness of the negotiations, on the one hand, and preserving the other party's freedom to decline to enter into the contract, on the other.

2- The Scope of Compensation Between Negative Interest and Positive Interest

Although monetary compensation constitutes the recognized remedy for a breach of the duty of good faith during negotiations, the principal debate concerns the scope and components of such compensation. Legal scholarship is divided into two principal approaches. The first advocates a broader scope of compensation that encompasses the "expectation interest, while the second, which represents the prevailing view in both legal scholarship and judicial practice, limits recovery to the "reliance interest", also referred to as "reliance compensation"²³.

2.1- Compensation for the Expectation Interest or Performance Damages:

This form of compensation seeks to place the injured party in the same financial position they would have occupied had the contract been concluded and fully performed. Accordingly, it covers not only the actual losses sustained by the injured party but also the profits that would have been earned had the contract been concluded and performed (loss of expected profits). This approach has, however, been the subject of substantial criticism. Awarding compensation for the anticipated profits of a contract that was never concluded amounts to an indirect enforcement of the contract, thus undermining the principle that no party may be compelled to enter into a contract. The injured party cannot claim entitlement to the contractual benefits because no binding contract ever came into existence.

2.2- Compensation for Negative Interest or Reliance Damages:

Compensation for the reliance interest represents the prevailing approach adopted by the majority of legislative systems and judicial decisions²⁴. The purpose of this form of damages is to restore the injured party to the position they would have occupied had the negotiations never taken place. Therefore, it compensates the injured party for the loss suffered as a result of reasonably relying on the seriousness of negotiations that were wrongfully terminated by the other party. Such compensation generally comprises two principal elements:

- **Actual Loss or Loss Sustained:** This includes all costs and expenses reasonably incurred by the injured party during the course of the negotiations in reliance on the anticipated conclusion of the contract. Legal scholarship has expressly stated that such Compensation encompass "the loss of time, expenses incurred in preparing for negotiations, all costs incurred for the purpose of concluding the final contract, as well as travel, accommodation, and preliminary study expenses"²⁵. They also include, for example, attorneys' fees, expert witness fees, and the costs of technical studies and economic feasibility assessments undertaken in preparation for the conclusion of the contract. Such expenditures would not have been incurred had the injured party not entered into negotiations in reliance on the other party's demonstrated intention to conclude the contract, only for that party to withdraw from the negotiations arbitrarily.

- **Loss of profit or gains missed by the injured party:** A careful distinction must be drawn in this regard. The loss of profit recoverable under the reliance interest does not refer to the profits that would have been earned under the contract that was never concluded. Rather, it refers to the loss of a "genuine opportunity" to conclude another contract that was available to the injured party, which they rejected or neglected due to their engagement in the abusively broken negotiations. Comparative legal scholarship has observed that recoverable compensation include "the loss suffered as a result of being deprived of the opportunity to conclude a contract with a third party; compensation for the loss of opportunity encompasses both pecuniary and non-pecuniary harm resulting from the loss of a serious and genuine opportunity to realize a financial gain"²⁶. The burden of proving the existence and seriousness of such an opportunity rests with the injured party, who must establish that a real and substantial opportunity to contract with a third party existed and that this opportunity was lost because they continued the negotiations in the genuine belief that they would culminate in the conclusion of the contract.

In conclusion, the sanction for breaching the principle of good faith in the contract formation stage materializes in monetary compensation designed to redress the harm caused by the breach of trust. Legal systems have wisely balanced the need to protect this trust with the preservation of contractual freedom by rejecting compulsion to contract and confining compensation to the realm of negative interest, thereby restoring matters to their proper state without imposing the effects of a contract that never came into being.

B) Contemporary Challenges and Prospects for Applying the Principle of Good Faith in Modern Contracts

In an era marked by rapid digital transformations and increasingly intertwined global economic relations, the contract is no longer merely a physical document exchanged between two parties in a single setting. Contracts have evolved into new and complex forms, shaped by the imperatives of speed, efficiency, and globalization. These modern contracts—whether electronic, self-executing smart contracts, or even standardized adhesion contracts—pose fundamental challenges to classical legal principles, foremost among them the principle of good faith. If, in its traditional form, this principle serves as "the living conscience of the contract," functioning as a

moral standard to ensure balance and protect the legitimate trust between contracting parties²⁷, how can it maintain its role in contractual environments where direct human involvement diminishes and informational and technological gaps between parties widen?

Envisioning the future application of the principle of good faith in this contemporary context requires identifying the most prominent challenges it faces, which can be summarized as follows:

1- The Challenge of the Digital Environment and Electronic Contracts

The spread of e-commerce and online contracting has brought electronic contracts to the forefront, characterized by the absence of direct physical interaction between contracting parties. This absence creates fertile ground for significant challenges to the principle of good faith:

1.1- Information Asymmetry:

In most electronic contracts—particularly between supplier and consumer—the first party (the institution or company) possesses an extensive volume of technical and legal information about the product or service, while the second party (the consumer) lacks such knowledge. Here, the principle of good faith goes beyond merely refraining from deceit, imposing a positive obligation on the more knowledgeable party to disclose, with transparency and clarity, all material information that could influence the other party's decision. Concealing a material fact or presenting it ambiguously or misleadingly constitutes a clear violation of good faith at the contract formation stage²⁸.

1.2- Click-Wrap Agreements:

Who among us thoroughly reads the lengthy and complex “terms and conditions” before clicking “I Agree”? Such contracts have become the norm in the digital world. Imposing unfair or unexpected clauses within these lengthy texts exploits the contracting party's need and trust, contradicting the requirements of good faith. Contemporary jurisprudence and case law tend to interpret the principle of good faith as obliging service providers to highlight essential and unusual terms clearly and separately, rather than burying them deep within lengthy clauses—otherwise, such provisions are deemed void²⁹.

2- The Challenge of Smart Contracts and Blockchain Technology

Smart contracts represent a qualitative leap in contracting: computer programs that automatically execute contractual terms once predefined conditions are met, without the need for intermediaries. While they bring efficiency and trust, their automated and rigid nature presents unique challenges:

2.1- Code Rigidity:

Smart contracts operate under the logic of “code is law,” meaning the contract executes exactly as programmed. But what if a programming error or unforeseen loophole leads to an unjust or inequitable outcome for one party? Here, the principle of good faith becomes relevant even before the contract is concluded—during the design and coding phase. It obliges the parties, especially the one designing the contract, to exercise due diligence in ensuring the code is error-free, anticipating different scenarios, and providing mechanisms to handle unforeseen situations³⁰.

2.2- Lack of Flexibility and Negotiation:

The automated nature of smart contracts may eliminate the negotiation space and flexibility needed to amend the agreement in response to extraordinary circumstances. Good faith requires contracts to be built in a spirit of cooperation and, in the smart contract context, may necessitate incorporating mechanisms to halt or review automatic execution if exceptional events occur—achievable by linking the contract to reliable external data sources (Oracles) capable of confirming such circumstances.

3- Future Prospects — Toward a Proactive Implementation of the Principle of Good Faith

Addressing these contemporary challenges does not diminish the role of good faith; on the contrary, it underscores its importance as a safeguard for fairness and trust in modern contractual environments. Its future application lies in shifting from a remedial role (intervening after disputes arise) to a preventive and proactive one:

3.1- Good Faith by Design:

The principle of good faith should be embedded into the very design of electronic platforms and smart contracts. This entails obliging programmers and web designers to adopt user-friendly and transparent interfaces, provide essential information in a simple and clear manner, and build smart contracts with enough flexibility to address exceptional situations³¹.

3.2- Broadening the Interpretation of the Duty to Inform:

Courts should adopt an expansive interpretation of the duty of disclosure and transparency in modern contracts—requiring not just that information be made available, but that it be accessible and understandable in a meaningful way to the weaker party in the contractual relationship.

3.3- The Role of Legislative and Regulatory Bodies:

Legislators bear the responsibility of updating laws to keep pace with these developments, by enacting clear rules governing electronic and smart contracts. The recent amendment to the French Civil Code offers a model: Article 1104 explicitly states that “contracts must be negotiated, formed, and performed in good faith,” thereby unequivocally extending the principle to the contract formation stage³². Adopting such provisions affirms the centrality of good faith as a mandatory rule that cannot be waived.

It can be said that the principle of good faith in contract formation faces unprecedented challenges in the modern era, yet these challenges do not diminish its significance; rather, they enhance its standing as an indispensable moral and legal standard. The future trajectory of its application points toward making it a proactive principle, embedded within the core of emerging contractual technologies, ensuring it remains a guardian of justice and equity in an increasingly complex world.

In conclusion, this discussion demonstrates that the principle of good faith has evolved beyond being a moral value to become a binding legal norm with enforceable remedies and the ability to adapt to contemporary developments. While legal systems have preserved contractual freedom by rejecting specific performance and compelling parties to contract, they have concurrently safeguarded legitimate trust through financial compensation—typically limited to the

“negative interest,” covering losses and missed opportunities without granting profits from a contract that was never formed.

Furthermore, the analysis shows that the principle remains flexible and dynamic in confronting the challenges of modern contracts—from information asymmetry in electronic contracts to code rigidity in smart contracts—functioning as a tool for transparency, cooperation, and fairness. The shift from a remedial role to a preventive one, through concepts such as “good faith by design” and an expanded duty to inform, reflects the transformation of the principle into a moral and legal compass guiding the contractual process from inception, ensuring justice and equity regardless of evolving contractual forms.

Conclusion:

In conclusion, this study demonstrates that the principle of good faith has evolved from being merely a moral compass to becoming a vital legal cornerstone and a safeguard for the integrity of contractual relations from the formation stage onward. The research traced the historical roots of the principle—from Roman law and canon law to its development in modern legislation—and revealed how its influence has expanded to encompass explicit obligations of transparency, honesty, and cooperation from the earliest stages of negotiation. This makes it a pivotal tool for regulating the conduct of parties before the agreement matures.

Results:

- The principle of good faith governs a balanced remedial mechanism that protects contractual freedom by excluding coercion in the conclusion of contracts, while simultaneously ensuring fair monetary compensation based on actual damage as a just means of redressing losses arising from breaches of trust, without imposing the effects of a contract to which the parties have not mutually consented. This balance reflects a vision that respects both the contractual dignity of the individual and the need to preserve economic and social stability.
- The analysis did not remain confined to traditional frameworks; rather, it explored the role of the principle in addressing the challenges of the digital age. Good faith has proven its flexibility and adaptability—including the concept of “good faith by design” in electronic and smart contracts—thereby becoming a framework that compels system designers and practitioners to adopt transparent mechanisms for disclosure, cooperation, and the elimination of informational asymmetry.
- Integrating this principle into the design of digital contractual systems not only shields against harmful practices but also strengthens trust between parties and stimulates markets to operate on the foundations of fairness.

Recommendations:

At the practical level, the research findings call for greater attention from legislators, judges, and practitioners. Legislators are urged to formulate clear rules that reinforce duties of disclosure and cooperation; judges are expected to apply the principle with flexibility that maintains the balance between compensation and freedom of contract; and legal practitioners are encouraged to draft contracts and pre-contractual practices incorporating concrete obligations of good faith. Through this approach, the principle transforms from a theoretical rule into a practical mechanism with demonstrable effectiveness in real-world application.

The principle of good faith remains the legal conscience that safeguards trust and establishes fairness in transactions. It is, therefore, an indispensable cornerstone for ensuring the integrity and

continuity of the contractual process, even amidst the rapid technological and social transformations of our time.

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