

## GOOD FAITH IN CONTRACTS: AN EVIDENT PRINCIPLE IN ALGERIAN LAW?



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**Abstract:** Good faith is more a self-control than a legal requirement, since moral qualities like honesty and loyalty do not need a drafted text to be recognised. At first glance, it would seem that Algerian legislator only imposed good faith at the stage of performance of the contract according to article 107/1 Algerian Civil Code. This paper will allow us to get a broader vision on the legal status of good faith in Algerian law, by surrounding a number of legal provisions whether in the Civil Code or in special legal texts, in order to grasp, as much as possible, the true legal nature of good faith in contracts under Algerian law.

**Key Words:** general principle, negotiations, formation of the contract, performance of the contract, loyalty, cooperation.

### حسن النية في العقود: مبدأ بديهي في القانون الجزائري؟

**ملخص:** يعتبر حسن النية ضابطاً ذاتياً أكثر من كونه مطلباً قانونياً، إذ أن المزايا الأخلاقية كالصدق والوفاء ليست بحاجة إلى نص مكتوب حتى يتم الاعتراف بها. وقد يبدو لنا للوهلة الأولى أن المشرع الجزائري اكتفى بفرض حسن النية في مرحلة تنفيذ العقد طبقاً للمادة 1/107 من القانون المدني الجزائري. سيتيح لنا هذا المقال الحصول على رؤية أوسع حول المكانة القانونية لحسن النية في القانون الجزائري، من خلال تحليل عدد من الأحكام القانونية سواء في القانون المدني أو في النصوص القانونية الخاصة، من أجل محاولة الاقتراب قدر الإمكان، إلى الطبيعة القانونية الحقيقية لحسن النية في العقود في القانون الجزائري.

**الكلمات المفتاحية:** مبدأ عام، التفاوض، تكوين العقد، تنفيذ العقد، النزاهة، التعاون.



## BONNE FOI DANS LES CONTRATS: UN PRINCIPE ÉVIDENT EN DROIT ALGÉRIEN ?

**Résumé:** La bonne foi est plus une maîtrise de soi qu'une exigence légale, car des qualités morales comme l'honnêteté et la loyauté n'ont pas besoin d'un texte rédigé pour être reconnues. A première vue, il semblerait que le législateur Algérien n'ait imposé la bonne foi qu'au stade de l'exécution du contrat selon l'article 107/1 du Code Civil Algérien. Cet article va nous permettre d'avoir une vision plus large sur le statut juridique de la bonne foi en droit Algérien, en analysant un certain nombre de dispositions juridiques que ce soit dans le Code Civil ou dans les textes juridiques spéciaux, afin de saisir, autant que possible, la véritable nature juridique de la bonne foi dans les contrats en droit Algérien.

**Mots Clés:** principe général, négociations, formation du contrat, exécution du contrat, loyauté, coopération.



## Introduction:

General principles of law are a set of rules which do not result from any written text, but to which law gives legal value and recognizes their obligatory character, even without a worded provision. That is why general principles are both advantageous and disadvantageous, because of their vagueness and generality. But, despite their ambiguity, no one can deny the role and the place of general principles in the objective law, and no one can reject the fact that the breach of these principles is strictly condemned by law.

Good faith is one of the general principles of law in most legal systems. Its whole purpose is to ensure trust<sup>1</sup> into transactions. ‘Good faith is the soul of contract law’<sup>2</sup>, this is how Mazeaud so aptly put it.

Good faith, as a common term, has always been discussed with particular sensitivity, due to the abstract nature of the term ‘faith’, which refers more to ‘intention’. But, despite its imprecise character, the study of good faith has never been neglected by doctrine, and its pure moral origin didn’t prevent modern civil codes from recognising it as one of the fundamental principles of law, especially in the contractual field.

In Private Law, contracts must be negotiated, formed, performed and also terminated in good faith. In article 107/1 A.C.C (Algerian Civil Code)<sup>3</sup>, Algerian legislator limited the requirement of good faith at the stage of performance. This limitation may lead some to deny good faith as a general principle in Algerian law, especially since French law has recognised it at all stages of the contract, upgrading it to the rank of public order. Thus, we can talk about a ‘loyal contract’ in French law.

The purpose of this study is to shed light on the attitude adopted by the Algerian legislator in terms of good faith in contracts.

In this context, we may ask: To what extent did the Algerian legislator adopt the principle of good faith?

To answer this problematic, our study will be divided into two parts. The first part will be devoted to the notion of good faith in Algerian law (I), and our opinion on the actual legal status of good faith in Algerian law will be developed in the second part (II).

<sup>1</sup> Élise M. CHARPENTIER, Le rôle de la bonne foi dans l'élaboration de la théorie du contrat, R.D.U.S., n° 26, 1996, p. 304.

<sup>2</sup> Cited in : Mustapha MEKKI, La bonne foi dans l'avant-projet de réforme du droit des obligations du 23 octobre 2013, p. 4. [Online] <https://mustaphamekki.openum.ca/files/sites/37/2015/09/Bonne-foi-Mekki.pdf> Accessed on: June 28, 2023 at 10:54 a.m.

<sup>3</sup> Art. 107/1 of Ordinance n° 75-58 of September 26, 1975, on Civil code, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 78, of September 30, 1975, amended and supplemented : « The contract must be performed in accordance with its content and in good faith”.



## I. Notion of good faith in Algerian law:

Many authors have attempted to define good faith, but it has not been easy to give a precise definition for such a general principle<sup>1</sup>. Moreover, the ethical origin of this notion and its ambiguity make its definition problematic and not easy to grasp. However, in Algerian law, good faith can be described through its senses (1) and also through its aspects (2).

### 1. Senses of good faith:

Historically, the notion of good faith was born from the need to deal with formalism that characterized contracts in Roman law. The Roman origin of “bona fides” means ‘the goddess Fides’, which represented for Romans good faith that should govern relations between individuals. Romans raised the value of ‘fides’ to the level of goddess<sup>2</sup>.

In Roman law, formalism governed contracts and imposed strictly full compliance with its requirements. Good or bad intentions, and other factors that affect the will, had no effect in Roman law, fraud had no legal effects<sup>3</sup>. That is why good faith was only a moral or religious duty, it was not primarily a legal concept in Roman law. The evolution of Roman law allowed, gradually, the abandonment of formalism and the recognition of good faith in contracts<sup>4</sup>.

Thus, appeared ‘good faith contracts’ which are binding contracts for the parties, and their binding force arises from the will of parties not from their form<sup>5</sup>.

Today, many modern legal systems have, expressly, included in their civil codes provisions that make from good faith a general principle in contracts. And in most Civil Law jurisdictions, the expression of good faith has two senses:

The first sense is objective, it means first and foremost loyalty and good intention in the execution of legal acts. Good faith, in this sense, is a pure moral notion which constitutes a rule of conduct requiring people to observe loyalty and honesty in their actions<sup>6</sup>. According to the objective sense, good faith is a rule of

<sup>1</sup> According to Law Lord Hobhouse: ‘such general principles can be illustrated but not defined’. Cited in: Robert KOLB, *La bonne foi en droit international public*, Graduate Institute Publications, Genève, 2000. [Online] <https://books.openedition.org/iheid/4646?lang=fr> Accessed on: July 23, 2023 at 6:28 p.m.

<sup>2</sup> Remus VALSAN, ‘Fides, bona fides, and bonus vir: Relations of trust and confidence in Roman Antiquity’, *Journal of Law, Religion and State*, vol. 5, no. 1, 2017, p. 51.

<sup>3</sup> هدى بن يوب، مبدأ حسن النية في العقود، مذكرة مقدمة لنيل شهادة الماجستير تخصص: قانون العقود المدنية، كلية الحقوق والعلوم السياسية، جامعة العربي بن مهيدي أم البواقي، السنة الجامعية 2012/2013، ص 10.

<sup>4</sup> Élise M. CHARPENTIER, *Op.cit.*, p. 306.

<sup>5</sup> هدى بن يوب، مرجع سابق، ص 12.

<sup>6</sup> فاطمة الزهراء زيتوني، بحث مضمون مبدأ حسن النية في إطار نظرية العقد، مجلة القانون والعلوم السياسية، العدد 4، جوان 2016، ص 440.



conduct in the society<sup>1</sup> that all people must respect in their acts. For ex. seller in good faith, performing a contract in good faith...

The second sense is subjective, according to which, good faith is a psychological or a mental state, represented in ignorance of a fact or circumstance. It is a mistaken belief that arises in someone's mind<sup>2</sup> in the existence of a right or a legal situation, when the reality is completely different. A person may believe, in good faith, that he is complying with the applicable rules when such is not the case. It is in this meaning that we say that good faith is always presumed<sup>3</sup>. Here, good faith aims to protect ignorance, if this ignorance is not at fault. In such a case, law helps those who act in good faith despite the irregularity of their real situation<sup>4</sup>.

Most legal systems recognise good faith in its subjective and objective senses, the two concepts are complementary<sup>5</sup>, they complete each other.

By referring to different legal provisions in Algerian law, we can notice that Algerian legislator has adopted both objective and subjective senses to determine good faith.

The objective sense can be found in art. 111/2 A.C.C. related to the interpretation of contracts. According to which, in case of confusion, the judge must seek the common intention of the parties regardless of the literal meaning of the terms, taking into account the nature of the transaction, as well as loyalty and trust that must exist between the parties, according to accepted business practices. Here, the reference of loyalty and trust, must be in accordance with 'accepted business practices' which is an objective standard. It allows the judge, when seeking the common intention of the parties, to make a contextual interpretation beyond the literal meaning of the writing contract.

The subjective sense is found, for ex., in art. 714/2 A.C.C. on undivided ownership. The buyer may ask for the contract to be annulled, if he did not know that the seller was not the owner of the thing sold. Here, the buyer's ignorance makes him a buyer in good faith in the subjective sense. Which means that the buyer, actually, had a mistaken but honest belief, even if it was negligent, allowing him to claim the annulment of the contract.

## 2. Aspects of good faith:

<sup>1</sup> Louise ROLLAND, La bonne foi dans le code civil du Québec : Du général au particulier, R.D.U.S., n° 26, 1996, p. 384.

<sup>2</sup> فاطمة الزهراء زيتوني، مرجع سابق، ص 433.

<sup>3</sup> William CHERBONNIER, Lauryanne CROCHET, Eugénie DURAND, Yannick FAVZLAVAKI, Valentine FIGAROL, Jean Christophe FOIX, Leo GABILLARD, Luc KEH, Elodie LE GORGNE, Jeremy MORVAN, Jean-Charles SINAUD, Béverley SCHULTZ, Sabine TARDIF-CANNEVA, La loyauté : de la règle morale au principe juridique. In: Revue juridique de l'Ouest, n°3, 2012, p. 328.

<sup>4</sup> Brigitte LEFEBVRE, La bonne foi : notion protéiforme, R.D.U.S, n° 26, 1996, p. 325.

<sup>5</sup> هدى بن يوب، مرجع سابق، ص 73.



In contractual relationships good faith is related to loyalty, integrity, honesty and cooperation<sup>1</sup>. But in general, loyalty and cooperation are the main aspects of good faith in Algerian law.

## 2.1. Loyalty:

“Trust” is a pillar requirement of any contractual relationship, as it reflects an ethical aspect, necessary for a stable and secure relationship. The duty of loyalty is based on the trust that the parties must have in each other, especially when the performance of the contract extends over a long period. Then, mutual trust will be essential for the performance of the contract<sup>2</sup>.

Loyalty, as the first aspect of good faith, means that the contracting party refrains from any fraud that makes it difficult or impossible to perform the obligation<sup>3</sup>. The duty of loyalty is imposed on both creditor and debtor during all the stages of the contractual relationship and it, generally, lays on negative obligations on the parties.

As a negative duty, loyalty brings together three main prohibitions: not to increase the burden on the contracting party, not to compromise the contractual relationship and not to adopt excessive or unreasonable conduct<sup>4</sup>.

For exchanges security reasons, as well as for the proper functioning of the market economy, loyalty is required in all contracts under Algerian law. A pronounced application of loyalty can be found in law n° 04-02 on the rules applicable to business practices, amended and supplemented<sup>5</sup>. The 1<sup>st</sup> article defines the main purpose of law n° 04-02, which is to establish the rules and principles of transparency and loyalty applicable to commercial practices between economic agents or between them and consumers, and to ensure consumer protection and information.

We can notice here that, in law n° 04-02, Algerian legislator made from ‘loyalty’ the cornerstone of all the commercial transactions. Transparency and loyalty have been set as a basic standard in business, and the first reference that must govern all the commercial dealings between the economic agents themselves and between them and the consumer.

<sup>1</sup> Sophie VIGNERON, Le rejet de la bonne foi en droit anglais, In: Robin-Olivier, S. and Fasquelle, D., eds. Les échanges entre les droits, l'expérience communautaire, Bruylant, Bruxelles, 2008, p. 308.

<sup>2</sup> Elise POISSON, Bonne foi et loyauté dans les relations commerciales, Lavery, de Billy, Octobre 2006, p. 1.

<sup>3</sup> علي فيلالي، الالتزامات، النظرية العامة للعقد، موفم للنشر، الجزائر، 2010، ص 369.

<sup>4</sup> Didier LLUELLES, La bonne foi dans l'exécution des contrats et la problématique des sanctions, La revue du barreau canadien, V. 83, 2004, p. 190.

<sup>5</sup> Law n° 04-02 of June 23, 2004 on the rules applicable to business practices, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 41, of June 27, 2004, amended and supplemented by Law n°10-06 of August 15, 2010, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N°46 of August 18, 2010.



In addition, the duty to inform the consumer, mentioned in art. 1, is another aspect of cooperation and loyalty, which implies a trustful behaviour of the economic agents in all their practices far from lies, unfairness and dishonesty.

The terms “Must, is required<sup>1</sup>” and “is banned, is prohibited<sup>2</sup>” are used in, almost, all the provisions of law n° 04-02, which means that the duty to act in transparency and loyalty is a matter of public order in Algerian law. The principle of good faith in commercial practices is reinforced by the stipulation of aggravated sanctions, provided for in art. 31 et seq. in case of the violation of such moral values.

In law n° 09-03 on consumer protection and fraud repression, amended and supplemented<sup>3</sup>, the legislator used the term “loyal product” as a typical product of basic quality, the minimum requirement that all intervening parties must guarantee to the consumer. Which means that the product intended for the consumer must, obligatory, correspond to the legal standard and commercial uses.

Art. 3 of law n° 09-03 defines a healthy, loyal and marketable product as a product which is free of any defect and/or hidden vice, and presenting a guarantee against any harm to health, safety and/or material and moral interests of the consumer.

In the same article, the legislator used the term “exchanges loyalty” as a mandatory ethical basis, to determine the technical specifications of the product intended for the consumer. This means that in law n° 09-03, the legislator makes sure that all the exchanges must be in compliance with honesty and legal rules, which reflects the important status that Algerian legislator grants to good faith, especially in the trade market.

## 2.2. Cooperation:

Cooperation is the second aspect of good faith in Algerian law. According to Algerian doctrine<sup>4</sup>, the relationship between parties is a cooperation and not a discord or a confrontation as we used to believe, and the conflict of interests does not prevent a loyal cooperation between the parties.

<sup>1</sup> For ex. Art. 8 of law n° 04-02 : “The seller is required, before the conclusion of the sale, to provide the consumer by any means with fair and sincere information relating to the characteristics of the product or service, the conditions of sale practiced as well as any limitations of contractual liability of the sale or the service”.

<sup>2</sup> For ex. Art. 26 of law n° 04-02: “All unfair commercial practices contrary to honest and fair practices and by which an economic agent harms the interests of one or more other economic agents, are prohibited”.

<sup>3</sup> Law n° 09-03 of February 25, 2009 on consumer protection and fraud repression, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 15 of March 8, 2009, amended and supplemented by Law n° 18-09 of 10 June 2018, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 35 of June 13, 2018.

<sup>4</sup> علي فيلالي، مرجع سابق، ص 370.



The duty of cooperation as a positive duty<sup>1</sup>, lays on positive obligations on the contracting parties that should be manifested at all stages of the contract, from negotiations and not only at the stage of performance. It requires active behaviour intended to notify the co-contracting party of any event necessary for the formation, performance and termination of the contract. Cooperation also means to look after the interests of the other party, by providing him with the information or advice he is entitled to expect<sup>2</sup>.

Algerian legislator has used the notion of cooperation to impose a duty to inform on the professional towards the consumer, in law n° 09-03 relating to consumer protection and fraud repression, amended and supplemented. Art. 17 states that any party involved must bring to the attention of the consumer all the information relating to the product that he puts out for consumption, by way of labeling, marking or by any other appropriate means<sup>3</sup>.

Another requirement of the duty to inform before/at the stage of formation of the contract can be found in law n° 04-02 on the rules applicable to business practices, amended and supplemented, in Chapter I on 'Information on prices, tariffs and conditions of sale' of Title II on 'transparency of commercial practices'.

In law n° 18-05 on electronic commerce<sup>4</sup>, the legislator imposed on the e-supplier the duty to include in the electronic contract, in particular, detailed information on goods and services, delivery conditions, warranty and after-sales service, termination of the e-contract, and other information for an informed e-consumer.

In another context, medical contracts are entirely subject to good faith. The failure to inform the patient engages the liability of the doctor. According to art. 23 of law n° 18-11 on health amended and supplemented<sup>5</sup>, the patient must be informed about his health condition, the treatment he requires and the risks to which he is exposed. In addition to art. 343 according to which, no medical act, no treatment can be performed without the free and informed consent of the patient.

Many other legal texts, in Algerian law, impose the duty of cooperation between contracting parties. We can cite, for ex., in insurance contract and according to art. 15 of ordinance n°. 95-07 of January 25, 1995 relating to insurance amended and supplemented, the policyholder has the duty to, accurately, declare any change or

<sup>1</sup>Didier LLUELLES, *Op.cit.*,p. 191.

<sup>2</sup> Elise POISSON, *Op. cit.*, p. 2.

<sup>3</sup> See also: Executive Decree No. 13-378 of November 9, 2013 setting the terms and conditions relating to consumer information, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 58 of November 18, 2013.

<sup>4</sup> Law n° 18-05 of May 10, 2018 on electronic commerce, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 28 of May 16, 2018.

<sup>5</sup> Law n° 18-11 of July 2, 2018, on health, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 46 of July 29, 2018, amended and supplemented by Ordinance N° 20-02 of August 30, 2020, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 50 of August 30, 2020.



aggravation of the risk and to inform the insurer of anything that may occur during the contract.

We can say that, the duty to inform is 'the Master Duty' in Algerian law, highly required in all contracts and at all stages, from negotiations and until the end of the contract. In fact, it is a reciprocal duty of information. For good faith considerations, each party must say everything he/she knows about the contract to the other, before, during and after the conclusion of the contract. So, in our opinion, the duty to inform is the first and the best expression of good faith in the field of contracts, as it reflects honesty and a true will to be loyal towards the other party.

## **II. Good faith as an underlying principle in Algerian law:**

Good faith is always presumed in Algerian law. In all contracts, it is presumed that the parties have acted in good faith until proven otherwise. But, the absence of written provisions relating to good faith outside the stage of performance, may lead to deny the existence of a general principle of good faith in Algerian law. In this part, we are going to give our opinion on the lack of such explicit legal provisions (1), followed by the underlying nature of good faith in Algerian law (2).

### **1. Lack of an explicit regulation of good faith in Algerian law:**

French law explicitly stipulated in the new article 1104 French C.C.<sup>1</sup> that contracts must be negotiated, formed and performed in good faith, and that this provision is a matter of public order<sup>2</sup>, so that it cannot be excluded by means of agreement. It is clear that French law took a big step in matters of good faith, which reflects a serious intention of French legislator to imply moral values into the field of contracts. Commenting on this French attitude, Lord Leggatt said that French law does not only support formed contracts, it aims above all to limit parties' freedom in making contracts<sup>3</sup>.

Unlike French law, Algerian law is still far from an explicit regulation of good faith and still keeps the old version of art. 1134 French C.C. (abrogated by Ordinance no. 2016-131 of 10 Feb. 2016), which provided that conventions must be performed in good faith.

Art. 107 A.C.C. imposes good faith only at the stage of performance. But, this does not mean, at all, that good faith is not required at the other stages of the contract. As a guiding principle, good faith leads contracting parties to act responsibly at all stages of the contract. And if Algerian legislator limited the requirement of good faith

<sup>1</sup> French Civil Code Amended by Ordinance No. 2016-131 of February 10, 2016 - art. 2. Came into force on 1 October 2016.

<sup>2</sup> Art. 1104 French C. C.: « Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public. »

<sup>3</sup> Justice LEGGATT, Contractual duties of good faith: Lecture to the Commercial Bar Association on 18 October 2016p. 2.. [On line] <https://www.judiciary.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf> Accessed on: August 07, 2023 at 1:39 p.m.



at the stage of performance, this silence does not mean that Algerian legislator neglects good faith at the other stages.

Contracts are made to be performed. The one and only purpose of any contract is the execution of its content. This is why, Algerian legislator has granted the greatest interest of good faith at this stage. And regardless of keeping the old version of the French article, it is no coincidence that art. 107 A.C.C. seems to make from good faith a general principle when it comes to performing contracts.

In our opinion, it is not a limitation, it is just a reminder. Art. 107 A.C.C. aims to remind the contracting party to be concerned with the interest of the other party, and to act honestly when performing the contract. In all the steps of the contract, each party tries to get the best and highest benefit from the contract, from negotiations and until the termination of their relationship. But, the stage of performance is the occasion where everyone tries to get the biggest gain for himself, no matter what means is used. So, good faith becomes a necessity at this critical stage, just to remind parties to cooperate and to be loyal towards each other. It is just a reinforcement of the principle since most conflicts arise at this stage.

In addition, we can clearly see that, apart from articles where good faith is explicitly provided for in Algerian civil code<sup>1</sup>, “good faith” as a literal term is not present in many others. But despite that, no one can deny that these last ones are based on good faith.

It should be reminded that, “general principles of law have an independent existence of their written support. They are characterized, first, by their unwritten character, but on which everyone agrees. General principles do not belong to written law, even when they are included in a text, they exist independently of their possible written recognition”<sup>2</sup>.

Thus, all the contractual relationships expect good faith, from negotiations until their termination. Moreover, all the legal provisions arise from good faith, and aim to punish the party who did not act honestly towards the co-contracting party. No need for a written article in the civil code to recognise such a principle.

In our opinion, good faith is an underlying principle in Algerian law, and there is no need to remind each time that, this or that, act or omission, must be subject to good faith.

## **2. Implicit requirement of good faith in Algerian law:**

<sup>1</sup> See for ex., Art. 824 A.C.C.: “The possessor of a right who is unaware that he is infringing the rights of others is presumed to be in good faith, unless this ignorance is the result of a serious fault. If the possessor is a moral person, it is the good or bad faith of his representative that must be taken into consideration.

Good faith is always presumed until proven otherwise”.

<sup>2</sup> Sophie SEYS, Delphine DE JONGHE, François TULKENS, Les principes généraux du droit, Anthemis, Vol. 2, 2012, pp. 493-549. [Online] <https://books.openedition.org/pusl/2006?lang=fr>  
Accessed on : August 24, 2023 at 11:24 a.m.



So, good faith principle underlies all the contracts in Algerian law. It determines their content and limits the freedom of parties as a means of justice, to ensure that free-will has not been abused for self-interest. In Algerian law, good faith is required at all stages, from negotiations (1), formation (2) and the performance (3) of contracts.

### 2.1. At the stage of negotiations:

Negotiations are the stage before the formation of the contract, they are not obligatory in all contracts, but are often required in some high-risk contracts.

Algerian legislator did not regulate the pre-contractual stage with special provisions, and did not explicitly require the parties to act in good faith at that stage, contrary to French legislator<sup>1</sup>. So, under Algerian law, there is no legal duty to act in good faith at the stage of negotiations, as the current art. 107 A.C.C. limits the duty to act in good faith at the stage of performance. Nevertheless, and as mentioned previously, good faith is an underlying principle in Algerian law, present at all stages including negotiations.

Negotiations are subject to free-will, so good faith is therefore required during this period. Otherwise, dishonesty, fraud and unfairness are authorized at this stage, which is not compatible with the spirit of Algerian law, which tends to protect the weaker party and to make justice prevail above individual interests.

Parties are not always equal in their power of negotiation, they may be subject to unequal economic or intellectual conditions. And unfortunately, many take advantage of the weak or ignorant party to derive undue advantages<sup>2</sup>.

Noting that, negotiating in good faith should not be confused with the freedom of contract. The duty to negotiate in good faith does not mean that the negotiator has the duty to conclude the contract. The negotiator remains entirely free to contract or not to contract. He can freely end the negotiations and refrain from concluding the contract, all that is required of him is to end the negotiations with legitimate reasons, far from lies and tricks<sup>3</sup>.

As examples, each contracting party has the duty to disclose all the information necessary for enlightened negotiations. The party is prevented from breaking off negotiations abusively, from voluntarily continuing negotiations that are clearly doomed to failure, or from using for purposes unrelated to negotiation, and without the consent of the other party, confidential information disclosed during the negotiations<sup>4</sup>. It is also considered a breach of good faith in negotiations, the no-

<sup>1</sup> Art. 1112/1 French C.C.: « The initiative, progress and termination of pre-contractual negotiations are free. They must imperatively meet the requirements of good faith ».

<sup>2</sup> Marie Annik GRÉGOIRE, Les sanctions de l'obligation de bonne foi lors de la formation et de l'élaboration du contrat, *Revue du notariat*, V. 104, n° 2, septembre 2002, p. 175.

<sup>3</sup> هدى بن يوب، مرجع سابق، ص 115.

<sup>4</sup> Elise POISSON, *Op. cit.*, p. 2.



intention to conclude a contract, conducting parallel negotiations and knowingly entering into an invalid contract<sup>1</sup>.

## 2.2. At the stage of formation:

At the stage of formation, good faith plays the role of a protective principle. It has a complementary function to vices of consent theory<sup>2</sup>. The most important and dangerous requirement about the formation of the contract is to ensure that all the content of the contract is known to the co-contracting party<sup>3</sup>. Hence the need of an informed consent, free from vices.

The duty to inform has a preventive function at the stage of formation, it allows parties to get all the information, necessary for an enlightened consent<sup>4</sup>. The existence and the validity of mutual consent require the duty to inform and the duty to be informed<sup>5</sup>. The duty to inform is an application of the duty of cooperation, as previously mentioned, that may need a positive act from both parties, giving the information from one party and asking for the information from the other party.

For good faith considerations, Algerian legislator gave a particular attention to the duty to inform at the stage of formation. In art. 86/2 A.C.C. the legislator has forced the party to be honest, and obliged him to notify the co-contracting party of any fact or event that would affect the party's decision, whether or not to enter into a contract. Considering that the intentional silence of one party regarding a fact or a modality constitutes fraud, when it is proven that the contract would not have been concluded if the other party had been aware of it. Thus, the non-disclosure of information necessary for the conclusion of the contract constitutes a breach of the principle of good faith, even before the breach of the legal provisions. Relative nullity of the contract in addition of damages can result.

The obligatory existence of an enlightened consent at the stage of formation, free from vices, is another prove that good faith is an absolute requirement at that stage, in Algerian law.

## 2.3. At the stage of performance:

Good faith in Algerian law is provided for by mandatory rules, in particular at the stage of performance<sup>6</sup>, and considerable sanctions are imposed in the event of breach<sup>7</sup>.

<sup>1</sup> محمود فباوض، مدى التزام الأنظمة القانونية المقارنة بمبدأ حسن النية في مرحلة التفاوض على العقد، مجلة الشريعة والقانون، عدد 54، الإمارات العربية المتحدة، 2013، ص 238 وما بعدها.  
<sup>2</sup> هدى بن يوب، مرجع سابق، ص 106.

<sup>3</sup> Marie Annik GRÉGOIRE, *Op. cit.*, p. 176.

<sup>4</sup> فاطمة الزهراء زيتوني، مبدأ حسن النية في العقود (دراسة مقارنة)، رسالة مقدمة لنيل شهادة دكتوراه في العلوم، كلية الحقوق والعلوم السياسية، جامعة أبي بكر بلقايد- تلمسان، 2017-2018، ص 377.  
<sup>5</sup> هدى بن يوب، مرجع سابق، ص 89.

<sup>6</sup> Art. 107 A.C.C.: « The contract **must** be performed in accordance with its content and in good faith ».

<sup>7</sup> For ex. art. 182/3 A.C.C. states that a debtor in good faith who has not committed fraud or serious fault, is only liable for the damage which could normally have been foreseen at the formation of the



It should be reminded that, good faith authorizes judges to restrict the interpretation of laws and contracts, and also to deviate from codified rules. Judges use good faith as a last resort if the contract leads to manifestly unfair results<sup>1</sup>. And for good faith considerations, the party may not claim a literal performance of the contract if it entails a prejudice for the co-contracting party<sup>2</sup>. The fair, or not fair, behaviour of the contracting parties is taken into account before taking the decision by the judge.

So, although it is based on ethical considerations, good faith has a binding nature. The breach of the requirements of good faith is subject to legal sanctions, such as damages or nullity of a contract or other sanctions. Moreover, any transgression in this regard may entail the liability of all those who knowingly participated in it<sup>3</sup>.

In the same context, we should mention that there is a strong link between good faith and the binding force of contract<sup>4</sup>. According to art. 106 A.C.C. the contract is the law of parties, it may be revoked or modified only with their mutual consent or for causes provided for by law. Here, the parties have a duty to perform the content and terms of their contract exactly as agreed when forming the contract. While, in entering into the contract, the parties also expected honest performance and party's own intent. Thus, we can say that good faith is an integral part of the contract in Algerian law, from its formation and even more, from its negotiation.

Noting that at the opposite, some Common Law legal systems consider that good faith is a threat to the binding force of contract and an illegitimate restriction on the parties' freedom to pursue their own interests, as it gives judges an access to the contract. Such is the case of English law.

### Conclusion:

In Algerian law, good faith is an aspect of contractual justice. It is the first requirement in all contracts, an underlying principle present throughout the contract at all stages, even without a legal codified text.

We have seen that, like any general principle, good faith exists independently of its written support. It does not need a drafted provision to be applied, because it is one of the pillars of law.

Algerian law does not reject good faith at any stage of the contractual relationship. The fact that Algerian legislator did not provide for an explicit article in

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contract. While, a debtor in bad faith who has committed fraud is liable for foreseen but also unforeseen damages. See also art. 185, 178/2 A.C.C ...

<sup>1</sup> Hans-Bernd SCHÄFER and Hüseyin Can AKSOY, Good faith, Encyclopedia of Law and Economics, December 2015, p. 1.

<sup>2</sup> شيرزاد عزيز سليمان ويونس عثمان علي، حسن النية في تنفيذ العقد – دراسة مقارنة، المجلة العلمية لجامعة جيهان – السليمانية، المجلد (5)، العدد (1)، العراق، حزيران 2021، ص 55.

<sup>3</sup> Élise POISSON, *Op. cit.*, p. 1.

<sup>4</sup> صباح عسالي، مبدأ حسن النية كمعيار لحماية المتعاقد، مجلة الحقوق والعلوم الإنسانية، المجلد 14، العدد 3، 2012، ص 723.



the civil code, requiring good faith at all stages of the contract, does not mean that Algerian law does not recognise this principle. Algerian legislator cannot predict articles for each case, and all the articles which do not make explicit reference to good faith, are based on it. It is an evident principle.

Today, the spirit of Algerian law tends, more and more, towards the protection of the weaker party, in particular through special legal texts (law n° 04-02 on the rules applicable to business practices, amended and supplemented; law n° 09-03 on consumer protection and fraud repression, amended and supplemented; law n° 18-05 on electronic commerce ...). Thus, denying good faith as a general principle under Algerian law, leads to denying the entire Algerian legislative policy in matters of contracts.

Our suggestion, and since good faith is, in our opinion, an underlying principle in Algerian law: no legal review is needed on good faith provisions in contracts. It already exists.

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