Categories of Reasonableness and Good Faith in Private Law Regulation

NATALYA I. BESEDKINA¹, VASILY V. GUSHCHIN², TAIMURAZ E. KALLAGOV³, TATIANA V. LARINA⁴, ZLATA V. MAKARCHUK⁵

¹Department of Legal Regulation, Economic Operations Financial University, Moscow, Russia
²Department of Civil and Business Law, Russian State University of Justice, Moscow, Russia
³Department of Constitutional Law, Gorsky State Agrarian University, Vladikavkaz, Russia
⁴Department of Legal Regulation of Economic Activity, Financial University Under the Government of The Russian Federation, Moscow, Russia
⁵Department of Administrative and Financial Law, Peoples’ Friendship University of Russia, Moscow, Russia

Abstract: The relevance of the study. The relevance of the study lies in the fact that there is no understanding in Russian contract law of the institute of good faith and the institute of reasonableness in contract law. In practice, when implementing the institutions of reasonableness and good faith in Russian legislation, they are modified considering national characteristics. For the correct and effective application of new laws, it is necessary, according to the authors of the article, to formulate their essence in the legislation, excluding the ambiguity of their interpretation. The conclusions obtained in the course of the study develop and supplement the conceptual apparatus in the field of theoretical and legal understanding and legislative regulation (on the example of civil law and legislation) of the principle of good faith.

The purpose of the article. The purpose of the article is to study the legal nature and essence of the categories of reasonableness and good faith in the field of private law regulation in the legislation of modern Russia.

Methods. The leading method of studying the problem was the deductive method, which allowed studying the legal nature and features of the implementation in Russian law of such fundamental categories of private law as reasonableness and good faith. The article uses the inductive method, the method of systematic scientific analysis, comparative legal and historical methods. The leading method, which was the basis for solving the problem, consists in studying the legal foundations and features of the implementation of the categories of reasonableness and good faith in the field of private law regulation. The methodological basis of the research was the general scientific dialectical method of cognition and the private scientific methods that follow from it: system-structural, concrete-sociological, technical-legal, historical-legal, and comparative legal methods. Their application allowed the authors of the article to study the objects under consideration in their interrelation, integrity, comprehensively and objectively.

Results. The article proves the theoretical unsolved problem of the place and role in the private law regulation of categories and principles of reasonableness and good faith. From the point of view of the interests of participants in civil turnover, its stability should be ensured by the most complete implementation of the principles of good faith and justice, as well as an appropriate number of preventive norms against unfair conduct. The article concludes that good faith is essential in filling the gaps in the legislation. It is not always possible to establish a single rule, to approve a norm that excludes unfair conduct. The gaps are not only due to legislative errors. Two factors have an important impact: the diversity of relations and their constant development in different areas (for example, e-commerce, financial markets).

Keywords: human rights, civil law, reasonableness, good faith, the principle of civil law, private law, public law.

INTRODUCTION

Currently, the legal theory is dominated by the approach according to which good faith is considered primarily as the most important principle of civil law in general. It is true that "legal principles objectively receive a generally valid expression or direct consolidation in the system of legal norms". Thus, in recent years, a tendency has been developed in Russian legislation to concretize the general civil principle of good faith in the sub-branches of civil law. The new laws introduced into the Civil Code of the Russian Federation indicate that, in particular, the concretization concerned contract law. Contractual legal relations are the main form of modern civil turnover. The parties enter into legal relations to achieve the expected result, the benefit to which they aspire, through mutual efforts. Proper execution and
stability of contractual legal relations allow judging the development of the economy and the overall level of well-being. The good faith conduct of the parties ensures the support and development of civil turnover. Counterparties are interested in entering into obligations only if they have confidence that everyone will properly perform their duties. This requires the confidence of the parties in the contract in their mutual good-faith behavior [1].

Good faith and reasonableness are among the most important principles of Russian civil law (Article 1 of the Civil Code of the Russian Federation). This legal category requires participants in civil turnover to refrain from actions (inaction) that entail a violation of the actual balance of interests with formal observance of rights. During the last period of economic development, the gross domestic product of the Russian Federation increased from 7,305.6 billion rubles in 2000 to 85,880.6 billion rubles in 2016 at current prices or from 11,217.3 billion rubles in 2000 to 61,897.5 billion rubles in 2016 at constant prices. According to this economic growth, the volume of various tangible and intangible goods in civil circulation has also increased, which increases the need for participants in its effective legal regulation. From the point of view of the interests of participants in civil turnover, its stability should be ensured by the most complete implementation of the principle of good faith and an appropriate number of preventive norms against unfair conduct.

METHODS

The leading method of scientific research of the problem of reasonableness and good faith in civil law and the sphere of private law regulation was the deductive method, which allowed studying the legal nature and features of the implementation of reasonableness and good faith as legal categories and principles in civil law. The methodological basis of the research was the general scientific dialectical method of cognition and the private scientific methods that follow from it: system-structural, concrete-sociological, technical-legal, historical-legal, and comparative legal methods. Their application allowed the authors of the article to study the objects under consideration in their interrelation, integrity, comprehensively and objectively.

RESULTS

The good faith and reasonableness of the parties lie not only in their obligation to inform each other of significant circumstances. The parties shall provide reliable information. Previously, only significant misconception and deception as private cases of invalidity of transactions were considered in the Civil Code of the Russian Federation (Article 178 and Article 179 of the Civil Code of the Russian Federation). However, since 2015, the institute of misrepresentation (false assurances of fact) has been borrowed from English law, called somewhat differently: (false) assurances about the circumstances (Article 431.2 of the Civil Code of the Russian Federation). It assumes that a party is liable to the other party for any false representations related to the contract.

In general, this new law deserves a positive assessment, since it provides the victim with more grounds and ways to protect against false assurances about the circumstances. Thus, previously, a party was only entitled to demand the invalidation of the contract, provided that a significant misconception or deception was proved. The legal norm of Article 431.2 of the Civil Code of the Russian Federation provides the right, in the event of the unreliability of assurances, to demand recovery of losses, refusal to perform the contract, or recognition of the contract as invalid. In the scientific literature, a proposal is made, among other possibilities, to allow a party using the estoppel principle: to deprive the party who reported the assurances of the opportunity to challenge their reliability and demand the execution of the contract in the form as if these assurances were true [2].

In Russia, in the framework of civil proceedings, the court always checks the arguments and evidence of both parties for compliance with their facts. The court does not trust the parties and reveals which of them misleads the court on specific circumstances. After all the circumstances of the case are established, the court, according to its internal conviction, makes the appropriate legal decision.

Even though Article 431.2 of the Civil Code of the Russian Federation is generally a positive new law, it contains several shortcomings. Thus, a clear disadvantage of the rule is that the type of claim directly depends on the degree of materiality of the assurances made.

The motivation to observe good faith and reasonableness consists in negative consequences for unfair conduct and privileges for good-faith behavior. This is most fully illustrated in the Civil Code of the Russian Federation by the category of bona fide and mala fide acquirer. The owner may demand property, securities, money from a mala fide acquirer, demand compensation for losses, return of the received income (Articles 15, 147.1, 223, 301, 302 of the Civil Code of the Russian Federation). It is forbidden to make such claims to a bona fide acquirer with rare exceptions (he/she purchased the property free of charge, the property was disposed of against the will of the owner).

It is impossible to nominate objections on the valuable paper against a bona fide acquirer (paragraph 1 of Art. 145 of the Civil Code of the Russian Federation). A bona fide acquirer, unlike mala fide acquirer, has the right to reserve the improvements made or to demand compensation for their cost (Article 303 of the Civil Code of...
the Russian Federation). It follows from these rules that the negative consequences that occur for a mala fide acquirer do not apply to a bona fide acquirer, just as the privileges of a bona fide acquirer do not apply to a mala fide acquirer.

In 2015, amendments were made to Article 307 of the Civil Code of the Russian Federation, which opens the section of the law of obligations. Good faith applies to contractual relations since the latter is part of the binding ones. Paragraph 3 of this article establishes that the parties shall behave in good faith when establishing, performing, and terminating an obligation.

**DISCUSSION**

Well-known Soviet and Russian scholars addressed the issue of good faith and reasonableness, as well as research on topical issues of civil law: V.V. Gruzdev [3], D.V. Dobrachev [4], I.A. Zenin [5]. E.V. Ivanova [6], N.M. Korshunov [7], R.T. Mardaliev [8], S.A. Muromtsev [9], and V.O. Mushinskii [10]. Several authors touched upon the issues of the correlation of good faith with other principles and the evaluative nature of good faith (E.V. Protas [11], M.B. Smolenskii [12], A.A. Spektor [13], E.A. Sukhanov [14]). G.T. Beknazary-Yuzbasheva, R.A. Kalamkaryan, A.V. Popova, E.A. Sorokina, Costa Lazota Lucas Agusto, and others considered good faith in international commercial turnover and the contract law of individual countries. Several foreign works in English of prominent representatives of the doctrine, such as M. Charman, E. McKendrick, E.J. Schuster, Sheinman, R. Zimmermann, and S. Whittaker are devoted to good faith in contractual English and European law.

**CONCLUSION**

The relevance of this scientific article is that in Russian contract law there is no understanding of the institution of good faith in contract law. We can only note E.E. Bogdanova's dissertation "Good faith of participants in contractual relations and problems of protecting subjective civil rights", written in 2010, among the doctrinal sources devoted to good faith in treaty law. Nevertheless, the content of this dissertation concerns good faith in civil law and does not specifically consider its implementation in contractual relations. This is mainly since the norms expressing the requirement of good faith in contractual legal relations were directly introduced into Russian legislation only in 2015.

In practice, when implementing the institute of good faith in Russian legislation, it is modified considering national characteristics. For the correct and effective application of new laws, it is necessary to formulate their essence in the legislation, eliminating the ambiguity of their interpretation. It is known that the significance of any institution is evidenced by the results of its practical application. At the moment, the rich Russian judicial practice contains decisions in which the courts have affected the good faith in the contractual legal relations of the parties. On their basis, it is possible to draw theoretical and practical conclusions about the role of the principle of good faith in the settlement of disputes in the field of contract law, its application, and qualification by the courts. According to the statistics of the Judicial Department of the Supreme Court of the Russian Federation, the number of disputes on non-performance or improper performance of obligations under contracts for 2015-2016 increased from 65 to 70% of all categories of cases, which indicates the problem of counterparty trust and turnover stability.

Good faith is essential in filling in the gaps in legislation. It is not always possible to establish a single rule, to approve a norm that excludes unfair conduct. The gaps are not only due to legislative errors. Two factors have an important impact: the diversity of relations and their constant development in different areas (for example, e-commerce, financial markets). For example, Francesco Zilio considers a situation that, although it does not fall under the composition of unjustified enrichment, however, entails losses. In this regard, F. Zilio argues that it is reasonable to recover damages from a person who has unjustly enriched himself/herself on the grounds at the expense of another person [15]. Thus, the principle of good faith has a positive effect on the process of improving legislation and regulating civil circulation.

Since 2015, the legislator has explicitly provided for the duty of good faith in contract law (Article 307 of the Civil Code of the Russian Federation). Moreover, paragraph 3 of Article 307 of the Civil Code of the Russian Federation specifies that the parties are obliged to behave in good faith not only when they are in contractual relations, but also when they are "established" and "terminated".

The application of the *culpa in contrahendo* doctrine is of great value since the parties communicate to each other their will and expectations of the final result at the stage of preliminary negotiations and preparations.

For example, before entering into a contract for the provision of services with a professional photographer, the parties discuss the specifics of the shooting, the expectations and wishes of the client, and the corresponding cost of the agreed service. It is under the agreed conditions that the parties are ready to enter into legal relations. Often, the decision itself depends on the negotiations – whether to conclude a contract. Consequently, already at the stage of negotiations, the parties communicate their will to each other, exert mutual influence on it and form the terms of the contract. A similar idea can be traced to English contract law. In England, the contract is defined as a "meeting of minds". The contract is considered concluded from the moment the offeror receives the
acceptance from the other party. This can be done by mail, during a phone conversation, etc. In Russia, the approach to the concept of a contract is different. Priority in establishing the fact of the conclusion of the contract is formal. There is no direct indication of the will of the parties.

RECOMMENDATIONS
The theoretical significance of the study lies in the fact that the conclusions obtained in the course of the study develop and supplement the conceptual apparatus in the field of theoretical and legal understanding and legislative regulation (on the example of civil law and legislation) of the principle of good faith [16]. The great difficulty in justifying the boundary of good faith (and going beyond it) of the parties to contractual relations can be illustrated by a vivid example from judicial practice – the decision of March 7, 2012, No. 89 of the Presidium of the Moscow Regional Court.

The plot of this interesting case is as follows. Sh.Yu.V. applied to the court with a claim against Sh.A.A., Zh.V.N., K.O.A., the Administration of the I. region and, having clarified the claims, asked: to recognize as null and void the contract of purchase and sale of the land plot dated October 07, 2008, concluded between Sh.A.A. and Zh.V.N., and the contract of sale and purchase of the site dated May 22, 2010, concluded between Zh.V.N. and K.O.A.; apply the consequences of the invalidity of void transactions; recognize the land plot as jointly acquired property of the spouses; recognize the ownership of a residential building located on the specified site. In support of the stated requirements, she indicated that she is in a registered marriage with Sh.A.A. On the disputed land plot that belonged to her husband, they jointly built a residential house in which they live to this day, however, the house has not been put into operation, there are no title documents for it. In the autumn of 2010, she learned that her husband had sold the land plot to Zh.V.N. on October 07, 2008, and that the latter, in turn, had sold it to K.O.A. on May 22, 2010. The court considers these contracts invalid since the law prohibits the alienation of a land plot without a building located on it. Also, the husband made this transaction without her consent. He considers that the disputed land plot is the jointly acquired property of the spouses, since, during the marriage, common funds had been invested in its development and improvement, including landscape works, which significantly increased its value.

As it was established by the court and confirmed by the case materials, that Sh.Yu.V. and Sh.A.A. have been married since September 20, 2003. In the period from 2004 to 2007, the spouses Sh. erected a residential building with a total area of 980.6 square meters on a land plot belonging to Sysoevo LLC, carried out work on the installation of heating, water supply, sewerage systems, landscape, and design work, installed the phone. The contract agreements for the construction of the house, the conduct of communications, and the provision of communication services were concluded in the period from 2004 to 2006 in the name of Yu.V. Shatrova. The court found that in 2006 the house was suitable for living. Since 2006, the Shatrovs, together with their minor children, born in 2006 and 2007, actually lived in the specified house until 2011, which is confirmed by the case materials, including the acts of June 22, 2011, on the seizure of the disputed house and the property located in it, drawn up as part of the enforcement proceedings initiated based on the decision of the Istra City Court of February 01, 2011, on the recovery of monetary amounts from Sh.A.A. in favor of Zh.V.N. under the loan agreement.

In 2007, a passport of the house project was obtained for the already built residential building of Sh.A.A., and on June 19, 2008 – a permit for the construction of the house. On June 25, 2008, that is, before the alienation of the land plot, a technical inventory of the built residential building was carried out.

Since the disputed household was built during the marriage by the Sh. spouses, it has the regime of joint ownership under the law (paragraph 1 of Article 34 of the FC of the Russian Federation). The defendant Sh.A.A. during the trial recognized the claims of Sh.Yu.V. in terms of recognizing her right to the house, which is jointly acquired property. In such circumstances, the court had no legal grounds for refusing to satisfy the claims of Sh.Yu.V. on the recognition of the ownership right to a share of the house.

It can be noted that the legislator puts the duty of mutual awareness and transparency in the conduct of business as the basis for good-faith negotiations. Indeed, the provision of complete and reliable information is necessary, since it contributes to the correct formation of the will of the parties and the achievement of the goal of the obligation. The Civil Code of the Russian Federation contains many rules that require the parties to interact by sending notices and notifications to each other (for example, art. 507, 515, 528, 546, 680, 720, 810 Civil Code of the Russian Federation). In cases where there is no symmetry of information (for example, one of the parties is a professional participant or has special knowledge), the parties are in an unequal position. In this regard, it is necessary to familiarize the counterparty with relevant information (for example, the obligation is directly established in Article 495 of the Civil Code of the Russian Federation). Otherwise, there is a risk of unfair conduct and abuse of law. The counterparty may claim ignorance of the circumstances.

The principle of reasonable expectations applies: a party is entitled to what it could expect based on its knowledge. The Supreme Court of the Russian Federation in 2014 clarified that if the condition of the contract
is unclear, and it is impossible to establish the actual general will of the parties, then the condition is interpreted against the party that proposed the condition.

In practice, there is little application of this article. Thus, in the period from the date of entry into force of Article 434.1 of the Civil Code of the Russian Federation (June 1, 2015) and up to the present time (date of appeal: March 10, 2021), the author identified only 4 cases considered in arbitration courts and 4 – in courts of general jurisdiction, in which the courts recorded in the decisions of this article. The analysis of the identified cases allows concluding the heterogeneity of judicial practice. Thus, in some cases, the courts avoid qualifying the circumstances for compliance with good faith negotiations. In many other cases, the courts, on the contrary, assess the actual circumstances and, based on them, draw reasonable conclusions about the bona fide or unfair conduct of the party in the negotiation process. For example, the court granted the request to terminate the enforcement proceedings, the essence of which was reduced to the obligation of the Tambov Regional State Budgetary Institution Tambov Airport to conclude a contract for the provision of security services with the FSUE "EPD of the Ministry of Transport of the Russian Federation". The court, refusing the demand to oblige to conclude a contract, proceeded from the following circumstances:

a) the parties have taken all possible measures to conduct negotiations since 2012;
b) the parties did not agree on the essential terms of the contract (the volume of services provided and their cost);
c) FSUE "EPD of the Ministry of Transport of the Russian Federation", being a de facto monopolist, offered a volume of services that did not meet real needs and a cost condition that was not comparable with the airport budget.

In this regard, the court concluded that there was a violation of the balance of interests of the parties and the loss of the possibility of concluding a contract concerning the conditions proposed by FSUE "EPD of the Ministry of Transport of the Russian Federation". It is difficult to conclude the general trend of the judicial qualification of this article as the cases, in which the arguments (based on Art. 434.1 of the Civil Code of the Russian Federation) had been differently estimated, are few.

The requirement of good faith shall be observed when filling in gaps, if the analogy of the law is not applicable (paragraph 2 of Article 6 of the Civil Code). Good faith is a value in building relationships between participants in civil turnover. This is one of the moral and legal categories that allow for a fair social policy without the forced redistribution of property from one person to another.

REFERENCES: