Violation of the principle of good faith in the pre-contractual negotiations

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Abstract

The pre-contractual liability and obligations contained in it is one of the most important issues in the area of contract laws. The principle of good faith is one of the important principles in this field which dominates over the entire contract period ranging from pre-contract, conclusion and implementation stages of the contract.

Although the freedom of the will is the primary principle in both British and Iranian legal systems, and this principle includes the unliability of the negotiator until the conclusion of the contract, this doesn’t imply unliability of the negotiator during this period. This means that we would encounter some commitments, such as the obligation to comply with the obligations of good faith, transparency in the negotiations, provision of the necessary information, commitment to cooperate and promise not to deviate from negotiations and .... Therefore if these obligations are not fulfilled, we will face some performance bonds, including the obligation to negotiate, the obligation to disclose information, paying reparation for loss of benefit and position of the contract, termination of the contract during the execution period due to the errors in the pre-contract period.

Keywords: principle of good faith, performance bond for freedom of contract violations, the pre-contractability, the obligation to negotiate, pre-contract negotiations.
Introduction

Good faith in the sense of honesty whose accurate and logical position has been defined in the field of contract law is considered an important and necessary principle in different stages of contracts, ranging from contract conclusion to implementation and interpretation of contracts. Each of these stages, require special behaviors and rules for compliance with good faith. Pre-contractual negotiations and preliminary talks are inevitable for achieving an agreement. During preliminary talks, the parties negotiate with the aim of concluding a contract at the end of the talks, and expect to achieve an agreement and conclude the contract at the end. Therefore the parties are required to behave with utmost good faith and without any self-interest intentions in the negotiation process, so that one party or both of them don’t incur any unwanted loss in the negotiation process. Despite its great importance in the pre-contractual negotiations, good faith has not been analyzed in detail under a separate title, and has merely been discussed briefly among other topics. Meanwhile, this principle has been discussed in more detail in countries which follow the written legal system, and this is because of the fact that this principle has been accepted as a binding principle in these countries. In Iran, good faith has been discussed among other topics and only some aspects of good faith in negotiations and contract conclusion have been talked about, this is because of the fact that this principle has not been explicitly accounted for by the legislator. The studies carried out in Iran in this regard are somehow affected by its rules laid down in the laws of the countries which follow the written legal system.

In this paper attempts are made to investigate the status of good faith in the pre-contractual negotiations in different legal systems as well as in the pre-contractual negotiations in the Iranian Law. Attempts are also made to figure out whether good faith is acceptable in the pre-contractual negotiations within the Iranian legal; system.

Literature Review
Generalities, definitions and concepts of good faith

Investigation of the words and concepts origins is one of the most basic steps for better description and recognition of those given words or concepts. To this end, understanding the original literal meaning of good faith is striking. In the Persian culture good faith is the opposite of ill faith and literally refers to good intentions (Dehkhoda Dictionary). Similar examples of this concept are also defined in the English and foreign cultures. In the foreign legal culture, good faith is a genitive compound consisting of two words ((good)) and ((will)), which is usually accompanied by (good dealing) in the contract laws. Black's Law Dictionary defines good faith as: a state of mind based on a) honesty in belief or purpose b) adherence to the commitment made to others c) the observance of reasonable commercial standards of fair dealing in a certain profession or trade or business d) lack of fraud and subjection or concession intentions against conscience.

According to many experts in law, good faith is a subjective, qualitative and vague, and therefore very difficult to define concept. Some lawyers interpret good faith as ((the intellectual disposition of an individual who performs a wrong legal or material action and believes that his/her action is in accordance with the law, while it is not)) (Jafari Langroodi, M. J., 1993, p. 14).
Due to lack of considering by legislators, good faith is discussed under other titles in Iran, and some aspects of good faith are proposed in negotiations and contract formation. Research conducted in Iran is affected by the relevant provisions in countries with written law.

A review of the research carried out about good faith in contracts, especially in the formation of contracts, it is clear that there is no written teaching entitled independently as ”in good faith in the negotiation”. In this regard, there is a thesis written and defended by Mr. Ali Ansari in University of Tehran, as the principle of good faith in contract. The thesis has a comparative dimension with French law, and is mostly related to the principle of good faith during the signature and implementation of contracts.

The literature also includes a thesis and an article on the good faith and its implications in jurisprudence by Dr. Morteza Hajipoor. The author has examined the functions of good faith in contracts in his works. However, there is no research that analyzes all aspects of good faith, especially regarding the sanctions related to liability resulting from the negotiation. This plays a key role in motivation for this research.

According to many experts in law, good faith is a subjective, qualitative, and vague concept; therefore, it is very difficult to define. Some lawyers have defined good faith as “intellectual condition of a person who does wrong legal or material action, and believes that his/her acts are in accordance with the law, while it is wrong” (Jafari Langroodi, M.J., 1993, p. 14)

**The status of good faith in the pre-contractual stages in different legal systems**

Since the countries which follow the written legal systems have a very broad and pervasive approach towards good faith, good faith has been clearly regarded as a necessary factor in the preliminary negotiations which has to be observed in the context of laws or legal proceedings. Accordingly, the courts of law in these countries have decisively issued verdicts about the good faith-based pre-contractual liabilities, an example of such verdicts include the verdicts issued in France. Although the obligation to negotiate in good faith is not explicitly laid down In the French law, the legal proceedings indicate the credibility of good faith in the negotiations on the basis of pre-contractual liability. In the law of this country, just like the law the other Germanic Roman and common law countries, the basic principle is that parties are free to negotiate and put an end to it, and this principle arises from the fundamental principle of parties free will and freedom of contract, but with development of the overall commitment to honesty and loyalty in the negotiations and, in other words, the obligation to negotiate in good faith, this general principle has faced some restrictions. In case the negotiations are terminated with an ill faith, or at least some sort of fraud and deception has been performed, abuse of the right can be regarded as a fault and lead to liability in this regard. In such a case, Article 2003 of the Civil Law is adduced for liability arising from fault.

In the common law and even in the United States where the principle of good faith has been explicitly laid down in its domestic law, good faith has not been accepted in the preliminary negotiations and contract conclusions. The main reason of this is the contradiction of this principle with the principle of free will in general, and the principle of parties’ freedom of
contract in particular. Thus, the point that initiation of negotiations for a contract creates a binding relationship by itself, is not accepted in these countries. In addition to the above-mentioned reason, they argue that accepting the risks is one of the means of entering the hazardous arena of trade, the parties must accept the risks before the contract has been signed.

The British laws just like the countries which follow the common law system, reject the principle of good faith in contractual negotiations and argue that the contradiction of this principle with the principle of free will and freedom of contract is the main reason of this rejection. Despite the clear rejection of good faith in negotiations in the common law (for example in England), this principle has been implicitly raised in facilities such as undue influence and abuse of supply. On the contrary, theories such as fault in the preliminary talks that was raised in Germany and violation of laws dealt with in France, (both arising from the written law thoughts), a theory known as binding promissory estoppel was raised in the common law which shows the importance of negotiation in good faith in the pre-contractual obligations.

**Good faith in the pre-contractual negotiation in the Iranian Law**

In the Iranian legal system, good faith has not been explicitly regarded as a general principle in the laws and regulations so that parties be obliged to observe that in conclusion of contracts in general, and at the stage of preliminary talks in particular. However, study of special laws, as well as juridical sources that form the basis of rules and regulations setting, show that the although the principle of good faith is not explicitly discussed by the legislator, this principle together with its peripherals have been implicitly accounted for in some laws and regulations. Articles 12 and 13 of Insurance Act deal with providing correct and accurate information in conclusion of contracts and the sanction of violations from this obligation is also laid down in these articles.

Articles 33, 34 and 35 of e-commerce Act also deal with the required accuracy of information provided for the business that takes place in cyberspace. Misrepresentation in conclusion of contract, refraining from telling the truth in the sale and rent contracts, are titles that, depending on the circumstances, can be the source of contractual obligations for the parties in the negotiations for conclusion of contracts (Ghanavati, Jalil and Javer, H. 2006 P 159 ). These examples show that the Iranian legal system is not indifferent to the principle of good faith in conclusion of contracts in general and in pre-contract negotiations in particular and has provided some information that indicate the importance of the need for honesty at this stage.

**Discussion and Conclusion**

The principle of good faith is one of the principles that dominates over the entire period of the contract and indicates that the parties must follow all the dominant ethical principles during there-contractual period, during the conclusion of contract, or at the time it is being enforced, enter the contract conclusion process with no intention of fraud or causing loss to the other party, and conclude a contract in compliance with common standards. The pre-contractual negotiation period is also one of the stages in which the good faith principle should be observed. This stage includes some commitments, violation of which would bring about liability. These commitments
include: provision of the necessary information, transparency in negotiations, obligation not to deviate from negotiations.
Unfortunately, the principle of good faith in the pre-contract period is not duly taken into account in the Iranian legal system, and this issue calls for further inquests on the part of legislators.
References


