

**The relation of the principle of good faith to the limiting and excluding
circumstances of contractual liability**

Abstract. The content of the article reflects the relationship of the principle of good faith with the circumstances of maintaining and excluding contractual legal responsibility, its relevance and contradiction. The reasoning in the research is guided by the extent, to which circumstances, that focus on the limitation of liability, will pass the general test of the principle of good faith. Attention is focused on the consistency and relevance of the principle of good faith with the norms stipulated in the contract during contracting. Also, on the correct interpretation of good faith as a general, somewhat abstract and undefined, so-called “open norm”. The study of the article mainly serves to discuss the limiting and excluding circumstances of contractual liability in combination with the principle of good faith. For more clarity, specific examples are discussed, as well as excerpts from judicial practice, which determine the compatibility of the principle of good faith and limiting and excluding circumstances of responsibility.

Key words: principle of good faith, contractual liability, limitation and exclusion of liability.

Introduction. The principle of good faith is a pillar of civil law. All actions of the participants in civil proceedings - whether mutually agreed upon, premeditated or completely unintended - must be within the general concept of good faith, especially if it does not derive directly from the relevant legal relationship or the norm regulating this relationship¹. Many norms of the Civil Code sometimes directly establish the duty of good faith in private legal relations, and the majority of norms, although not directly indicating this, are nevertheless unequivocally based on it². In other words, good faith is a consequence of all contractual relations and it is always “taken into consideration” even without considering.

More precisely, in all cases, the behavior of a participant in civil legal relations is subject to the requirement of good faith³ and, because it protects the fair expectations of the parties and establishes cooperation between them based on mutual trust, it helps to bring the human and social

1 Kereselidze D, 2009, The Most General Systematic Concepts of Private Law, Tbilisi; p. 83.

2 Decision of 05/07/2019 of Supreme Court of Georgia on the case N AC - 726-2019 <http://prg.supremecourt.ge>

3 Commentary on CC, book three, Tbilisi, 2001. p. 272

elements to the forefront. This makes the parties' relations more informal and economical. They are no longer forced to consider every detail in their contract,⁴ since the principle of good faith imposes such (additional) obligations on the parties, which are not imposed by the contract, but are derived from the general standard of good faith⁵. Thus, it is very interesting to discuss the principle in the binding-legal relationship at the stage of the origination of the obligation in relation to the compatibility and compliance of the prior reservations of the counteragents of the limiting and excluding circumstances of responsibility.

Main text. General overview of the principle of good faith. The word “good faith” has a moral rather than a legal meaning, and it is this “morality” that determines the basis of the legal norm - that the cumulative unity of law and morality leads to a result of higher value. There are cases when the actions of persons in the binding-legal relationship (as well as in the civil-legal relationship as a whole) completely meet the requirements of the legal norm, but remain beyond the requirements of the moral and ethical norms. It is to fill this imbalance that the principle of good faith serves to ensure that the actions of the parties meet both legal and moral requirements, because this is the only way to achieve a perfect legal order.

According to the explanation of the Supreme Court of Georgia: “The application of the principle of good faith becomes relevant when the request or action of a person formally complies with the applicable substantive law, but its implementation is unfair in a particular case. Therefore, its function is to avoid clearly unfair consequences, which is directly related to the stability and solidity of civil relations”⁶.

Morality determines the effectiveness of law, and good faith has much to do with morality. As mentioned above, good faith behavior is not the same as legal behavior. Not every unlawful act is a mala fide act, and, conversely, mala fide conduct is not always unlawful conduct⁷. According to the general definition, good faith sets the standard of action, which is characterized by honesty, openness, the ability to take into account the interests and rights of the other party⁸.

Based on the principle of good faith, it is not only inadmissible to fulfill an obligation by an unacceptable action, but it also protects the trust of the participants of the legal relationship on civil turnover and guarantees that legal rights will not be abused.⁹

Based on the principle of good faith, not only is it not allowed that the obligation is fulfilled

4 Vashakidze G., “Good faith according to the Civil Code of Georgia - abstraction or valid law”; *Georgian Law Review*, Journal 10/2007. p. 18.

5 Khunashvili N, 2016, *The Principle of Good Faith in Contract Law*, ed. Tbilisi, Bona Causa; p. 46

6 See DSCG №AS-862-828-2016, February 24, 2017; №As-528-501-2015, November 4, 2015; №AS-549-521-2015, November 18, 2015; <http://prg.supremecourt.ge>

7 Zoidze, *Commentary to CC*, Book 3, 2008, article 361, p. 270.

8 *Commentary to CC*, Book 3, 2019, art. 389, p. 361.

9 Totladze L, Gabrichidze G, Tumanishvili G, Turava P, Chachanidze E, 2012, *Explanatory Legal Dictionary*, GIZ, IRZ; p. 252.

by an unacceptable act, but it also protects the trust of the participants of the legal relationship on civil turnover, that legal rights will not be abused.

The principle of good faith, with specific rules derived from it, is one of the criteria, along with three criteria such as morality, imperative norm and public order, that limit private autonomy. In addition, while a violation of morality, imperative norms and public order leads to the invalidity of the contract, the principle of good faith serves not only to determine the validity of the contract, but also to determine the contractual rights and obligations of the parties and to distribute them fairly¹⁰.

It should also be noted that the principle of good faith applies both at the conclusion of the contract and at the pre-contractual stage, as well as during the implementation and fulfillment of the rights and duties arising from the contract (ibid., p. 333). Thus, the principle of good faith is really of great importance in relation to contractual law itself.

The principle of good faith originates from Roman law. The principle “bona fides”, which means good faith, occupied an important place in “ius civile” and Roman legal thought¹¹. According to Roman law, good faith is faithfulness to a promise. An honest person is one who behaves honestly and sincerely¹².

Outstanding representatives of the German doctrine - Konrad Zweigert and Heinrich Kotz refer to “good faith” as the behavior of counteragents, which should be evaluated as “good faith”. Due to the multiple meanings of the concept of good faith, it is referred to by different authors by different names. Some authors call it “norm”, others - “legal principle”; “standard behavior rule”, “source of unwritten law”, “highest norm”, “royal norm” and even “queen of norms”¹³, and because of its abstractness and indeterminacy, it is considered as a general rule of conduct, a general norm.

“General Clause” (general clause) - refers to a legal norm, the actual composition of which is widely established and requires specification in judicial practice. It is often used by the legislator in order for the general formulation of the legal norm to include as much legislative composition as possible. As a result, it is possible the law to be freed from the list of detailed signs and at the same time the field of application of the law not be limited. In addition, the legislation often contains evaluative categories, the content of which changes over time, for example, moral norms, good faith, etc.)¹⁴. Because of this, the principle of good faith is an open norm, as a result of the develop-

10 Khunashvili N, 2016, *The Principle of Good Faith in Contract Law*, ed. Tbilisi, Bona Causa; p. 334

11 Supreme Court decision of 08/05/2020 on case N#AS- 1351-2019; <http://prg.supremecourt.ge>

12 Khunashvili N, 2016, *The Principle of Good Faith in Contract Law*, ed. Tbilisi, Bona Causa; p. 27

13 Ioseliani A., “Principle of Good Faith in Contract Law (comparative legal research, Georgian Law Review, journal - Special Edition 2007, p. 32).

14 Totladze L, Gabrichidze G, Tumanishvili G, Turava P, Chachanidze E, 2012, *Explanatory Legal Dictionary*, GIZ, IRZ; p. 119.

ment (specification) of the internal system of which new norms are born and they continue their independent life¹⁵.

Even the Oath of the ancient Greek physician - Hippocrates, which dates back to 400 years BC and counts for twenty-five centuries, emphasizes the physician`s obligation to fulfill his professional duty conscientiously and faithfully. In the last paragraph of the Oath we read: ““If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times.¹⁶” It should be noted that Hippocrates also considered the consequences of not fulfilling the oath, in particular: - “If I swerve from it or violate it, may the reverse be my lot”. In that era, from a modern point of view, the Hippocratic Oath may be considered as a kind of unilateral contract made by the physician with the patient (patients), in which it is agreed to fulfill the obligation precisely on the basis of conscientious behavior and, at the same time, the measures of responsibility in case of non-fulfilment are indicated.

The principle of good faith in relation to fundamental human rights. According to the opinions expressed in the doctrine, due to the general and broad meaning of good faith, it falls outside the scope of regulation of private legal relations and, as one of the most important manifestations of human rights protection, should be interpreted in the spirit of fundamental rights.

Although, according to the generally prevailing opinion, the fundamental rights directly apply only to the relations between the state and the citizen, and not between citizens (or citizens and legal entities of private law), under to the same dominant opinion, the fundamental rights develop the so-called power of intermediary (indirect) action on such relations¹⁷. For example, Article 20 (1) of the Constitution of Georgia, the main law of the country, enshrines the inviolability of personal communication. Both postal and non-postal correspondence are protected by the right to inviolability of communication. However, any public provider of relevant services is limited by this fundamental right. Due to the fact that “Georgia Post” LLC is a commercial legal entity established by the state to exercise public powers, it is unconditionally limited by the fundamental right to inviolability of correspondence. In addition, it should be taken into account that the fundamental rights will be binding for Georgian Post LLC even if it is privatized. Private service providers are limited by the right to inviolability of correspondence by virtue of the indirect validity of fundamental rights¹⁸.

15 Ioseliani A., “Principle of Good Faith in Contract Law (comparative legal research, Georgian Law Review, journal - Special Edition 2007, p. 34).

16 <http://www.higia.ge/ka/healthDetailed/171/%E1%83%B0/508/508>

17 Cheredychenko., The Constitution of Contract Law: Something New under the Sun? Electronic Journal of Comparative Law, vol.81.1. March 2004 (used “Principle of Good Faith in Contract Law” by Ioseliani A. (comparative legal research, Georgian Law Review, journal - Special Edition 2007, p. 46)

18 Kobakhidze I., Commentary on the Constitution of Georgia, Chapter Two, Georgian Citizenship, Fundamental Human Rights and Freedoms, Constitutionalism Research and Promotion Center, German Society for International Cooperation (GIZ) 2013, Article 20 (1), p. 184

Thus, the basic principles of law, including the principle of good faith, include and strengthen constitutional values, thereby realizing the imperative of the Constitution in individual laws. In this way, the Constitution acts in an indirect form towards third parties and is also the scale of ethical evaluation in private legal relations¹⁹.

It is interesting how the standard of good faith behavior should be determined when the state is one of the contracting parties to the contract, because the state, as the creator of the moral and legal order, should create a higher standard of performance, it should be a model of compliance with the conditions stipulated in the contract. The ruling of September 30, 2019 of the Supreme Court of Georgia (case NoAS-1027-2019) explains: “In all legal relations in which the State participates, the degree of trust and good faith is exceptionally high. In this case, there should be no problem with a broad interpretation and application of the principle of good faith. The solution should be found in the restoration of the structural imbalance, priority should be given to the standard of faithful behavior, morality, and trust. These are the priorities that are determined by the duty itself – to protect the transactions concluded within the frames of private autonomy. In the conditions of transactions concluded within the frames of private autonomy, the interest of the “weaker party” participating in the contract should be protected, and while striving to restore social equality, we should not forget to protect the interests of the weaker party²⁰. Moreover, regardless of the private legal nature of the legal relationship, the principle of legal trust on the part of private law subjects towards the actions of the contracting party, the State, applies²¹. That is, despite the fact that the contract law establishes the beginnings of the equality of the counterparties, the State, as an institution with hierarchical leverage, will be imposed more requirements of good faith action to maintain the balance of interests of the other counterparty.

“Subjective” and “objective” understanding of the principle of good faith. Although the principle of good faith is a party-oriented doctrine, its very general and abstract character pushes the judicial system towards precedent-setting decisions because of the need for the judge to specify it in each case, depending on the circumstances of the case. “This, in turn, requires great attention to ensure that the judge’s subjectively understood fairness and good faith and misinterpretation of the principle do not affect the legitimate interests of the parties.²² However, good faith is both a normative and a subjective will definition tool, and based on it, both the law and the contract defect will be eliminated²³. In one of the decisions, the Supreme Court indicates: the court should proceed from

19 Vashakidze G., “Good faith according to the Civil Code of Georgia - abstraction or valid law”; Georgian Law Review, Journal 10/2007. p. 40

20 Decision of 30.09.2019 of the Supreme Court of Georgia (case No. AS- 027-2019) field 21) <http://prg.supremecourt.ge>

21 Decision of 29.03.2019 of the Supreme Court of Georgia (case No. AS- 1215- 2018) field 202) <http://prg.supremecourt.ge>

22 Vashakidze G., “Good faith according to the Civil Code of Georgia - abstraction or valid law”; Georgian Law Review, Journal 10/2007. p. 18

23 SCG 30/09/2019 Case No.AS-1054-2019 Decision <http://prg.supremecourt.ge>

what the parties would have agreed to as parties to a bona fide contract, following the principle of good faith and in the conditions of careful reconciliation of their interests, if they did not miss the relevant clause of the contract. The existing gaps must be filled by extending the contract in such a way that the main clauses of the specific contract are “thought through” (BGHZ 84, 1, 7; 90, 69, 77; 135, 387, 392). Therefore, when determining the hypothetical will of the parties, in parallel with the rest of the content of the contract and other circumstances at the time of the conclusion of the contract, special attention should be paid to the actual will of the parties, as far as it can be determined....”²⁴

The principle of good faith can be divided into **subjective and objective principles of good faith**. The principle of **subjective** good faith is usually defined as a spiritual attitude that is not based on any objective fact or event. This is especially important in the law of things. The concept of **objective** good faith is usually based on the standard of behavior of the counterparties²⁵.

To express the principle of objective good faith, Germany uses the term *Treu und Glauben*, which means loyalty and trust. “*Treu*” means faithfulness, loyalty, infallibility, trustworthiness, and “*Glaube*” means trust or firm belief. *Treu und Glauben* implies a standard of honest, loyal and well-considered (prudent) behavior, protecting the interests of the other party²⁶. The standard of good faith basically means that the counterparty should take into account the interests of the other party, on the other hand, the principle of good faith is the gate through which moral values become law²⁷.

Paragraph 242 of the modern edition of the German Civil Code concerns the conscientious performance of the obligation. The literal wording of the mentioned article states, that both the debtor and the creditor must act in accordance with the principle of good faith. Its composition is as follows: the parties involved in the legal relationship, during the performance of the obligation and after it, must observe the principle of trust, be considerate of each other’s rights, property and interests, and act in consideration of the principle of loyalty²⁸.

The principle of good faith in various unified acts. The principle of good faith is recognized by the Vienna Convention of 1980 on Contracts for the International Sale of Goods (CISG), according

24 Supreme Court of Georgia, decision NoAS-1027-2019, September 30, 2019 <http://prg.supremecourt.ge>

25 Ioseliani A., “Principle of Good Faith in Contract Law (comparative legal research, Georgian Law Review, journal - Special Edition 2007, p. 20)

26 Wittaker S, Zimmermann R. Good Faith in European Contract Law: The Common Care of European private law. Cambridge, New York., 2000, 31- used “The Principle of Good Faith in Contract Law” by Khunashvili N., 2016, ed. Tbilisi, Bona Causa, p. 27

27 Wittaker S, Zimmermann R. Good Faith in European Contract Law: The Common Care of European private law. Cambridge, New York., 2000, 31- used “The Principle of Good Faith in Contract Law” by Khunashvili N., 2016, ed. Tbilisi, Bona Causa, p. 27

28 Kropholler I, 2014, Educational Commentary to the German Civil Code, Tbilisi, GYLA Foundation for the Support of Legal Education, GIZ, 2014, p. 113)

to the first part of the seventh article of which, the need to promote good faith cooperation in international trade must be taken into account when interpreting the Convention.

The principle of good faith is also reflected in the principles of European contract law. In particular, according to the article 1:201, “Each party must act according to the principles of good faith and honesty”. It should be noted that in the literature these general provisions are discussed mainly in relation to the fulfillment of obligations²⁹.

The **principle of good faith** is also recognized in the Article 1.7 of the **Principles of International Commercial Contracts** developed by the **International Institute for the Unification of Private Law (UNIDROIT)**, in particular, “Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.³⁰”

The principle of good faith in Georgian contract law and its compatibility with limiting and excluding circumstances of liability. The Civil Code of Georgia does not provide a legal definition of “good faith” as a term. Imperative rules of conduct, which must be observed unconditionally, are derived from the principle of good faith in contractual relations. Thus, there are obligations corresponding to the principle of good faith³¹. The literature explains the meaning of contractual legal good faith: „Contractual legal good faith is not only a mean of defining and completing the contract, which can serve to determine the obligations, legal nature, scope and fields of the obligations in a specific case, but - according to the common opinion spread in the literature and legal proceedings - it also means trusting other people. Contractual law refers to the trust of a person, which he/she can have, taking into account common sense³²”.

The principle of good faith is general, somewhat abstract and, as mentioned in the literature, “too undefined³³”. Due to its nature, it is mainly regulated by general norms. In the Georgian civil legal order, this role is mainly manifested by the third part of the article 8 of the Civil Code (**along with other norms scattered in the Code**), according to which - “Participants in a legal relationship shall exercise their rights and duties in good faith”. In other words, the law prohibits not only actions that are expressed in deception and violence, but also protects the party when the contract turns out to be unfair³⁴. In addition, it is clear from the content of the article 8 (3) that the will of the parties to the contract can be controlled (**ibid.**), which is a kind of restriction of individual freedom³⁵. However, this restriction cannot lose the quality of freedom of the obligation relationship, because

29 See Towards a European Civil Code, ed. by Hartkamp/ Hesselink/ Hondius/ Perron/ Vranken, Nijmegen, Dodrecht, Boston, London, 1994, 205-209.)

30 See Principles of International Commercial Contracts (UNIDROIT), Rom, 1994, Uniform Law Review, 2004, 124).

31 Khunashvili N, 2016, The Principle of Good Faith in Contract Law, ed. Tbilisi, Bona Causa; p. 47

32 Eckl.Ch., Treu und Glauben im spanischen Vertragsrecht, Mohr Siebeck, Tubingen, 2007, 191.

33 Khunashvili N, 2016, The Principle of Good Faith in Contract Law, ed. Tbilisi, Bona Causa; p. 32

34 Zoidze B, 2005, Reception of European private law in Georgia, Tbilisi; p. 280

35 Kereselidze D, 2009, The Most General Systematic Concepts of Private Law, Tbilisi; p. 83

the Civil Code establishes the principles that the autonomy of the will of the parties is guaranteed.

As mentioned above, according to the principles of Unidroit, the parties do not have the right to exclude or restrict the obligation associated with good faith conduct. However, according to Georgian civil legislation (Article 410), they have the right to restrict and/or exclude specific measures of liability during the conclusion of the contract, although this form of restriction should be within the general framework of good faith, because “the principle of good faith is manifested in the obligation of the subjects of the relationship to take into account the interests of another person to the extent, which does not lead to undue restriction of his/her³⁶ interests”.

It was also said above that the principle of good faith applies both at the conclusion of the contract and at the pre-contractual stage, as well as during the implementation and fulfillment of the rights and duties arising from the contract and at the time of imposition of liability.

In itself, it is very important to determine the criteria for good faith actions at the stage of contract performance and/or imposition of the liability, but also at the stage of contracting, the correct interpretation of the principle of good faith and its consistency and relevance with the norms stipulated in the contract are of great importance.

It is indisputable that the ground for the origin of the obligation, i.e. the conclusion of the contract, establishes one of the most important institutions of the law of obligations and uniquely determines the further direction of the contract. That is, how well the contractual conditions are drafted determines the subsequent fate of the contract.

According to the opinion expressed in the Georgian doctrine, “the basis of the transaction should be considered the joint presentation of the circumstances by transaction parties, due to which they (parties) conclude the transaction³⁷. Under Ortman’s theory, when concluding a contract, “the starting point should be the interests and expectations of the parties, and contractual risks should be distributed between the parties in accordance with these interests.³⁸” Of course, it implies that the interest and expectations of the counteragents should be consistent and compliant with the principle of good faith, even if it is designed for certain details of the limitation of liability when concluding the contract.

Therefore, we may ask whether the parties’ reservations to the limitation and/or exclusion of liability at the stage of contracting will pass the general test of good faith? The doctrine explains that when concluding a contract, “the parties can agree on stricter or softer terms, but they can make such an agreement taking into account the principle of good faith³⁹,” (at the same time, only one

36 Kereselidze D, 2009, *The Most General Systematic Concepts of Private Law*, Tbilisi; p. 83.

37 Chanturia L., “General part of civil law”, ed. “Law”, Tbilisi, 2011,369

38 Eckl.Ch., *Treu und Glauben imspanischen Vertragrecht*, Mohr Siebeck, Tubingen, 2007,36 - used “The Principle of Good Faith in Contract Law” by Khunashvili N., ed. Tbilisi, *Bona Causa*, p.241

39 *Гражданское и торговое право Европейского Союза (основные институты): Учеб. пособие. Под. общ. Ред. В.В.*

circumstance is specified in the articles 8 (3) and 361 of the Civil Code of Georgia, namely: - “fulfilment of obligations in good faith”, i.e. “in accordance with good faith”... principle of good faith (obligation) must be observed at conclusion of the contract; in addition, the principle of good faith applies not only to the debtor, but also to the creditor⁴⁰.

Attention should be paid to the fact that the discussion and agreement on the specific limitations of liability at the stage of the origination of the obligation, and/or on preliminary rejection of the claim for damages due to the violation of the obligation (article 410 of the Civil Code) does not mean that the parties neglect the timely performance, nor the non-fulfilment of the obligation relationship (non-binding), and therefore does not contribute to the dishonest attitude towards the performance of the parties, on the contrary... At the stage of concluding the contract, the proper distribution of the powers of the person declaring the will and the recipient of the will - detailing, including the distribution of the burden of risk, possible complications of fulfilment, predetermining the measures of responsibility, agreement on their limitation in specific cases creates more expectations for the proper fulfilment of the obligation

Let's discuss a specific example: in shipping contract the parties agree that if the packing of goods is done by the creditor, then the carrier is not responsible for damage or deterioration of the good due to improper packaging. That is, the risk is transferred to the creditor.

The given contract not only does not include a light, non-binding attitude towards proper performance, but the distribution of the burden of risk to the creditor provides him with more motivation for prompt performance, because improper performance by the creditor (in the given case - improper, poor-quality packaging of the good) on the one hand, causes damage to the creditor himself by spoiling the good, and on the other hand, eliminates the possibility of claiming damages, which, in turn, protects the debtor from unjustified liability for damages and, finally, creates the basis for the full implementation of the agreement stipulated in the contract.

Thus, the possibility given to the contracting parties under the article 410 of the Civil Code, namely, the issue of prior agreement of the parties regarding the limitation of liability, is relevant to the principle of good faith and does not create a legal contradiction.

In addition, analyzing all the details during the conclusion of the contract and making it a contractual norm allows to avoid the imposition of unjustified compensation of damages in case of possible complications and/or non-fulfilment at the stage of its execution, because the legislation allows the possibility to consider good faith as one of the grounds for exemption from damage com-

Безбаха, В.Ф. Понъки, К. М. Беликовой, Рудн. М.,2010,140.

40 Khunashvili N, 2016, The Principle of Good Faith in Contract Law, ed. Tbilisi, Bona Causa; p. 46

pensation. The representative of Georgian legal doctrine N.Khunashvili explains in his monograph “The principle of good faith in contract law”: Although “such a ground is not directly provided by the law, however, the possibility of releasing the debtor from compensation of damages based on the principle of good faith clearly follows from the analysis of the norms.⁴¹”

In this regard, the article 410 of the Civil Code has an interesting intersection with the article 412 of the Civil Code. In particular, in accordance with the cited article (412), only the damages which the debtor could have foreseen and which are the direct consequence of the action causing them shall be compensated. That is, the definition of the article 412 of the Civil Code reinforces the reservation of the article 410 of the Civil Code in the sense that it is based on the presumption of possible damage. This norm expresses the interest of the debtor and exempts him/her from the risk, which is unacceptable for the usual principle of property responsibility. In other words, it is considered probable damage that the damage to the debtor must be probable at the time of the conclusion of the contract⁴².

Article 410 of the Civil Code contemplates the possible exemption from compensation for damages during the conclusion of the contract; the article establishes the issue of possible exemption from compensation for damages or its limitation in the cases provided for by the law or upon the agreement of the parties.

Conclusion. Based on the foregoing, civil law - allowing for the possibility of a preliminary reservation by the parties on the limitation of liability or possible exemption from it - considers such contracts in the general framework of good faith, and this is objectively justified. However, such agreements, due to their legal nature, require caution. Therefore, in court proceedings, attention should be paid to the detailed consideration of the circumstances of the case in relation to the principle of good faith in each specific case.

When determining the good faith or bad faith of the party, in each specific case, the court must legally evaluate the prudence of the contracting parties, the ability to consider the possible complication of the contract, the possible impossibility of performance, as well as the possibility of damage both during the conclusion of the contract and at the later stages of its development, because a remedy - a contractual term of exclusion or limitation that is unfair in its legal nature - has no legal force. “Courts are empowered with broad discretionary powers, by virtue of which conditions, limiting or excluding the means of legal protection are not used if they significantly contradict the principles of justice, good faith and reasonableness and violate the contractual balance”⁴³.

41 Khunashvili N, 2016, *The Principle of Good Faith in Contract Law*, ed. Tbilisi, Bona Causa; p. 326

42 Zoidze B, *Commentary on the Civil Code of Georgia*, book three, ed. “Law”, Tb., 2001, p.465.

43 Lando O, Beale H, 2000, ‘principles of European Contract Law, part I, and II. KluWer Law International, The Hague/London/Boston,2000,388-390; Comment No. 5 on art.7.1.6 UPICC