CHAPTER 5 : GOOD FAITH

GOOD FAITH

Main concerns

1- Is it possible to define the concept of good faith? Because it is a vague notion, it appears difficult to give it a precise, positive and unequivocal meaning. Would it therefore not be preferable to use a merely functional definition of the notion?

2- Should this notion be maintained, even though it is easier to define it negatively, by reference to its opposite: bad faith? In this perspective, are the terms 'bad faith' and 'abuse' synonymous?

3- Is it possible to speak indifferently of "good faith" and of "fairness" ("*loyauté*" in French)? An analysis of common Acquis Communautaire and Acquis International would lead to the conclusion that the two terms are interchangeable. However, the distinction is essentially maintained in comparative law, which tends to differentiate between the two terms. From this perspective, the question arises as to whether fairness is a type of good faith. Similarly, the term "appearance" only represents one facet of good faith; the two cannot be considered as being synonymous.

4- From the study of Acquis Communautaire and Acquis International, as well as comparative law, it is apparent that the expression 'good faith and fair dealing' is simply translated in French as "good faith". Is this a mere convenience of language, or is it indicative of an approach that distinguishes more clearly in English than in French, from a terminological point of view, good faith in a subjective sense and good faith in an objective sense?

5- Following from this question, should the expression 'good faith' systematically be qualified with the use of the adjectives 'objective' and 'subjective'? In order to answer, it is necessary to question the relevance of such a distinction with regard to the applicable legal régime (burden of proof, a possible control by supreme courts etc…).

6- Should the different functions of good faith not lead to the use of different terms? For example, in German and in Dutch law, different terms are used to refer to good faith as a tool to interpret and extend the content of a contract on the one hand, and as mistaken belief on the other.

General Introduction

The terminological study of the notion of good faith reveals that this notion runs through a number of concepts. Firstly, it appears that a number of systems consider that good faith applies to the law of obligations generally, and not simply to contract law[1]. In addition, beyond the sphere of contract law, good faith sometimes affects almost all private law. It is found in such areas as family law, property law, and laws governing inheritance and gifts. The fact that it touches so many areas is not confined to French, Belgian or even Quebec law. In the Netherlands, for example, good faith has been applied to inheritance laws, company law, bankruptcy law, property law and even to private international law. The conclusion was

[1] §242 of the German Civil Code (BGB), which appears in the sections dealing with obligations in general; Article 1175 of the Italian Civil Code which also appears under a title dealing with obligations in general; Article 288 of the Greek Civil Code; Article 762 of the Portuguese Civil Code which appears in the part relating to the performance of obligations in general or article 6:2 of the Dutch Civil Code (BW) which also appears in the general section on obligations.

therefore reached that good faith should simply apply to all the laws affecting property rights. Certain legal systems, Germany for example, have gone even further by overcoming the public law/private law divide. The civil codes of Quebec and of Switzerland can equally be cited as examples as certain introductory articles state that each person's rights will apply according to the criteria of good faith[2].

Moreover, the success of the notion of good faith finds a real echo in developments of contemporary European, Community, international and national law.

Whether we envisage good faith in Acquis Communautaire or Acquis International, or in comparative law, it is useful to retrace the origins of the concept (**I**) in order better to comprehend the difficulties associated with it (**II**).

I. GOOD FAITH : AN HISTORICAL PERSPECTIVE

Three historical periods are distinguished below; Roman law (**A**), medieval law **(B**) and the XIXth century, period of the first codifications (**C**).

A. Roman Origins

The introduction of the notion of good faith in Roman contract law[3] would undoubtedly have been impossible without inspiration from the Greeks. Among others, the Stoics PYTHAGORAS and ZENO produced works that were at the origin of notions of justice and equity. "This new concept opens the contractual system to the ethics of what is just and equitable, the latter, according to CICERO's dream, linking all men, citizens or pagans, in a universal society of *boni viri,* of good men"[4].

It is CICERO who left the most complete definition of good faith: "These words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance"[5].

One of the particularities of Roman procedure was the formulae system. The praetor (a magistrate who received citizens, listened to their pleadings, authorized or forbade a certain course of action, verified allegations and brought the case before a judge) gave his approval only to requests that could be expressed in specific, pre-determined formulae. There was a limited number of formulae, which, in turn limited the number of available rights. If originally, the lender ensured that the ancient formula was properly observed, after 150 B.C., he became competent to create new formulae. This period corresponds with the expansion of Rome into the entire Mediterranean basin. The number of praetors grew, and the post of peregrine praetor, responsible for disputes among 'foreigners', the non-citizens, was created[6]. It appears that it was during this period that the procedure was profoundly modified. It is believed that the peregrines, as outsiders to the city, could not use the ancient formulae, and their rights would therefore not have been recognized. The peregrine praetor therefore settled

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[2] Article 6 of the Quebec Civil Code; Article 2 of the Swiss Civil Code

[3] R.-M. RAMPELBERG, *Repères romains pour le droit européen des contrats*, L.G.D.J., Systèmes, Droit, 2005, p. 43; J.-P. LEVY, A. CASTALDO, *Histoire du droit civil*, Précis, Dalloz, 1st edition, 2002, p. 690; M.J. SCHERMAIER, « *Bona fides* in Roman contract law », *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 63.

[4] R.-M. RAMPELBERG, *op.cit.* p. 44.

[5] *De Off*, 3, 17. quoted by R.-M. RAMPELBERG, *op.cit.* p. 44-45.

[6] B. JALUZOT, La bonne foi dans les contrats, Etude comparative de droit français, allemand et japonais, Dalloz, 2001, n°61, p. 24.

disputes not by applying the law in force for citizens, but by applying a law that he himself created[7].

It is in this context that good faith rights of action, *bona fide judicia,* were born. The lists of good faith rights of action vary depending on the historical period, and thus depending on the author. According to the Ciceron[8] list, the *bona fine judicia* were filed in matters of guardianship, fiduciary duty, and in agency, rental and sales contracts. GAIUS[9], two hundred years later, added *negotiorum gestorum*, deposits, *societas* and *l'actio rei uxoriae*. Finally, Justinian[10] increased the list of right of actions to include pledges, claims to divide property, claims to succeed to estates held by third parties and the *actio praecriptis uerbis* for exchanges and estimation contracts[11].

Initially designed to solve legal relationships for which the law had never created a right of action (such as those between peregrines, to whom Roman law could not apply), these rights of action were introduced by the urban praetor into the *jus civile* (the civil law that applied only to Roman citizens) at the end of the second century B.C.[12]

It is apparent that during this period, good faith allowed the judge to actively intervene in legal relations protected by good faith rights of action (especially in the determination of the quantum of damages, and in the creation of new obligations founded on morality)[13]. It also appears that it is from these good faith rights of action that contracts based on good faith were born.

These contracts of good faith concerned consensual contracts that distinguished themselves from formal contracts by their conditions of validity and by the fact that they were all in good faith, that is to say they came largely under the judge's broad power of interpretation.

The *bona fides* forces the judge to determine what each party owes the other. It is on this basis that the *ius gentium* introduced a fundamental principle in contract law: consensualism. From then on, the consensual contract distinguished itself from the contract of pure law, the principle trait of the *ius civile,* in that it was sanctioned by a 'good faith right of action', thus providing the judge with a significant margin of appreciation, especially with regards to the amount of the damages awarded. This good faith right of action also allows the judge to determine whether one party's behaviour is in keeping with the attitude of an 'honest man'.

In this type of contract, the judge's interpretation is thus dominated by the notion of good faith, and the parties' intentions are considerably limited by three types of obligations: (1) the *essentialia*, without which an act can not exist (for example, the object sold and the price paid in a contract of sale), (2) the *naturalia*, that are included in the contract unless expressly excluded (for example, a guarantee against attacks on property rights), and (3) the *accidentalia,* which are only included in the contract by virtue of an express clause (for example, a liabilities guarantee)[14].

The practical use of the notion of good faith in Roman law is often illustrated through the classic example of a contract of sale because of the importance attached to the seller's duty to inform with regard to the hidden defects guarantee and the guaranty against attacks on property rights. Other illustrations include the theory of abuse of rights, the recognition of the *rebus sic stantibus* principle etc… It is interesting to note that these illustrations of the role of good faith in Roman law are easily transposable to contemporary law.

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[7] *Ibid* n°62, p. 24.

[8] *De Officiis*, published in 44 BC.

[9] *Institutes*, 143 AD.

[10] *Institutes*, 533 AD.

[11] Generally, see B. JALUZOT, *op. cit.* n°63, p. 24.

[12] *Ibid*. n°75, p. 27.

[13] On this last point, it would appear that these moral obligations were established by the praetor. "Starting off as moral obligations, they became legal obligations and acquired a place in the legal system". B. JALUZOT, *op. cit.* n°84, p. 29. In this way, new contractual rules appeared such as the defence of non-performance or compensation.

[14] B. JALUZOT, *op. cit*., n°94, p. 30.

In the fourth and fifth century A.D., a split in the notion of *bonae fidei contractus* occurred. Contracts of good faith were either concluded in ignorance of an unfavorable element, or were concluded with neither constraints nor deceit and were thus immune from attack[15].

If Roman law reserved the use of the notion of *bona fides* for contract law and procedure, it appears that this requirement was, on the one hand, extended to all of the *jus commune* (the law common to all Christian European countries) and, on the other hand, became closer to *aequitas.*

B. Good Faith in Medieval Law[16]

From the 12th century onwards, contracts of good faith as they had existed under Roman law became the rule rather than the exception. A contract was concluded by the mere exchange of consent. However the passage from the principle of *ex nudo pacto action non nascitur* ("no right of action is created from a bare pact") to that of *consesu obligat* ("consent alone suffices") occurred gradually, and apparently with great difficulty. It appears as if consensualism was only recognized as a general principle in the 16th century.

It is equally during the course of this period that good faith became a general principle of both national and international commerce. This time period also saw the generalization of the principle *exceptio doli*, which would later become the foundation for the theory of abuse of right.

In addition to the development of good faith, medieval law also bore witness to the rapprochement between good faith ("*bona fides*") and equity ("*aequitas*"). On this question the German and the French Romanists adopt opposing positions. The former first considered that the two notions were distinct before later treating them the same them after the Byzantine period (476-1453). However, the French authors considered that good faith was simply a manifestation of equity. Constantine even went so far as to proclaim this theory as being an essential principle of the entire Roman legal system. Later, Justinian made the *jus aequuum* into the supreme source of law[17].

In practice, during the Byzantine legal period, the functions of good faith and of equity largely overlapped.

This overlap was primarily caused by the enlargement of the notion of good faith, which had been given general application, so that there was, on a practical level, a confusion with *aequitas.*

This historical confusion thus allows for a better understanding of certain contemporary problems, most notably that of the wording of articles 1134-3 and 1135 of the French Civil Code, and of similar articles in other civil codes[18]. However, above all, this confusion can be used to justify the terminological distinction that appears in Dutch law, largely inspired by German law which, in its latest Civil Code (BW) reform, chose to substitute "good faith" with the expression "reason and equity".

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[15] *Ibid.* n°95, p. 31.

[16] R.-M. RAMPELBERG, *Repères romains pour le droit européen des contrats*, L.G.D.J., Systèmes, Droit, 2005, p. 47; J. GORDLEY, « Good Faith in Contract Law in the Medieval ius commune », *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 93.

[17] B. JALUZOT, *op. cit.* n°104 to 109, p. 33-34.

[18] The confusion which reigns between equity and good faith, in particular with regard to the legal basis for completive obligations has been remarked upon by a number of commentators, from various nationalities. See for example M.W. HESSELINK, « The concept of good faith », *in Towards a European Civil Code, Third Fully Revised and Expanded Edition*, Kluwer Law International, 2004, p. 472, note 9; L. ANTONIOLLI, *« Principles of European Contract Law and Italian Law. A Commentary »*, L.ANTONIOLLI, A. VENEZIANO eds, Kluwer Law International, 2005, p. 55; Ph. JACQUES, *Regards sur l'article 1135 du Code civil*, Préf. François Chabas, Dalloz, 2005, n° 156, p 295.

If Roman and Medieval law contribute to the understanding of the meaning that can be attributed to good faith, the period of Napoleonic codification clarifies the meaning and the purpose of good faith in contemporary law.

C. Good faith in the Nineteenth Century

Little information exists regarding the concept of good faith during the period of Napoleonic codification. However, a few points are discernable, notably the fact that good faith emanates from the notion of 'natural law'[19]. It also appears as if it was generally recognized in commercial transactions. However, "referring to God to legitimize the existence of good faith leads to the automatic deferral to God regarding the content of the rule. Perhaps this explains the absence of discussion regarding good faith in preparation work, in addition to the absence of any definition and in depth study of good faith"[20].

If natural law served as the justification for the insertion of good faith into the French Civil Code of 1804, this authority was undermined during the nineteenth century primarily by the historical school and the Positivist doctrine. It was first the works of Emmanuel KANT, but especially those of Friedrich von SAVIGNY, that were at the origin of the historical school. This school searched for the sources of all law in history. Positivism, which finds its origins in the works of one of von SAVIGNY's contemporaries, Auguste COMTE, is "a theory according to which social sciences should be experimental sciences, and the law was thus treated as a science of social relationships in which experience had an essential role"[21]. Bearing in mind the importance of these two schools of thought at the beginning of the twentieth century, it is surprising to note the establishment of good faith in the BGB in 1900. Nonetheless the notion had lost all of its meaning and new theories appeared in order to determine the content of good faith.

The School of Begriffsjurisprudenz held an opposing view from that of the School Freirechtsbewegung. The former sought the recognition of a legal order founded on precise and abstract concepts in order to avoid a judge's arbitrary discretion. The latter, begun through the works of JHERING, aimed to achieve a relaxing of the law and of its interpretation. This school of thought is particularly important, for in promoting the development of an interpretive and completive judicial power, it began the renewal of the notion of good faith[22]. However, just as the School of Begriffsjurisprudenz had done, the School of Freirechtsbewegung fell into excess by proposing to completely detach itself from the letter of the law and to grant but a secondary importance to the law. "The directives that were intended for the judges were totally vague and would have exposed parties to the greatest uncertainty"[23].

Good faith therefore became a written rule that has seen tremendous growth in a number of different national systems, even though it does not have a definition. Nor is there any consensus regarding the exact legal nature of good faith. This terminological and notional imprecision inevitably affects the function fulfilled by good faith in contemporary law.

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[19] Indeed, until the XIXth century, God was considered to be the origin of all things including good faith, which could not be altered by man. It is in this spirit that DOMAT distinguishes between immutable laws and arbitrary laws. Within immutable laws, there is a further distinction between those which can be derogated from and those which cannot. « Thus, the laws which prescribe good faith, fidelity, sincerity and which forbid deceit, fraud and any surprise, are laws from which there cannot be any derogation » (J. DOMAT, *Traité des lois*, 1689, edited and commented by J. Remy, Paris 1835, chap. XI, *De la nature et de l'esprit des lois, et de leurs différentes espèces*, n°1, quoted by B. JALUZOT, *op. cit.* n°125, p. 38).

[20] B. JALUZOT, *op. cit.* n°127, p. 39.

[21] B. JALUZOT, *op. cit.* n°130, p. 39.

[22] B. JALUZOT, *op. cit.*, n°139, p.42.

[23] B. JALUZOT, *op. cit.*, n°155, p. 46.

II. GOOD FAITH: DIFFICULTIES ASSOCIATED WITH THE CONCEPT

Having reviewed the historical developments, it appears that good faith is a notion which attracts great interest in contemporary law not only because of the functions it performs, but equally, and especially, as a result of the vagueness that surrounds it. Although the notion should not be rigid, it remains that the adaptability of the concept must fit within a certain framework in order for its uses to be, to some extent, restricted. After considering the uncertainties that surround the notion of good faith (**A**), we shall examine the means employed in attempts to rationalize it (**B**).

A. Good Faith: a notion with uncertain boundaries

It is possible to distinguish two meanings and two functions of good faith. In the objective sense, good faith is perceived as being the method used to moralize contractual relationships, and to temper the inequalities that could result from the dogma of the autonomy theory. In the subjective sense, good faith aims to protect the mistaken belief of one contracting party, and to give effect to appearances. Even if the objective/subjective dichotomy is found in a number of legal systems, this first rationalization effort was insufficient to dispel the multiple uncertainties surrounding the notion and the functions of good faith[24].

The primary cause of the uncertainty remains, even today, the general absence of definition[25]. The concept of good faith seems to generate more interest based on its function than on its definition[26].

"Good faith is therefore usually said to be an open norm, a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied, and which must be established through concretisation. Most lawyers from a system where good faith plays an important role, will therefore agree that these differences in theoretical conception do not matter very much (…) What really matters

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[24] On the relevance of the distinction between objective and subjective understanding, see for example E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Préf. P. de Vareilles-Sommières, L.G.D.J., Tome 463, 2006, n°627 and following. In any event, this approach rapidly runs into obstacles: « […] generally, the distinction made between the objective and the subjective is subject to caution; […] for there is in any objectivism a share of subjectivism and vice versa » Y. LOUSSOUARN, « Rapport de synthèse », *in La bonne foi*, TAHC, 1992, p.13.

[25] Luc GRYNBAUM admits that «it is difficult to give a definition of good faith » (*Le contrat contingent, l'adaptation du contrat par le juge sur habilitation du législateur*, Préf. M. Gobert, L.G.D.J., 2004, p.101). Along the same lines, D. COHEN is of the view that « (good faith) finally represents a necessary standard, tinged with moral considerations and with the idea of normality, just like good morals or the good paterfamilias, notions which have all been qualified at some stage as « irritating, because they do not allow the historian or the jurist to define them with any degree of precision » J.-L. GAZZANIGA, *Introduction historique au droit des obligations*, PUF, 1992, n°84 ». (« La bonne foi contractuelle : éclipse et renaissance », *in Le Code civil (1804-2004) un passé, un présent, un avenir*, Dalloz, 2004, p. 518, n°2). Certain academics have however attempted to present and clarify the various definitions of good faith (see. R. VOIRIN, *La bonne foi, notion et rôle actuels en droit privé français*, L.G.D.J., 1939, n°23, p. 32). The "Vocabulaire juridique" of the Association Henri Capitant suggests that good faith be defined as the « fair behaviour which is required in particular for the performance of an obligation; attitude of integrity and honesty… ». In any event, there is a certain consensus among academics to the effect that « to define good faith by reference to what it is not is of limited (if not no) interest: if it is envisaged in this way, good faith becomes an unnecessary detour and appears as an "inconsistent notion", since it ends up being the same thing to say that there was no deceit or fraud, or that a particular party was in good faith ». (Ph. JACQUES, *op. cit.* n°161, p. 303-304 as well as the other references cited above).

[26] Y. LOUSSOUARN point out that « the definition of good faith is linked to the role which it is meant to play » (« Rapport de synthèse », *in La bonne foi*, TAHC, 1992, p. 9). He goes on to question whether: « such observations reflect a certain impossibility: that of providing one definition of good faith which reflects its various aspects? Should one give up on the idea of defining the notion and accept its atomization or is there not a compromise solution between these two extreme positions? » (Y. LOUSSOUARN, o*p. cit.* p. 11).

is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates[27].

More than a rule, good faith is also used as a standard[28], a general principle according to some[29], or a norm, a rule, a maxim, a duty, an obligation according to others[30]. This terminological and conceptual inconsistencies can for a large part be explained by the frequent and anarchic use of good faith in different national laws and in international law. However, this imprecision does not only result in disadvantages.

In fact, a substantive analysis reveals that good faith is an open norm the content of which cannot, nor should not, be determined in an abstract manner, so that it is able to adapt to the particular circumstances which surround it[31].

Is that to say that the determination of the content of good faith depends solely on the personality of the judge settling the litigation[32]? Not necessarily. It seems possible to objectivize the notion of good faith, by providing judges with guidelines, without freezing the notion and detracting from its essential characteristic: adaptability.

B. Good Faith: a 'domesticable' notion?

Conversely to most legal systems, American, German and Dutch law[33] have attempted from a legal and/or academic point of view, rather than to define good faith from an abstract point of view, to provide certain criteria to enable judges to determine the content of good faith in different factual situations.

1. Rationalization attempts through legislation. Specificities of American and Dutch law

It is interesting to note that while American law fully adopted liberal British contractual conceptions, symbolized by the legal doctrine of *caveat emptor*, it also used the idea of good faith very early on[34]. However, rather surprisingly, despite recognition of an implicit obligation of good faith by the courts, the *American Law Institute* did not expressly recognize it as a separate doctrine in 1920 when the first edition of *Restatement of Contracts*[35] was

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[27] M. W. HESSELINK, « The concept of good faith », *in Towards a European Civil Code*, Kluwer Law International, Third fully Revised and Expanded edition, 2004, p.474.

[28] Ph. JACQUES, *op. cit* , n°160.

[29] On the nature of good faith as general clause, general standard or principle, see C. JAUFFRET-SPINOSI, « Théorie et Pratique de la Clause Générale en Droit Français Et Dans les autres Systèmes Juridiques Romanistes », *in General Clauses and Standards in European Contract Law. Comparative Law, EC Law and Contract Law Codification*, S. GRUNDMANN, D. MAZEAUD eds., Kluwer Law International, 2006, p. 23.

[30] For a full picture of terminological inconsistencies see M.W. HESSELINK, *op. cit.* p. 473, notes 12-20.

[31] See also Ph. JACQUES, *op. cit.,* n°160, p. 302 and J. WIGHTMAN, « Good Faith and Pluralism in the Law of Contract », *in Good faith in contract: concept and context*, R. BROWNSWORD, N.J. HIRD, G. HOWELLS Eds., p. 47-48 who makes an express distinction between « *rule* » and « *standard* » and who declares: « *The advantage of rules is calculability, in that their application, being dependent only on factual characteristics, should be predictable. The drawback is that they are likely to be under or over-inclusive when the outcomes are measured in terms of the values of purpose underlying the law. Conversely, standards may offer less calculability, but greater normative accuracy in that the norms underlying the law are consistently translated into outcomes. […]Good faith is clearly a standard, and therefore might be expected to score well on normative accuracy but less well on calculability. However, neither rules nor standards are uniform in relation to calculability and normative accuracy, and in looking at a general standard like good faith, it is important to assess the balance between normative accuracy and calculability that is struck in different contexts* ».

[32] M.W. HESSELINK, *op. cit.*, p. 486.

[33] These are some examples, but are by no means exhaustive.

[34] The first references to the notion of good faith, in American law, can be found in caselaw as early as the end of the XIXth century: *Armstrong v Agricultural Ins. Co*, [1890] 29 *N.E.* 991 (N.Y.) according to which insurers are under an obligation of good faith when they demand proof of loss.

[35] "A Restatement" represents an attempt by the American Law Institute, a private organisation of scholars, judges and practioners, to formulate with some precision the leading rules and principles in major fields of American law… », R.S. SUMMERS, « The Conceptualisation of good faith in American contract law: a general

drafted. The courts continued to use the concept of good faith energetically, and when the *Second Restatement of Contracts* was drafted in 1981, the concept was firmly anchored in American law. In this second writing, section 205 expressly provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".

However, the *Second Restatement of Contracts* is of little use in the determining what is, or at least, what is covered by the notion of good faith. For this, one must consult the *Uniform Commercial Code* (U.C.C.). Indeed, attorneys at the *American Law Institute*, taking note of the frequent use of good faith in commercial transaction, set out to unify the theory in the 1950's, and did so in the U.C.C, in between the two draftings of the *Restatement of Contracts*[36].

In the 1960's the U.C.C. was adopted by a large number of American States, with the exception of Louisiana. In its first version, section 1-203 stated as follows: "Every contract or duty within this Act imposes an obligation of good faith in its performance and enforcement". However, the provision was only applicable to areas covered by the U.C.C., that is to say, contracts of sale, documentary letters of credit, and securities. It did not apply to all contracts as a general rule. Since then, the U.C.C. has been adopted by almost all States and governs the greater part of commercial transactions in the United States. Its influence is such that occasionally, judges refer to it in order to resolve a case that does not fall within its scope of application.

The U.C.C. is of interest in the determination of what is, or what is covered by, good faith, on the basis of various articles. Firstly, article 1-201 (20) defines good faith as: "honesty in fact and the observance of reasonable commercial standards of fair dealing". This definition applies to the whole of the U.C.C., with the exception of Section 5 regarding letters of credit, which in its article 5-107(7), defines good faith as: "honesty in fact in the conduct or transaction concerned".

In addition to these two indications as to the meaning of good faith in contractual relations, it is interesting to note that article 1-302 (b) states that: « The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable ».

Similarly, Dutch law does not define good faith. However, article 3:12 BW of the Civil Code states that: "In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved »[37].

2. Rationalization Attempts by legal theory[38]

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account », in Good Faith in European Contract Law, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p 119.

[36] The initiative was encouraged by the fact the main drafter of the U.C.C., Karl LLEWELLYN, studied in part in Germany and was therefore extremely familiar with the concept of *Treu und Glauben*, stated at article §242 of the BGB.

[37] New Netherlands Civil Code - Patrimonial Law (trilingual edition English – French - Dutch), translated by P.P.C. Haanappel and Ejan Mackaay, Deventer, Pays-Bas and Boston, MA, Kluwer, 1990. However, the weight to be accorded to these elements should be put into perspective as pointed out by Martijn Hesselink: « These factors cannot really be considered as providing some sort of direction. The « Principles of law» (…) either don't exist, or cannot be determined or are generally conflicting (e.g. the principles of autonomy and solidarity). « The ways law is generally perceived in the Netherlands" are numerous: there is a relatively wide spectrum of political parties and we live in a society which is strongly individualistic and multicultural. As for the « social and personal interests in question » (i.e. especially the interests of the parties), they are generally totally opposing (which is why the parties have brought a claim before the courts) ». M.W. HESSELINK, op. cit. p. 497 note 153.

[38] The primary function of good faith is to be a "soft" concept (B. FAUVARQUE-COSSON, « La réforme du droit français des contrats: perspective comparative », *RDC* 2006/1, p. 147) which can be adapted by the

While certain legal systems expressly provide for elements intended to rationalize the interpretation of the duty of good faith, the majority of systems remain silent. It is therefore academic thinking that proposes rationalization elements, either through a methodology specific to German law or through legal theory.

German law[39] does not contain legislative provisions identical to those of the U.C.C. or of the BW. The rationalization attempt or objectivization of the notion of good faith stems from the methodology adopted by German authors, and followed by Dutch authors, often called *Fallgruppen*[40]. This involves determining the functions of good faith and organizing the different judgments concerning the notion – *Treu und Glauben* – into various groups. An inner system of good faith developed in this manner, and it aims to determine the content of good faith.

"The result is a system of sometimes quite specific duties, prohibitions, (sub) rules and doctrines which are all part of the content of good faith. It is said to have made decisions on the basis of §242 BGB agreeably predictable (legal certainty) and rational"[41].

Aside from the development of a particular methodology, the attempts to rationalize good faith can be found in the development of legal theories. Without purporting to list the theories exhaustively, mention should be made of the excluder theory[42], according to which the effect of the concept of good faith would be to exclude types of improper conduct likely to characterize a performance in bad faith. Professor SUMMERS, creator of the theory, therefore compiled a list of behaviours which are excluded by the requirement of good faith: « evasion of the spirit of the deal, lack of diligence and slacking off, willful rendering of only substantial performance, abuse of power to determine compliance, and interference with or failure to cooperate in the other party's performance ». This analysis received broad approval not only by the courts, but also in academic commentaries published in *the Second Restatement of Contracts*, regarding the duty of performance in good faith.

In direct opposition to the excluder theory stands the 'foregone opportunities' theory developed by Professor BURTON[43]. This theory also received a certain amount of support

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judge. If the notion is too rigidly defined, then there is a risk of "fossilization" (M.W. HESSELINK, *op. cit.*, p. 475), which would be in contradiction with its function.

[39] §242 as other paragraphs of the BGB are seen as general clauses. However, history has shown that these clauses could provide justification for certain nazi policies. Whence the necessity felt by the Germans to rationalize general clauses, generally and the general clause on good faith in particular. On the abuses that general clauses could cause, in particular during the nazi period, see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op. cit.,* p. 121 ; B. JALUZOT, *op. cit.*, n°137, p. 41 This is a perfect illustration of the views of C. JAMIN (« Une brève histoire politique des interprétations de l'article 1134 du code civil », *D.* 2002, Chron. p. 901 : « this history [that of article 1134 para. 1] teaches us a lot, not just that this formula [1134 al. 1] is perhaps no more than what its interpretors (professors and judges) make it out to be, but also and especially, on the political character of these interpretations. (…) the interpretors, in this instance, civil law specialists, even when they allegedly merely apply a dogmatic method which is allegedly objective and which is supposed to rationalize positive law by establishing principles and building legal theory (the professor) or then they simply wish to apply the law to a particular dispute (the judge), are largely influenced by the time they live in and the prevailing ideologies ».

[40] This comes in addition to the theories developed by certain schools of thought. See *supra*, General Introduction.

[41].M.W. HESSELINK, op. cit., p. 475.

[42] R.S. SUMMERS, « Good faith in general contract law and the sales provisions of the Uniform Commercial Code », [1969] 54 *Va. L. Rev.* 195; « The general duty of good faith - Its recognition and conceptualization », [1981-1982] 67 *Cornell L. Rev.* 810; « The Conceptualisation of good faith in American contract law: a general account », *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p. 118.

[43] S.J. BURTON, « Breach of contract and the common law duty to perform in good faith », [1980-1981] 94 *Harv. L. Rev*. 369; « Good faith performance of a contract within article 2 of the Uniform Commercial Code », [1981-1982] 67 *Iowa L. Rev*. 1; « More on Good Faith Performance of a Contract: A Reply to Professor Summers », [1983-1984] *Iowa L. Rev*. 497.

from the judges[44]. Embodying the economic approach to contractual good faith, it is founded on the theory that during the contractual formation period, parties forego the opportunity of entering into other contracts.

Bad faith conduct would thus occur if one party were to attempt to reappropriate his/her foregone opportunities during contractual formation.

In spite of these academic debates, it appears from American caselaw that American courts have implicitly used the two theories together, so that they have become more complementary than opposing[45].

Finally, the theory of M.W. HESSELINK, according to which good faith is nothing but a cover, a pretext, appears to be the most provocative[46]: The use of the concept of good faith is nothing but a pretext designed to reassure judges when they fulfill their role of creating law. The role of good faith is in fact neither more nor less than the role fulfilled by the judge in his normal course of action. As such, good faith appears as a norm so broad that it is empty. *A fortiori,* the use of good faith becomes pointless. In any event, should this approach be broadly accepted, there would be no limit to its scope of application"[47].

Ultimately, such approach is not all that far from that put forward by recent academic works[48].

Indeed it appears from such works that, although there is no legal concept or mechanism which is sufficiently defined to be of any use, the notion of good faith has allowed judges to adopt certain solutions. The use of the notion appears as a means, and not as an end. Good faith could in fact be perceived as being merely a revealing agent.

A judge traditionally uses this notion as an instrument of contractual justice, in particular to judge the results which arise out of the exercise of a claim. This does not take away its moral dimension, even though, as observed by Mr. LE TOURNEAU: "it involves a watered-

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[44] Professor Burton et Professor Summers's theories are regularly endorsed by caslaw. For a non-exhaustive list, see E.M.S. HOUH, « The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel ? », [2005] 1 *Utah Law Review* 1, esp. p.5 note 20.

[45] E.M.S. HOUH, « Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law », [2002-2003] 88 *Cornell L. Rev.* 1025; « The Doctrine of Good Faith in Contract Law: A Nearly Empty Vessel », [2005] 1 *Utah Law Review* 1: *« The excluder-analysis certainly has the potential to effect justice in a broader, non-economic sense, but in its original iteration it was, and is, quite susceptible to almost exclusively economically driven applications by the courts. In this regard, Summer's argument – that the pursuit of justice provides a better rationale for the good faith obligation than does economic efficiency – is significantly weakened »* An almost identical view can be found at: E.A. FARNSWORTH, « Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code », [1962-163] 30 *U. Chi. L. Rev.* 666; « The Concept of Good Faith in American Law », Centro di studi e ricerche di diritto comparato e straniero (Rome 1993), No. 10, disponible sur Internet à l'adresse suivante: http://soi.cnr.it/~crdcs/crdcs/farnswrt.htm; « Good Faith in Contract Performance », *in Good Faith and Fault in Contract Law*, J. BEATSON, D.FRIEDMANN eds, Oxford, Clarendon Press, 1995, p. 153.

[46] « *Good Faith is a cover* », M.W. HESSELINK, *op. cit.*, p. 497.

[47] M.W. HESSELINK, *op. cit.*, p. 486-498. This theory does appear to be confirmed by professors Zimmermann and Whittaker, who, after mentioning the mere transitory use of article §242 du BGB state that: *« All in all, therefore, §242 BGB is neither « queen of rules » nor « blaneful plague » but an invitation, or a reminder, for courts to do what they do anyway and have always done: to specify, supplement and modify the law, i.e. to develop it in accordance with the perceived needs of their time »*. (R. ZIMMERMANN, S. WHITTAKER, « Good faith in European contract law: surveying the legal landscape », *in Good Faith in European Contract Law*, R. ZIMMERMANN, S. WHITTAKER eds., Cambridge University Press, 2000, p.32.).

[48] We shall cite, without pretending to any exhaustivity, the following works: S. DARMAISIN, *Le contrat moral*, Pref. Bernard Teyssié, L.G.D.J., 2000 ; L. FIN-LANGER, *L'équilibre contractuel*, Pref. Catherine Thibierge, L.G.D.J., 2002 ; L. GRYNBAUM, *Le contrat contingent, l'adaptation du contrat par le juge sur habilitation du législateur*, Préf. Michelle Gobert, L.G.D.J., 2004; A.-S. LAVEFVE-LABORDERIE, *La pérennité contractuelle*, Préf. Catherine Thibierge, L.G.D.J., 2005 ; A. DANIS-FATOME, *Apparence et contrat*, L.G.D.J., 2004; D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, Pref. Horatia Muir Watt, PUAM, 2001, who notes that although a principle of coherence could be lifted from the notion of good faith, meaning that one couldn't contradict oneself to the detriment of others -, a legal analysis inevitably leads to the conclusion that the concept is autonomous (see n°1202).

down morality, mixed with a particular interest: good faith is, in law, most often employed for utilitarian purposes (…)"[49].

Acquis Communautaire and Acquis International

Traditionally, three different meanings of the term "good faith"[50] have been put forward. Firstly, good faith is "a criteria of interpretation. To interpret a legal text be it a contract or a treaty or a statute in accordance with good faith is to interpret it according to its real spirit and not to interpret it strictly"[51]. Such a view contrasts with pure formalism and is based upon the traditional distinction in Roman law between actions of strict law and actions *bonae fidei* (actions based on good faith). Secondly, good faith is a moral quality: "to be in good faith is to behave loyally, sincerely, honestly; to keep one's word; to keep one's promise. Good faith is thus the reverse of undue influence, of fraud; it rules out any malicious intent"[52]. Finally, good faith is "the mistaken belief in the existence of a certain legal situation. This good faith "is always presumed […] Understood in this way, good faith is the other side of mistake, to which it is bound"[53].

Good faith is a flexible term which refuses to be imprisoned in any one particular definition. The study of the Acquis Communautaire and Acquis International reveals that the triple polysemy proposed is not irrelevant. On the contrary it reveals that good faith, being a flexible concept, takes different forms according to the functions assigned to it. These functions are themselves largely dependent upon the spheres or types of obligations to which good faith applies: "Good faith is an "open" concept"[54].

As a preliminary, it must be pointed out that the concept "good faith" does not appear in all international or European texts. It is also absent from certain international conventions[55]. Moreover, many Community texts do not even mention good faith.[56] However, it does appear in a large number of texts and its scope is increasing ever more in the light of the recent codification proposals. In these proposals, good faith appears sometimes as a (**I**) norm of interpretation, sometimes as a (**II**) source of obligations and sometimes as a (**III**) mistaken and forgivable belief, a ground for validity in certain legal situations.

I. GOOD FAITH, AN INSTRUMENT OF INTERPRETATION

[49] Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution du contrat*, Pref. H. Muir-Watt, L.G.D.J., 2004, n°351, p. 446 citing P. LE TOURNEAU, *Rep. civ*., V° Bonne foi, n°10.

[50] E. ZOLLER V° « Bonne foi », in Dictionnaire de la culture juridique.

[51] E. ZOLLER V° « Bonne foi », in Dictionnaire de la culture juridique.

[52] E. ZOLLER V° « Bonne foi », in Dictionnaire de la culture juridique.

[53] Ibid.

[54] P. MAYER, « Le principe de bonne foi devant les arbitres du commerce international », in *Etudes de droit international en l'honneur de Pierre Lalive*, ed. Helbing et Lichtenhahn, 1993, p 543, esp. p. 556.

[55] It does not appear in the Hague conventions (15th June 1955 on the law applicable to international sales of goods; 14th March 1978 on the law applicable to agency; 22nd December 1986 on the law applicable to contracts of international sales of goods). It does not even figure in the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes.

[56] Without being exhaustive the following are examples where good faith is missing: directive 1999/93/EC of the European Parliament and of Council of the 13th December 1999, on a Community framework for electronic signatures (*JOCE* L 13 19th January 2000, p. 12), directive 85/577/EEC of 20th December 1985 concerning the protection of the consumers in respect of contracts negotiated away from business premises (*JOCE* n° L 372 31st December 1985, p. 31), directive 94/47/EC of 26th October 1994 concerning the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (*JOCE* n° L 280 29th October 1994, p. 83), directive 1999/44/CE of 25th May 1999 on certain aspects of the sale of consumer goods and associated guarantees (*JOCE* n° L 171 7th July 1999, p. 12).

The expression "good faith" often appears in the context the interpretation of legislation. In this case, it is not given any specific definition. It seems to be understood as conflicting with a narrow and strict interpretation of texts. It ensures a certain flexibility of interpretation and prevents any paralysis which could otherwise result from a text being silent on an issue or giving rise to some doubt. This principle of interpretation applies primarily, to all international treaties (**A**). It sometimes takes on a particular value when it is applied to international texts which seek especially to promote good faith (understood as a standard of behaviour) (**B**). These texts must indeed be interpreted with the aim of promoting a certain ideal of justice and fairness in contractual relations. Good faith thus becomes a principle of interpretation, no longer merely of the international texts but also generally of the contracts which come under such texts (**C**).

A. A principle for the interpretation of international treaties

In public international law, good faith is a fundamental principle[57]. Article 26 of the Vienna Convention on the Law of Treaties, signed on 23rd May 1969 provides as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"; article 31 clarifies: "A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose".

This principle has in a way been repeated and consolidated by old article 5 of the EEC Treaty, now article 10 of the European Union Treaty: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." The term "good faith" does not appear as such in the text. However, it is generally admitted that this text can be read as the transposition into the Community legal order of the directive laid down by the Vienna Convention. From this point of view, the text serves the purpose of "strengthening a pre-existing obligation"[58] and is a "method of systematic interpretation" of Community legislation. Here again its role goes beyond a mere norm of interpretation[59].

B. A directive for the interpretation of rules relating to contracts

Beyond this application to treaties in general, good faith plays a greater role as a regulator where the said international treaties set out, more or less explicitly, to give good faith its full importance in interpersonal relations.

The Vienna Convention of 11th April 1980 on international sale of goods illustrates this situation perfectly. Article 7(1) sets out that, in interpreting the Convention, particular attention must be paid to the "observance of good faith in international trade". Good faith is thus defined as a guideline for the interpretation of the whole Convention: the interpreter "must ensure compliance with good faith in international trade"[60]. This disposition undoubtedly introduces a certain flexibility in conventional rules[61]. Good faith thus appears with a moral connotation, as a term used to regulate business life. If the freedom of the contracting parties is essential to a market economy, the freedom of some must coexist with the freedom of others: good faith presents itself as one of the regulating principles able to achieve this coexistence.

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[57] E. ZOLLER, La bonne foi en droit international public, Paris, Pedone, 1977.
[58] D. SIMON, Le système juridique communautaire, 3rd ed., PUF, 2001.
[59] See infra.
[60] V HEUZE, La vente internationale de marchandises, LGDJ 2000, n°91.
[61] Ibid.

In the same manner, article 5 of the UNCITRAL Convention on independent guarantees and stand-by letters of credit of 1995 sets out: "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit".

A similar expression appears in the UNCITRAL Convention on the assignment of receivables in international trade (see article 7 "principles of interpretation") and in the UNIDROIT Conventions of 28th May 1988, concerning international factoring and international financial leasing, respectively article 4 and 6.

The texts of "virtual" law share a similar preoccupation. Article 1.6 of the UNIDROIT Principles, even if it does not expressly set out good faith as a principle of interpretation, refers to it implicitly in the second paragraph: "issues within the scope of these principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles". And the explanatory note for the article points out that in order to successfully "fill the gaps in the principles", one should, on one hand, resort to analogy, and on the other, take into account some fundamental principles set out by the Principles amongst which good faith, as stated by the note on article 1.7.

As for PECL, they explicitly refer to good faith as a guide to the interpretation of the whole *corpus*, as stated in article 1:106: "These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the *need to promote good faith and fair dealing*, certainty in contractual relationships and uniformity of application". The expression is unequivocal: as every international text, PECL will have to be interpreted in good faith, but they have in addition a political aim, that of promoting good faith among the parties to the different contracts. It is in the light of this aim, that each disposition must be read.

Thus a certain number of international texts aim to promote good faith in contractual relations. They raise it to the status of a principle of interpretation of the dispositions they contain.

These observations lead, in a logical analysis, to a further observation: good faith acts as a regulating principle, not only in the reading of international texts relating to contracts but also in the interpretation of the contracts themselves.

C. A principle of contractual interpretation

The idea that a contract must be interpreted according to the principle of good faith permeates all the law relating to commercial contracts. It has developed notably in the frame of the *lex mercatoria* to such an extent that it has become one of its fundamental principles[62]. In fact, the requirement of good faith emerges directly from a number of international arbitration awards, which establish a true "general principle according to which agreements must be applied in good faith"[63].

In international arbitration, the interpretation in accordance to good faith is seen as "another way of favouring the interpretation according to the parties' real intention over a literal interpretation"[64]. To support this view, the sentence given long ago by President CASSIN is often quoted[65] as well as a ICC sentence rendered in 1975 in the following terms: "one should interpret the [contentious] clause… without forgetting to replace [the terms of the contract] in their context and to consider the contract as a whole, in order to bring out the real common intention of the parties. And when a term arouses controversy, one should interpret it

[62] See B. GOLDMAN, « La lex mercatoria dans les contrats internationaux: réalités et perspectives », JDI, 1979, 475.

[63] Ph FOUCHARD, E GAILLARD and B. GOLDMAN, Traité de l'arbitrage commercial international, Litec 1996 n°1470.

[64] Ibid.

[65] Sentence of 10 June 1955, Rev.crit., 1956.279, note H. Batiffol, Rev arb. 1956.15.

in accordance to the *good faith principle*"[66]. Here "the bad faith of a party, who claims the benefit of the rigour of the law and contract for himself, is invoked against such party. It is in fact a disguised way of introducing equity"[67].

The doctrinal projects of codification whether international or European, also make use of good faith to this end. As stated by Mr Ole LANDO: "the principles of European contract law and the UNIDROIT Principles attach a great importance to the principle of good faith under the influence of several laws mainly German, Dutch and American.

In each of these legal instruments, good faith is promoted to the rank of general principle which covers all stages of a contract"[68].

This high status changes the function of good faith from an interpretative role to that of extending the content of a contract.

The phrase "good faith" is thus used in the UNIDROIT Principles "to define a regulating concept in reference to which a contract must be interpreted".

Article 4.8 of the UNIDROIT Principles states that "where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied, and paragraph 2 of the same article adds: "in determining what is an appropriate term, regard shall be had, among other factors to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) *good faith and fair dealing*; (d) reasonableness".

The same reasoning is found in article 5:102 of the Principles of European contract law: "in interpreting the contract, regard shall be had in particular to […] g) *good faith and fair dealing*. Placed at the limit between "interpretation" and "content" of the contract, article 6:102 asserts that in addition to the express terms, a contract may contain implied terms which stem from (a) the intention of the parties, (b) the nature and purpose of the contract and (c) *good faith and fair dealing.* The term is close to equity at least partly, and is reminiscent of article 1135 of the French Civil Code according to which: "agreements are binding not only as to what is expressed therein, but also as to all the consequences which *equity,* usage or statute give to the obligation according to its nature". Thus the Principles follow the French tradition: they do not distinguish between consensual agreements and formal agreements (formal agreements with regard to which the principles of equity and good faith were unknown in the old law)[69].

Nowadays, even in respect of a formal and written contract, good faith remains a relevant principle of interpretation.

The GANDOLFI Principles are faithful to this view and use the term "good faith" in the same way. Article 39, which sets out the rules regarding the interpretation of a contract, ends with a final paragraph which is unambiguous: "In any event, the interpretation of a contract must not reach a conclusion that is contrary to good faith or to common sense". Moreover, it contains a clause regarding implied contractual terms which is along the same lines (art 32, paragraph 1) "besides the express clauses, the contents of a contract are made up of clauses (a) that are imposed by the present Code or by the European and national clauses, even replacing different clauses introduced by the parties (b) *that derive from the duty of good faith*. A parallel can be drawn with article 44 of the Principles: "The consequences of a contract result not only from the agreement between the parties but also from the articles of this Code as well as from the national and European principles, usage, *good faith and equity*.

From this, we see that good faith is not only a guide to the interpretation of the parties' intention but also a tool which influences the content of the contract. Judges are ready to go

[66] Sentence CCI case 1434, 1975, JDI, 1976.979; note Y. DERAINS.

[67] P. MAYER, « Le principe de bonne foi devant les arbitres du commerce international » op. cit. p 654.

[68] O LANDO, « L'avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences », RDC,jan. 2006, p167 et s. §11.

[69] See in this respect the writings of DOMAT such as quoted by E. COLAS « La notion d'équité dans l'interprétation des contrats » (1980-81) 83 R. du n.391 page 394: « there is no type of contract where it is not understood that one party acts in good faith as regards the other, with all the effects required by equity, whether in the way the contract is expressed, as in the performance of what is agreed including all consequences ».

beyond a simple clarification of the parties' intention; they seem prepared, encouraged by a number of academics and by numerous international texts, to use good faith as a real norm of interpretation even as a source of obligation.

II. GOOD FAITH, A STANDARD OF BEHAVIOUR

The expression "good faith", far from being univocal and unambiguous, is often regarded as a "standard of behaviour", which can occasionally even materialize as a specific obligation. This explains the use of expressions such as "duty of good faith" or "obligation of good faith".

As pointed out by Professor JACQUET, "the principle of good faith, sometimes seen as a basic principle of the *lex mercatoria*, can therefore be directly applicable to international contracts (…). Thus, the principle of good faith can impose obligations of behaviour directly upon the parties in the conclusion as well as in the implementation of the contract"[70].

Positive law imparts a varying degree of importance to the notion of good faith (**A**). However, in documents drafted by academics, the expression takes on a particular importance, especially through its objective dimension (**B**).

A. Positive Law

Reference to good faith as a standard of behaviour can be found in international as well as in Community law.

1. The United Nations Convention on Contracts for the International Sales of Goods: an implied obligation of good faith

Amongst the different international sources applicable to a contract, the notion of "good faith" appears mainly in the United Nation Convention on Contracts for the International Sale of Goods, 11 April 1980, in which the expression is abundantly used. However, it has an ambivalent status: the Convention does not contain any provision imposing a duty of good faith concerning the implementation of a contract. And whilst article 7(1) states that in the interpretation of the Convention good faith should prevail, it does not impose an actual duty of good faith upon the parties.

This article would appear to be the result of a compromise between the delegates of the civil law countries, favourable to the establishment of a duty of good faith, and those of the common law countries, strongly opposed to this solution[71].

Indeed, "a suggestion put forward by Spain in favour of a specific provision, in spite the support of most civil law countries, was met with a firm refusal emanating, for example, from England"[72]. Consequently, interpretations of this convention vary. Some argue that because it does not expressly impose a duty of good faith upon the parties, it simply means that such a duty does not exist. For others, on the contrary, this principle does not need to appear in the text to be accepted: a general principle of good faith can be implied. A half-way view is to consider that such a duty implicitly underlies an important number of specific provisions in the Convention so that this duty of good faith can be seen as one of the fundamental principles on which the Convention is based.

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[70] *Le contrat international,* Dalloz 2nd ed. 1999, p. 101 and 102.

[71] See *Conférence des Nations-Unies sur les contrats de vente internationale de marchandises*, Vienne, 10 March – 11 April 1980, *Documents officiels des Nations Unies*, p. 79 and p. 272 ; see also G. EORSI, « Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods », *Am. J. Int.Law*, 1979, vol. 27, p. 311, esp. p. 313.

[72] P. LALIVE, « Sur la bonne foi dans l'exécution des contrats d'État », *in Mélanges offerts à Raymond Vander Elst*, ed. Némésis, 1981, p. 434.

This last interpretation is appealing. The fact is that without being explicitly mentioned, the notion of good faith finds its way into an important number of articles in the Convention. For example, article 29(2) states: "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. *However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct*". Also, in article 35(3): "The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could have not been unaware of such lack of conformity". A parallel can be established between this article and provisions from articles 38, 40 and 44.

Article 77 relating to the obligation to mitigate the loss can also appear as another expression of the general principle of good faith between the parties. "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated". Finally, article 80 of the Convention states that: "a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". In this last article, the good faith of the debtor is required; indeed the debtor cannot rely on the slightest mistake of the creditor to avoid performing his obligations under the contract.

2. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

Article 14 of the Convention entitled "Standard of conduct and liability of guarantor/issuer", provides in its first paragraph that "the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice"[73]. The second paragraph states that the guarantor/issuer may not be exempted from liability "for its failure to act in good faith or for any grossly negligent conduct". Article 19 clarifies this general standard of behaviour by listing situations in which the guarantor/issuer can rely on a right to withhold payment.

3. Community Law

Good faith seems to be at the very heart of European institutions. Article 10 of the aforementioned Treaty on European Union (ex-article 5 of TEC) imposes upon Member States a negative obligation *to abstain from any measure which could jeopardise the attainment of the objectives set out in the Treaty*- as well as a two-fold positive obligation- *to take all appropriate measures to ensure fulfilment of their obligations under the Treaty and facilitate the achievement of the Community's tasks.* Although the term "good faith" does not explicitly appear in the text, the article has sometimes been interpreted as laying out a principle of "good faith in Community law", a principle of "loyal cooperation". Initially article 10 was analysed as a mere norm of interpretation the sole purpose of which was to introduce the specific obligations inherent to the Treaty.

Subsequently, the text was gradually construed by the ECJ as an autonomous source of obligations: today, any violation of art. 10 is considered as being a breach of Treaty obligations capable of leading to infringement proceedings under article 226 TEU.

This is also the case whenever the duty to inform the Commission, imposed on Member States by article 10 EC[74], is breached: the Court considers it a breach of the *obligation of*

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[73] See article 6 of the UNIDROIT Convention of 28 May 1988 on international finance leasing.

[74] ECJ, 22 Sept. 1988, *Commission v. Greece*, 272/86: Rec. 1988, p. 4875. – 13 Dec. 1991, *Commission v. Italy*, C-33/90: Rec. 1991, I, p. 5987; *Europe*, February 1992, comm. n°38. – 14 Oct. 1992, *Commission v. République hellénique*, C-65/91: Rec. 1992, I, p. 5245; *Europe*, December 1992, comm. n°439.

cooperation, imposed by article 5 of the Treaty, for a Member State to refuse or neglect to provide the Commission with requested information[75] or to fail voluntarily to provide the Commission with the information which is necessary to control the compliance of a Member State with Community law.[76] Although the term "good faith" is not used expressly and although the principle is applied in this instance to the relationship between Member States and Community institutions, this provision gives the principle of "good faith" a solid foundation in the Community *acquis*. It enables a better understanding of the precise meaning given to this general obligation: a requirement of loyal cooperation between Member States and willingness to honour their commitments[77] under the Treaty. Some academics have assimilated it to the German concept of "*Bundestrue*" ("federal loyalty" or loyalty to the federal State). According to this analysis, good faith would be an "illustration of the federal model and more precisely of Germany […] where the concept must be understood as entailing not only a unilateral obligation on the part of the Länder towards the central authorities but also as an allegiance to the federal principle by both the Member States and the central government itself"[78]. The necessity of cooperation thus applies not only to States but also to relations between the institutions within the European Union.

If the term "good faith" is not always used explicitly, that of fairness - no doubt because of its more objective connotation- is fundamental in Community law. It represents the "emergence of moral values"[79] in the Community system: "if freedom of economic operators is the sine qua non condition of a market economy, it cannot however be unlimited. […] the ECJ points out that the freedom of action on the part of economic operators can be measured by the awareness of their responsibility in the working of market forces: the duty of loyalty must govern the behaviour of undertakings and ultimately benefit the consumers"[80]. The judge will only refrain from punishing the impairment to the free movement of goods if the measures taken are justified by "the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer"[81]. Fairness also appears as a principle regulating free competition: "any obstacle to the freedom to undertake, which belongs to all undertakings, created by one of them, creates an imbalance for its own profit and constitutes unfair conduct as it is detrimental to the entire community[82]. The notions of *unfair* competition and *abuse* of dominant position, considerably developed throughout Community case law, are part of this trend.

Aside from the Treaty provisions, Community secondary legislation copiously refers to good faith and to fairness, with the two concepts often interlinked[83]. These legal texts use the terms "abuse", "abusive behaviour" to denote a behaviour tainted with bad faith. The concept of "good faith" is no longer defined by reference to its positive aspect but by reference to its negative aspect: abuse of rights.

This trend is clearly illustrated by Council Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts[84] which provides in article 3, §1: "a contractual term […]

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[75] ECJ, 22 March 1994, *Commission v. Spain, C-375/92:* Rec. 1994, I, p. 923*; Europe, May 1994, comm. D. Simon n°184*.

[76] ECJ, 24 March 1994*, Commission v.Great Britain, C-40/92:* Rec. 1994, I, p. 989*; Europe, May 1994, comm.* D. SIMON n°184.

[77] See V. CONSTANTINESCO, « L'article 5 CEE, de la bonne foi à la loyauté communautaire », *Mélanges Pescatore*, p. 97. More generally, see M. BLANQUET, *L'article 5 du traité CEE, Recherche sur les obligations de fidélité des États membres de la CEE*, Paris, LGDJ, 1994.

[78] L. DUBOUIS et Cl. BLUMANN, *Droit matériel de l'Union européenne*, Montchrestien, 3rd ed., n°114.

[79] See P. HETSCH, « L'émergence des valeurs morales dans la jurisprudence de la CJCE », *RTDE*, 1982, esp. p. 547.

[80] P. HETSCH, *op. cit.* p. 548.

[81] ECJ., 28 February 1979, *Rewe Zentral A.G.*, Rec. 1979, p. 469, paragraph n°8, p. 662.

[82] P. HETSCH, *op. cit*. p. 550.

[83] « […] la notion de bonne foi, synonyme reconnu de celle de loyauté […] », E. POILLOT, *Droit européen de la consommation et uniformisation du droit des contrats*, Pref. P. de VAREILLES-SOMMIERES, L.G.D.J., Tome 463, n°614, p. 270.

[84] *OJ* n° L 95 of 21 April 1993, p. 29.

shall be regarded as unfair, if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer". The very concept of "good faith" as it is understood under the above Directive is clarified by the 17th recital of the preamble: "Whereas the assessment, according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply of activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by *a means of making an overall evaluation of the different interests involved*; whereas this constitutes the requirement of good faith; whereas, in making an assessment of good faith, *particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer*; whereas the *requirement of good faith* may be satisfied by the seller or supplier where he deals *fairly* and *equitably* with the other party whose legitimate interests he has to take into account". As pointed out by M. CALAIS-AULOY, it seems that taken literally, the expression "good faith" is used here in its subjective dimension, as a criterion which should be taken into account in addition to the objective requirement of a significant imbalance[85]. However, it should be noted that when these texts were implemented by the Member States, the national legislators were concerned that this subjective approach would lead to a weakening of the measures taken against unfair contract terms; in order to avoid this risk they removed any reference to the concept of good faith altogether. This was the case for article L132-1 of the French Consumer Code.

Even when the term "good faith" is not explicitly used, the word "fairness" occasionally appears in secondary legislation (...) Directive 97/7/EC of 20th May 1997 on the protection of consumers in respect of distance contracts[86] sets out in its article 4.2 the requirement that the consumer should be provided with information prior to the conclusion of the contract. It is specified, in this respect that the information, "the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner, in any way appropriate to the means of distance communication used, *with due regard, in particular, to the principles of good faith in commercial transactions* and the principles governing the protection of those who are unable, pursuant to the legislation of Member States, to give their consent, such as minors".

Using similar wording, Directive 86/653/EEC of 18th December 1986 on the coordination of the laws of Member States relating to self-employed[87] agents sets out in its article 3: "the commercial agent must look after his principal's interest and act dutifully and in good faith". This reference to good faith and dutiful behaviour ("loyalty" in the French version) also appears in article 4 relating to the principal's behaviour.

Likewise, Directive 2002/65/EC of 23rd September 2002, concerning the distance marketing of consumer financial services[88], provides in article 3.2: " The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, *with due regard, in particular, to the principle of good faith in commercial transactions* and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States to give their consent, such as minors".

Finally, more recently, directive 2005/29/EC of 11th May 2005 concerning unfair business-to-consumer commercial practices in the internal market[89], specifies in its article 2, that "professional diligence" under the Directive means the "standard of special skill and care

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[85] J. CALAIS-AULOY, « Le devoir de se comporter de bonne foi dans les contrats de consommation », *in General clauses Standards in European Contract Law Comparative Law, EC Law and Contract Law Codification*, éd. S. GRUNDMANN et D. MAZEAUD, Kluwer Law International, 2005, p. 192-193. See also, ECJ, C-240 à 244/98, 27 June 2000, *Oceano Grupo*, esp. consid. 21.

[86] *OJ* n° L 144 4th June1997.

[87] *OJ* n° L 382 31st December 1986.

[88] *OJ* n° L 271 9th October 2002.

[89] *OJ* n° L 149 11th June 2005.

which a trader may reasonably be expected to exercise towards consumers, *commensurate with honest market practice and/or the general principle of good faith* in the trader's field of activity". Those who commented on the Directive raised the issue of the definition to be given to these two concepts (good faith and loyalty) in this context, in the following terms: "if the concept of loyalty ("fairness") is familiar to civil law systems, which include French law, it is not in keeping with the free play of market forces encouraged by the EU… And although English law may have inspired the economic approach adopted by directive 2005/29, the concept of "good faith" employed is unfamiliar to British jurists[90].

It appears from the analysis of the Acquis, including Acquis Communautaire, that the concept of good faith, interpreted as a standard of behaviour, is frequently used. It is noteworthy that recent writings by academics working on a European contract law suggest that the concept of good faith should be given an essential role in contract law.

B. Good faith in international and European codification proposals

These international and European texts use "good faith" in the objective sense and turn it into a fundamental notion, a general principle (**1**). Without giving a clear definition - but is the term not inherently incapable of being defined? – these texts offer a series of examples which allow the concept to be understood more concretely (**2**).

1. A general principle

Whilst the Vienna Convention does not establish "good faith" explicitly as a basic principle of contract law, both the Principles of European Contract Law (PECL) and the UNIDROIT principles go so far as to do this. Article 1.201 of the PECL sets out a duty to act in good faith: "Each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty". The first line of article 1.201 imposes a duty of good faith on each party to the contract and defines it in such wide terms that it establishes a truly general obligation.

It can be considered from the wording used in the text that good faith is required both during the implementation of the contract and at the stage of its formation.[91] It should also be noted that in their second version, PECL have opted for a wider definition than the one first retained. The initial text imposed on each party the duty to act in good faith "while exercising their rights and performing their duties.

It is noteworthy that the French version of PECL only refers to a compliance with the requirement of good faith, whilst the English version mentions "good faith and fair dealing". As mentioned in the commentary, "good faith" (in the English version) probably refers to the *intention* to act honestly and fairly. It is a subjective concept: "a person cannot use means

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[90] M. LUBY, « La directive 2005/29 sur les pratiques commerciales déloyales (une illustration de la nouvelle approche prônée par la Commission européenne) », *Europe* n° 11, Nov. 2005, Étude 11. It has however been proved that English law could accommodate itself of this new implementation of the concept of good faith. See C. TWIGG-FLESNER, D. PARRY, G. HOWELLS, A. NORDHAUSEN, *An Analysis of the Application And Scope of the Unfair Commercial Practices Directive, A Report for the DTI*, 2005, esp. p. 9, which is to be found at the following adress : http://www.dti.gov.uk/files/file32095.pdf; In the same spirit, on the reception of the directive by the new Member States and the existence of a general principle of good faith and/ or fairness/loyalty see C. VAN DAM, E. BUDAITE (coord.), *Unfair Commercial Practices. An analysis of the existing laws on unfair commercial practices between business and consumers in the new Member States. General Report*, BIICL, 2005, available at the following address:
http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_general_report_en.pdf; *adde* C. VAN DAM, E. BUDAITE (coord.), *Unfair Commercial Practices. An analysis of the existing laws on unfair commercial practices between business and consumers in the new Member States. National Reports*, BIICL, 2005, available on :
http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/ucp_national_report_en.pdf

[91] J. MESTRE, « Article 1 :201 – Bonne foi », *in Regards croisés sur les principes du droit européen du contrat et sur le droit français*, C. PRIETO (directed by), PUAM 2003, p. 116.

from which he would not profit, with the sole aim of harming the other party". However, the term "fair dealing" draws on an objective criterion, it is *fact* of acting with fairness. The term good faith used in French law must therefore be understood in its wider meaning, as including the objective dimension.

The same remark is true about the UNIDROIT principles, which explicitly set out the principle of "good faith". Article 7.1 paragraph 1 provides: "Each party must act *in accordance with good faith and fair dealing in international trade*". The commentary makes it clear that: "while pointing out that each party must act in accordance with good faith, the first paragraph of the said article, states clearly that *even in the absence of any particular dispositions in the Principles, the parties, must during the entire duration of the contract, including at the negotiation phase, act in good faith.*" The notion should again be understood in its wider meaning, as referring to the fairness of the parties. It should be added that article 7.1 paragraph 2, makes good faith mandatory: "The parties may not exclude or limit this duty". The commentary makes it clear that on the contrary, « nothing prevents the contracting parties from stipulating an even stricter standard of behaviour in their contract ».

However, the UNIDROIT principles, unlike PECL and in accordance with their scope use the expression "good faith and fair dealing *in international trade*" and the commentary for article 7(1) adds, that even when the Principles or commentaries only refer to "*good faith*" or "*good faith and fair dealing*", they should be understood as referring to the full expression "*good faith and fair dealing in international trade*". The commentary specifies that the French notion of "good faith" should be understood, in the commentaries, as including the more explicit term in English and that "good faith should be analysed in the light of the special conditions applying to international trade." The text thus aims to prevent any differences in interpretation arising out of different national laws and to achieve this it gives the concept of good faith a certain autonomy in the context of the Principles: « the concept must not be applied in accordance with the usual criteria adopted in the different legal systems », even though comparative law is, of course, the basis upon which the principle of good faith as now used in international trade was developed.

2. The concrete meaning of good faith

Because the term "good faith" is a vague notion, it is difficult to define precisely. Neither the UNIDROIT principles (**a**) nor PECL (**b**) nor the PAVIA project (**c**) attempt to do this. However, these texts contain numerous examples in which the principle of good faith applies, which enables us to understand how it comes into play.

a) UNIDROIT Principles

The UNIDROIT Principles provide a variety of examples where the principle of good faith applies[92].

Sometimes, the term « bad faith » is preferred to that of « good faith ». It enables the text to give a clearer idea of the prohibited behaviour. Good faith is in this case, defined negatively, by its opposite.

In the Principles, a number of specific applications of the general prohibition to exclude or limit the principle of good faith between the parties can be found. Article 3.19 thus declares the provisions in the Principles regarding fraud, threat and gross disparity to be of mandatory character. The commentary states that "it would be contrary to good faith for the parties to exclude or modify these provisions when concluding their contract". Article 7.1.6 sets out a prohibition as to certain exemption clauses: "A clause which limits or excludes one party's

[92] Articles 1.9 (2), 2.1.4(2)(b), 2.1.15, 2.1.16, 1.2.18, 2.1.20, 2.2.4(2), 2.2.5(2), 2.2.7., 2.2.10, 3.5, 3.8, 3.10, 4.1(2), 4.2(2°, 4.6, 4.8, 5.1.2., 5.1.3., 5.2.5., 6.1.3., 6.1.5., 6.1.16(2), 6.1.17(1), 6.2.3(3)(4), 7.1.2, 7.1.6, 7.1.7, 7.2.2(b)(c), 7.4.8, 7.4.13, 9.1.3, 9.1.4 et 9.1.10(1). Article 1.8, relating to the prohibition on inconsistent behaviour is one of the most obvious examples: « A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment ».

liability for non-performance or which permits one party to render performance *substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract"*.

The will to define good faith, by its antonym appears vividly in article 2.1.15 of the UNIDROIT Principles, named "Negotiations in bad faith": 1) A party is free to negotiate and is not liable for failure to reach an agreement. 2) However, a party who negotiates or breaks-off negotiations in bad faith is liable for the losses caused to the other party. 3) *It is bad faith*, in particular *for a party to enter in or continue negotiations when intending not to reach an agreement with the other party*".

Moreover, article 3.5, regarding avoidance of the contract for mistake sets out: "(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and: a) the other party made the same mistake or caused the mistake or knew or ought to have known of the mistake and *it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error* […]".

Sometimes, good faith appears as a standard of behaviour that the judge must try to restore, as set out in article 3.8 relative to fraud: "A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, *according to reasonable commercial standards of fair dealing*, the latter party should have disclosed." Or as set out in article 3.10 regarding gross disparity: "2) A court may, upon the request of the party entitled to avoidance, adapt the contract or term in order to make it accord with reasonable commercial *standards of fair dealing*".

Good faith also refers to a standard of behaviour close to that of fairness. Thus, article 3.10 of the Principles asserts that there is abuse of economic dependence when "the other party has *taken unfair advantage* of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill. In this example, again the power conferred to the court, is to be exercised in accordance with good faith: "The court may, upon the request of the party entitled to avoidance, adapt the contract or term in order to make it accord with reasonable *commercial standards of fair dealing*".

b) PECL

The same intention, that of describing behaviour in good faith or in bad faith reoccurs in a number of places in the Principles of European Contract Law.

First, it should be pointed out that the notion of good faith is presented as a principle which restricts the freedom of contract, following a reasoning also found in the Acquis CommunautaireCommunity.. Indeed, article 1:102 (1) states that: "Parties are free to enter into a contract and to determine its contents, *subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles*." Good faith thus seems to make up "the third segment in the contractual triangle also comprising freedom of contract and legal certainty"[93]. The notion of good faith is also frequently coupled with reasonableness defined in article 1:302: "Under these Principles reasonableness is to be judged *by what persons acting in good faith and in the same situation as the parties would consider to be reasonable*".

The requirement of good faith is found in many provisions of the Principles of European Contract Law[94]. Article 4:107 (1) thus states "A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or

[93] D. MAZEAUD, « Le nouvel ordre contractuel », *RDC*, déc. 2003, p. 295, § 29.

[94] I. DE LAMBERTERIE, G. ROUHETTE et D. TALLON, *Les principes du droit européen du contrat*, Paris, La documentation française, 1997, p. 19.

conduct, or fraudulent non-disclosure of any information *which in accordance with good faith and fair dealing it should have disclosed*." When a contract grants one of the parties excessive benefit or unfair advantage, it is provided in article 4:109 (2) that: "Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the *requirements of good faith and fair dealing* been followed". Also, in accordance with article 4:110 (1): "A party may avoid a term which has not been individually negotiated if, contrary to the *requirements of good faith and fair dealing*, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party (…)" Concerning the change of circumstances, article 6:111 of the Principles clearly states *in fine* that the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing, when the parties entered negotiations with a view to adapting the contract or terminating it. Articles 16:101 and 16:104 should also be cited. The role of good faith during the pre-contractual period was established by the Principles of European Contract Law, as well as by the UNDROIT Principles, as shown in article 2:301 entitled "Negotiations Contrary to Good Faith": (1) a party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who has negotiated or broken off negotiations *contrary to good faith and fair dealing* is liable for the losses caused to the other party. (3) It is *contrary to good faith and fair dealing*, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party". However, the Principles do not deal with the issue of a possible pre-contractual obligation of information imposed upon the parties. Article 4.106 and article 4.107 punish the giving of incorrect information during the formation of the contract as well as a fraudulous non-disclosure of information. “But the statement of a general and autonomous obligation of information goes beyond sanctions imposed for a fraudulent non-disclosure or the provision of incorrect information. Any relevant fact, any risk, even if it is exceptional, should be divulged in order for the parties to enter into the contract fully informed.

c) The PAVIA project

The notion of good faith is also very much omnipresent in the PAVIA project, in which numerous illustrations can be found. Despite the fact that the notion is not set forth as a general principle as it is in the UNIDROIT principles as well as in PECL, it still appears in article 1: “Definition: 1. A contract is the agreement of two or more parties to establish, regulate, alter or extinguish a legal relationship between said parties. It can also produce obligations or other effects on only one of the parties. 2. Except as provided for in the following provisions, a contract can also be created by conclusive behaviours, *following a previous statement of intent or according to usage or good faith*”.

The PAVIA project uses the notion of good faith several times. These different illustrations can provide elements which are useful for defining good faith in general, by induction at least. The project also includes provisions regarding the necessity to act in good faith even during the pre-contractual negotiations[95]. Good faith is defined negatively, in terms which are reminiscent of the notion of abuse of right and the necessity not to harm others. Article 51 concerning the "pendent condition" states that: “During the pendency of a suspensive condition the contracting party who is under an obligation or has created or

[95] Article 6, entitled *Obligation of good faith* “1. Each of the parties is free to undertake negotiations with a view to concluding a contract without being held at all responsible if said contract is not drawn up, unless his behaviour is contrary to good faith. 2. To enter into or continue negotiations with no real intention of concluding a contract is contrary to good faith. 3. If in the course of negotiations the parties have already considered the essentials of the contract whose conclusion is predictable, either party who breaks off negotiations without justifiable grounds, having created reasonable confidence in the other, is acting contrary to good faith. 4. If the situations considered in the above paragraphs occur, the party who acted contrary to good faith shall be liable for the harm he has caused to the other party to the extent of the costs the latter had to incur while the contract was being negotiated. Loss of opportunities caused by the negotiations underway shall also be made good”.

transferred a real right, shall act according to good faith *in order to safeguard the interests of the other party*, who can, if such is the case, judicially request one of the remedies provided for in Art. 172, without prejudice to the right to damages".

There is a clear duty to perform the contract in good faith. Article 75.1 states that "Each of the parties is bound to perform exactly and completely all the obligations laid on him by the contract, without request from the entitled party being necessary. In rendering due performance the debtor must conform to what has been agreed by the parties, to good faith and the diligence required in each specific case, on the basis of agreements, circumstances and usage". Article 108 should also be mentioned: "1. In contracts providing for mutual counter-performance, if one of the parties fails to perform or offer to perform his obligation, regardless of the gravity of the non-performance, the creditor can suspend his own performance which is due at the same time or subsequently, *unless such refusal to perform is contrary to good faith*. 2. The refusal is deemed, in particular, contrary to good faith when: a) it creates excessively onerous consequences for the other party; b) the non-performance is not substantial and the creditor's refusal causes the extinguishing of his obligation; c) the refusal prejudices a basic right of the person".

III. GOOD FAITH, A BASIS FOR THE PROTECTION OF MISTAKEN BELIEF

The notion of good faith is sometimes used in a much more precise manner. It can either refer to the situation in which a person acts in the belief that they are acting in accordance with the applicable law (**A**) or the situation in which a third party requires protection (**B**).

A. The belief in the lawfulness of a situation

The notion of good faith, in the case-law of the European Court of Justice (ECJ), refers to the legitimate belief on the part of the parties regarding the existence of certain applicable rules of law: good faith is in this case used to avoid, on a highly exceptional basis, the principle according to which ECJ case-law has a retrospective effect.

Indeed, the ECJ has consistently held that national courts may and must apply rules of Community law as interpreted by the ECJ, also, in principle, to legal relationships arising and established before the judgement ruling on the request for interpretation[96]: This is an application of the classical principle of retrospective effect of case-law. However, the ECJ case-law exceptionally allows a limitation on the temporal effects of a ruling when they are likely to undermine considerations of legal certainty arising out of public and private interests affected. The ECJ only adopts this solution in very precise circumstances when, on the one hand, there is a risk of serious economic repercussion due in particular to "the large number of legal relationships entered into in *good faith on the basis of the rules considered to be validly in force*" and, on the other hand, "where it appears that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions to which the conduct of other Member States or the Commission of the European Communities may even have contributed"[97]. Good faith is presented as the corollary of the concept of abuse of right – even though the expression abuse of right is not used. The ECJ thus restricts the freedom to bring a claim by precluding the reference to a text which a party had, in good faith, interpreted differently.

The expression "good faith" is sometimes also used as a means to set aside the application of a text which would in principle render the litigious agreement void.

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[96] Judgments of 27 March 1980, Salumi e.a. (joint cases 66/79, 127/79 and 128/79, Rec. p. 1237, point 9) and Denkavit Italiana (61/79, Rec. p. 1205, point 16).

[97] ECJ, 27 April 2006, *Richards*, C-423/04, points 40 to 42.

In French international private law, it was decided in the *Lizardi* case that a French person entering into a contract in France with a foreigner, "should not be required to know the laws of the different nations and their provisions concerning minority, legal majority and the extent of contractual obligations which can be undertaken by foreigners with regards to their legal capacity; the contract will be valid as long as the French party acted without rashness, without carelessness and *in good faith*"[98]. The mistaken and excusable belief is then "considered as a source of validity of certain legal situations which is an exception to the usual application of the rules of conflict of law"[99]. Good faith is thus used to simplify legal relations: without this solution, "tradesmen would have to inquire about the nationality of all their clients and when their clients happen to be foreigners, they would have to investigate the content of the relevant national law"[100]. For others, this solution is an application of the notion of appearance[101].

Article 11 of the EC Convention on the Law Applicable to Contractual Obligations "adopts this solution by giving it a bilateral effect"[102]. The article provides: "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence".

Therefore, the validation of an agreement, by derogating from the application of the national law which would cancel the agreement on the grounds of incapacity, benefits not only the French but also the foreign contracting party, no matter the country in which the contract was concluded, so long as both parties were in that country. The onus is on the contracting party wishing to rely on his incapacity to prove that, at the time of the conclusion of the contract, the other party knew of this incapacity or did not know of it only because of negligence on his part. However, it should be noted that the reference to "good faith" in this hypothesis is purely academic: it does not appear in the convention itself.

B. The protection of a third party acting "in good faith"

The expression "good faith" can also be used in a situation in which a third party legitimately believes in an apparent situation. Good faith is then used functionally, as an instrument to protect the third party.

This is particularly the case in the Hague Convention on the Law Applicable to Trusts and their Recognition concluded on 1st July 1985. Article 15 states: "The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the Forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters: a) the protection of minors and incapable parties; b) […], f) *the protection, in other respects, of third parties acting in good faith*".

Academic Projects such as PECL or the GANDOLFI works use good faith in such a way. Article 3:201 of PECL dealing with direct representation, provides that: "a person is to be treated as having granted authority to an apparent agent if the person's statements or conduct *induce the third party reasonably and in good faith* to believe that the apparent agent has been granted authority for the act performed by it". The Common Frame of Reference proposes in its last version to establish this rule. Indeed, the present article 6:103 of PECL concerning simulation ("When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails") would be moved to article 9:201 and completed with a second sub-section: « However, the apparent

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[98] Ch. Req., 16 janv. 1861, *D.*, 1861, 1, 93, *S.*, 1861, 1, 306, note MASSÉ, *Grands arrêts du droit international privé,* n°5.

[99] D. ALEXANDRE, « Rapport français. Droit international privé », in *La bonne foi*, Journées louisianaises, *Travaux de l'Association Henri Capitant*, tome XLIII, Litec, 1992, p. 548.

[100] P. MAYER et V. HEUZÉ, *Droit international privé*, Montchrestien, 8ème éd. 2004, n°524.

[101] M.-N. JOBARD-BACHELLIER, L'apparence en droit international privé – essai sur le rôle des représentations individuelles en droit international privé, LGDJ 1983.

[102] P. MAYER et V. HEUZÉ, *Droit international privé*, *op. cit*. n°525.

effect prevails in a question with a person, not being a party to the contract […], who has reasonably and in good faith relied on the contract's apparent effect ».

Moreover, this understanding of good faith is abundantly used in the GANDOLFI works. For examples, article 46 states, in its paragraph 2: "1. Unless explicitly agreed to the contrary, a contract, concluded to transfer ownership of a movable thing or to create or transfer a real right with respect to that thing, has real effects on the contracting parties and on third parties from the moment of delivery to the entitled person or to one charged by that person to receive it or to the carrier who, according to an agreement, must provide for delivery. 2. In the situation provided for in the preceding paragraph, if the one who transfers by contract a movable thing or a real right with respect to that thing is not the owner of the thing or entitled to the right thereof, the other party to the contract becomes the owner or entitled to the right in accordance with said contract at the moment of delivery, *provided he is in good faith*". Article 23 can also be read from the same angle: "A promise made to the public can be revoked before the expiration of the times mentioned in the preceding paragraph in the same form as the promise. In such case the person revoking the promise must pay fair compensation to *those who, in good faith, were induced by said promise to incur expenditure*, unless he can prove that the expected outcome would not have been obtained". Article 64 concerning the "agent without authority" can also be invoked this way, since it repeats the theory of the apparent agency: "One who has contracted as a representative without having the power to do so, or in excess of the authority conferred on him, is liable for any damage suffered by the third contracting party, as a result of his having believed in good faith that he was concluding a valid contract with the presumed principal, unless said third party avails himself of the power to treat the contract as made with the unauthorised representative". Article 65 (concerning *ratification*) should also be mentioned along with article 67 (*subjective conditions*), article 155 (*simulation and mental reserve*) and especially article 117 concerning the "*rights of third party in good faith*": "The exercise of the above rights by the creditor does not prejudice the rights acquired by third parties in good faith over the property of the creditor or over what is due to him, before said creditor, justifiably fearing non-performance, has warned the third parties in writing or, in the case of immovable or registered movable property, before the transcription of his judicial applications in public records, according to the laws of the State where the records are provided. This applies except for the provisions of Art. 161".

Comparative law

One of the characteristic features of good faith, as we have seen, is the uncertainty that surrounds this concept despite its omnipresence. Whether it be its legal nature, its content or the terminology used to define it, good faith, in contrast to the normal rigor of legal concepts, is characterised by its surprising inconsistency[103].

No matter how one defines the legal nature of good faith, it is clear that it is a fluid notion with a content that is able to be adapted to fit a particular context or legal dispute. The notion is therefore characterised by its great flexibility, which means the criticism generally levelled against good faith is that it undermines legal predictability and security. Even if the concept of good faith can be seen as a tool to promote a certain idea of contractual justice, whether that be "contractual solidarity" (*solidarisme contractuel*) or "the new contractual morality"[104], it remains a concept with multiple uses which has posed[105] and continues to pose

[103] G. WICKER 'Force obligatoire et contenu du contrat' in *Les concepts contractuels français à l'heure des principes du droit européen des contrats*, dir. P. REMY-CORLAY, D. FENOUILLET, Dalloz, 2003, p. 151 et s. , spec. n° 2 p. 154.

[104] J.-L. BAUDOUIN et P.-G. JOBIN, *Les obligations,* with the collaboration of N. VEZINA, ed. Y. Blais, 6th ed.; 2005, p13.

a problem of methodology. As we have seen, many different proposals have been put forward in order to define the notion of good faith[106].

The definition of good faith has been of a particular importance in Germany where the concept of '*Treu unt Glauben*'[107], found at article §242 BGB[108], has seen a resounding success[109]. In order to gain a clear understanding of the concept, the German approach has been to distinguish[110] between its different functions. This approach is one that is common to other judicial systems (it is followed, for example, in Italy and in the Netherlands) and therefore will be adopted in this study document in order to understand the most commonly used expressions of good faith in comparative law.

The concept of good faith will firstly be viewed as an instrument of interpretation (**I**), before being considered as a standard of behaviour (**II**) and finally as the basis for the protection offered in cases of mistaken belief (**III**). However, this structure is only relevant regarding the countries which recognise the existence of the notion itself. Under English law the concept has always been problematic, with the functions classically associated with good faith in civil law countries being fulfilled through other mechanisms in the anglo-saxon world. We will take, as a source of inspiration, the English approach in order to envisage in a final section (**IV**) the alternatives to the use of the concept of good faith.

I. GOOD FAITH, AN INSTRUMENT OF INTERPRETATION

In countries with a civil law tradition contracts are traditionally interpreted by reference to the parties' intentions; the spirit of an agreement carrying more weight than the strict wording[111].

More generally it appears that all legal systems recognize the pre-eminence of a "subjective" interpretation by searching for the parties' intentions[112]. After that, the "objective" interpretation comes into play, which interpretation is used in the application of the notion of good faith[113]. In other words, the contract must be interpreted as having the meaning which would be understood by reasonable persons placed in the same circumstances.

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[105] Y. LOUSSOUARN, 'Rapport de synthèse', *in La bonne foi (journées louisianaises)*, Travaux de l'association Henri Capitant, Tome XLIII, Paris, Litec, 1992, p. 11; P. SCHLESTRIEM, 'Good Faith in German Law and in International Uniform Laws', Centro di studi e ricerche di diritto comparato e straniero, Rome, 1997, p. 1-21, available at the following address: http://soi.cnr.it/~crdes/crdes/frames24.htm

[106] P. JOURDAIN, 'Rapport français', *in La bonne foi (journées louisianaises)*, TAHC, Tome XLIII, Paris, Litec, 1992, p. 121 et s ; Ph. JACQUES, *op. cit.* n° 160.

[107] On the difficulty of German jurists regarding the systemic treatment of good faith, GERNHUBER, « § 242 BGB - Funktionen und Tatbestände », *JuS* 1983, p. 765. *« Even experienced German academics admit that any attempt to present this seamless web systematically, following every twist and turn, must fail »*. B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op. cit.* p. 122.

[108] 'The debitor must execute his obligations in accordance with the principle of good faith and the common practice between the parties' *German Codes. Civil code and Commercial code, translated into French.* W. GARCIN (under the direction of) Editions Jupiter, 1967.

[109] Peter SCHLESTRIEM (*op. cit.*) notes that German judicial literature (jurisprudence, doctrine) is prolific regarding the question. He states that the most 'frightening' example is the 11th edition of *Staudinger commentary*, written by Dr Weber and which contains more than 2000 pages dedicated especially to §242 BGB. A shorter version has also been published containing 'only' 500 pages on §242 BGB (B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract. A Comparative Treaty* Second Edition, Hart Publishing, 2006, p120.

[110] A position inspired by the work of F. WIEACKER, *Zur rechtstheoretischen Präzisierung des § 242, Tübingen*, 1956, S. 20 et s.

[111] As is the case in Belgium law, French law, Quebec law, Italian law and in Dutch law.

[112] Art. 1156 of the French, Belgium and Luxembourg civil codes; §133 BGB; §914 ABGB; art. 1281 of the Spanish Civil Code; art. 173 and 200 of the Greek Civil Code; art. 1362 of the Italian Civil Code. The principle is also recognised by the jurisprudence *Haviltex*, HR 13 March 1982, NJ 1981. 635.

[113] The French, Belgian and Luxemburg civil codes do not use the term good faith contrary to the Italian (art. 1366) and Spanish (art. 1258) civil codes. The jurisprudence *Haviltex* in Dutch law does not expressly

It should be noted that that the new Dutch civil code[114] has chosen to remove all references to interpretation as it was considered that those in the 1838 Code were not only superfluous but were so general that they were perceived as being erroneous[115]. However, this approach remains exceptional and most legal systems contain either detailed legislation[116] or legal rules[117] to facilitate judicial interpretation and to improve legal certainty.

There are many legal systems which include the creation of additional obligations within the interpretive function of good faith.

This phenomenon is sometimes referred to as the "*forçage du contrat*"(a tool used by the judges who find the existence of additional obligations in a contract whether or not these were intended by the parties)[118]. However the creation of new obligations under the guise of an interpretation based on good faith combines its interpretive and suppletive functions. Hence certain authors have referred to the process as suppletive interpretation[119]. The creation of new obligations forms a part of the general trend to raise moral standards in contractual relations. Consequently, good faith can be understood as a true behavioural standard[120].

II. GOOD FAITH, A STANDARD OF BEHAVIOUR

The moralizing function that many legal systems attribute to good faith can be divided up in a fairly traditional way by distinguishing its completive (**A**), adaptive (**B**) and restrictive (**C**) functions. Together these functions create a genuine behavioural standard, a code of contractual ethics[121].

A. The completive function of good faith

Whilst national initiatives try to respond to the pressing need to clarify the use of terminology and concepts, many uncertainties remain, notably regarding the relationship between loyalty and good faith. This particular problem has been considered by a Quebec author who notes that often 'the obligations of good faith and loyalty are mentioned as if the two notions formed an indissociable unit'[122]. The author considers that the duty of loyalty constitutes a particular version of "the obligation of good faith", a "sub category" which is found in certain types of contract where a particularly strong relationship of trust exists between the parties (i.e. employment contracts, mandates, commercial agency…). Thus, loyalty appears to be the civil law equivalent of the fiduciary duties which are found in certain

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mention the term good faith within the context of an objective interpretation. However, one must not forget that the court founded its interpretation of article 6.248 BW on 'reason and equity'.

[114] In the same vein the rules of interpretation of contracts found in Scandinavian countries are determined by the courts and by academic doctrine.

[115] M.H. WISSINK, *The Principles of European Contract Law, A Commentary,* D. BUSCH, E. HONDIUS, H. van KOOTEN, H. SCHELHAAS, W. SCHRAMA eds., Kluwer Law International, 2002, p.242.

[116] Art. 1156 to 1164 of the Belgium, French and Luxembourg civil codes; art. 1258, 1281 to 1289 of the Spanish Civil Code ; art. 1362 to 1371 of the Italian Civil Code.

[117] §133 and 157 BGB; §914 and 915 ABGB ; art. 173 and 200 of the Greek Civil Code.

[118] L. LEVENEUR, 'Le forçage du contrat', *Droit et Patrimoine* 1998, p. 69.

[119] "Most authors agree that in practice it is not always possible to draw a clear line between interpreting and supplementing a contract, while a minority argue that there is no difference at all between the two" (M.H. WISSINK, op. cit., p. 242-243).

[120] "[…]the interpretation considers the wishes of the parties, which distinguishes it from the type of 'interpretation' which supplements […]", P. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*, Pref. R. Bout. L.G.D.J., 2000. no 61 p 65.

[121] For an idea on the behavioural standards imposed upon the contracting parties, see L. AYNES, *Vers une déontologie du contrat?*; conference given on the 11th May 2006 at the French Cour de cassation, found at the following address : http://www.courdecassation.fr/formation_br_4/2006_55/intervention_m._aynes_9141.html

[122] G. LECLERC, "Rapports canadiens. Le contrat en general.", *in La bonne foi, op.cit.* p.268.

contractual relations specific to common law countries, such as, for example, "agency" or "trust".

French law appears to embrace this distinction between good faith and loyalty. Whilst article 1134 para. 3 of the French Civil Code states that "[Agreements] must be performed in good faith", it should be noted, for example, that "The relationship between the commercial agent the and principal shall be governed by an obligation of loyalty and a reciprocal duty of information" (article L134-4 al.2 of the Commercial Code), In the same spirit, article L120-4 of the Employment code provides that "Contracts of employment shall be executed in good faith" whilst article L121-9 al.3 of the same code states that "the employee has a duty of loyalty towards his or her employer".

However, if the distinction appears transposable, it has not been unanimously accepted with certain authors preferring to use loyalty to qualify good faith viewed objectively as opposed to the protection offered in case of mistaken belief[123].

In a way it is a question of the transposition in France of the distinction which operates in Germany or the Netherlands, for example. Moreover, legal textbooks traditionally teach that the obligation of good faith is subdivided into a "duty of loyalty" on one hand and a "duty of cooperation" on the other[124]. In outline, it appears that the "duty of loyalty" consists of the abstention from all unfair behaviour whilst the "duty of cooperation" imposes a positive obligation to act.

No matter how one classifies the distinction between good faith and loyalty, it would seem appropriate to unify the terminology used by choosing between the two expressions, the distinction between them being more dogmatic than practical[125]. However, it is conceivable that a difference in terminology be maintained, as is the case in Germany and the Netherlands, in order clearly to distinguish on the one hand good faith which is the basis for protection in cases of mistaken belief, and on the other, good faith which sets a behavioural standard.

If it appears from most of the legislation that the obligation of good faith, objectively viewed, applies usually during the performance of a contract, this does not exclude its application throughout the contractual process. Consequently certain aspects of good faith will be examined firstly during the formation of the contract (**1**) and secondly during its performance (**2**).

1. At the moment of formation of the contract

The emphasis here will be placed on the requirement of good faith during the pre-contractual negotiations. However, one must not lose sight of the fact that the notion of good faith finds an expression in a less obvious way, through other mechanisms (loss due to an imbalance in the parties' obligations, fraud, error).

The origin of the requirement of good faith during the period of pre-contractual negotiations can be traced to an article by Rudolph von JHERING, published in 1861[126], and

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[123] Y. PICOD, *Le devoir de loyauté dans l'exécution du contrat*, Pref. Gérard Couturier, L.G.D.J., 1989, no 6, p. 11.

[124] F. TERRE, P. SIMLER, Y. LEQUETTE, *Droit civil, Les obligations,* 9e edition, Dalloz, Précis, 2005, no 439 p. 442; J. FLOUR, J.-L. AUBERT, E. SAVAUX, *Droit civil, Les obligations, T.1., L'acte juridique,* 11e edition, Armand Colin, 2004, no 378, p. 294; P. MALAURIE, L. AYNES, P. STOFFEL-MUNCK, *Les obligations,* Defrénois, 2e edition, 2005, no 764, p. 371; J. CARBONNIER, *Droit civil, Les biens, Les obligations,* Quadrige, Manuel, PUF, 2004, 22e edition, January 2000, no 1029, p. 2115.

[125] It has in fact been shown that in the context of secondary Community legislation "good faith" and "loyalty/fairness" were considered to be synonymous. Cf. our analysis on Community and international acquis, II,A, 3 and specifically note 88.

[126] R. VON JHERING, « Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts », 1861.IV. 1. However, this article, although fundamental, falls short of covering all aspects of the notion. This took place in the article by a Napolitan judge G. FAGELLA, « Dei periodi precontrattuali e dell loro vera ed esatta costruzione scientificaé », *in Studi Giurdici in onore di Carlo Fadda*, vol. III, p. 271. This article is crucial

in which the author considers that if a party causes the other to believe that the contract will be concluded, then such party is at fault. In other words, it is a matter of *culpa in contrahendo*[127].

In 1942 the Italian Civil Code became the first to codify the requirement of good faith during pre-contractual negotiations[128]. The French, Belgium and Luxembourg civil codes have not established a such a requirement[129], although in Belgium[130] and France the courts recognise the existence of a general principle of good faith governing the pre-contractual phase[131].

Conversely, the Civil Code of Quebec states in article 1375 that: "Good faith shall govern the behaviour of the parties, whether it be at the moment the obligation comes into existence, during its performance or the moment it is extinguished. 1991, c. 64, a. 1375".

This article must be read in parallel with article 6 which states that:"Article 6. Each person shall exercise his/her civil rights according to the requirements of good faith. 1991, c. 64, a. 6".

These articles are reminiscent of article 2 of the Suisse Civil code, which has been interpreted so as to impose a duty of good faith during the pre-contractual period. According to this article: "Art. 2 (1) Each person shall exercise his/her rights and execute his/her obligations according to the rules of good faith. (2) No manifest abuse of a right shall be protected by law".

It is submitted that this article imposes respect for the principle of good faith during the pre-contractual period.

The Portuguese[132] and Greek[133] civil codes also recognise the requirement of good faith during the pre-contractual phase.

German law is a little more specific and does not use the terminology of good faith. However, it recognises the existence of a special type of relationship, similar to contractual relations, which gives rise to certain rights and obligations[134]. There does however exist a divergence of opinion among academics over their legal basis. Hence it would be presumptuous to limit such basis to good faith. Nevertheless, in practice, the various

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and was the subject of a study carried out by R. SALEILLES, « De la responsabilité précontractuelle. A propos d'une étude nouvelle sur la matière », *RTD Civ.* 1907. 697.

[127] H. ROLAND, *Lexique juridique. Expressions latines*, 3ème édition, Litec, 2004, p. 53 *V°culpa in contrahendo* : « Fault in the conclusion of the contract. Fault leading to the cancellation of the contract following the breach by one of the parties of its duty of sincerity and good faith during the negotiations ».

[128]Article 1337 : « Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede (1366,1375, 2208). » It appears to be generally admitted that this necessity of good faith during the precontractual period implies « duties of information, clarity and secrecy […] ».

[129] A caveat should be noted regarding French law. Indeed, the *Catala Project* has seen the suggestion of a new article 1104: « Negotiations can be freely initiated, carried out and broken off, so long as the parties act in good faith The break down of negotiations can only give rise to liability if it is due to the bad faith or the fault of one of the parties » Furthermore, the *Catala Project* provides expressly, in articles 1110 et 1110-1 for a precontractual obligation of information. Such a provision appeared to be necessary to "give a general framework to this notion in order to overcome the diversity of its sources (case law or legislation) and the different legal treatments which it receives ». Y. LEQUETTE, G. LOISEAU, Y.-M. SERINET, « Exposé des motifs. Validité du contrat – Consentement (art. 1108 à 1115-1) », *in Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*, p. 20.

[130] For example, CA de Liège, 20 October 1989, Revue de droit commercial belge, 1990, 521, note X. DIEUX.

[131] For example, Cass. com., 22 April 1997, D. 1998, jur., 45, note P. CHAUVEL; Cass. com. 20 March 1972, Bull. civ. IV, n°93, p. 90, JCP 1973, II, 17543, note J. SCHMIDT; RTD Civ. 1972, 779, obs. G. DURRY.

[132] Article 227 of the Portuguese Civil Code.

[133] Article 197 of the Greek Civil Code.

[134] Article §311 of the BGB provides that: « An obligation relationship with duties under §241 paragraph 2 also arises from : 1. the opening of contractual negotiations (…) ».Article §241 paragraph 2 provides that : « The obligation relationship can, according to its content, oblige each party to have regard to the rights, legal entitlements and interests of the other party ». Translation from the annex of B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, The German Law of Contract. A comparative Treatise, op. cit.p. 896.

obligations which arise out of good faith during the precontractual period are very similar from one legal system to another. The legal basis for liability is not always identical (in Germany, the liability is contractual; in France and Belgium it is based on principles of tort) but what appears in all systems is the intention to sanction unfairness (disloyal behaviour).

Under English law there is no "duty to negotiate in good faith." Indeed in *Walford v Miles*[135] the court held that: "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content".

The solution seems to be the same under Scottish[136] and American law[137]. However, there is in existence a "duty to negotiate with care"[138], which duty has a place in the wider renewal of general contract law theory in England.

Therefore, although there is no "duty to negotiate in good faith", English law does recognise a certain number of obligations which protect the interests of the person with whom negotiations have been entered into. Thus, in practice, the requirements imposed upon the parties in these different countries are largely identical. A breach of these obligations ("obligation not to make any misrepresentation", "obligation of information", "obligation of good faith in *uberrimae fidei* contracts", "obligation of confidentiality") is sanctioned in accordance with the principles of misrepresentation, undue influence, collateral contracts, equitable estoppel and implied contracts.

It appears that there is a general duty to negotiate in good faith in civil law countries. In addition it seems that a consensus exists regarding the precise content of the obligation[139]. Thus the pre-contractual duty of good faith leads to the prohibition of negotiations without the intention to conclude the contract, of behaviour that is likely to cause physical harm to the

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[135] [1992] 2 AC 128.

[136] However, types of behaviour such as « misrepresentation », « fraud », « force and fear » or « undue influence » are, in any event, prohibited.

[137] Although American law does not recognise the existence of a general requirement of good faith during the negotiation phase of a contract, it does however provide various cases of liability, based essentially upon three theories: « restitution » (based on the unjust enrichment of one party in relation to the other during the negotiation phase), « misrepresentation » (based on the provision of false information, during the negotiations, in relation to the true intention of entering into the contract), « promissory estoppel » (based on a promise made by one party to induce the other party to enter into negotiations). Another problematic area is that of agreements to agree. Indeed, American courts have held that preliminary agreements are binding as soon as the parties have reached an agreement on all the points requiring negotiation, or in the event that express reciprocal undertakings have been given on the main points of the contract, even if some points are still undetermined. In this last case, the courts can impose a respect for the principle of good faith on the parties to carry the negotiations through to a successful conclusion. The courts focus on the intention of the parties. For an example, compare R.G. Group, Inc. v. the Horn & Hardard Co., 751 F. 2d 69 (2d Cir. 1984) and Texaco, Inc. v. Pennzoil, Co., 729 S.W.2nd 768 (Tex. Ct. App. 1987). On the whole, the "duty of good faith" during negotiations has been of great interest to American academics who have defended varying points of view.

It should furthermore be mentioned here that certain special provisions of American law impose a "duty to negotiate in good faith." For example, in its part relating to labour law, the *United States Code*, §§ 158 (a)(5), 158 (d)(2000). This article deals with unfair practices in labour law and imposes an obligation on the employer to negotiate collectively with the employee representatives. In this context, "to negotiate collectively" means "the performance of mutual obligations on the part of the employer and the employee representatives to discuss in good faith subjects such as remuneration, working hours, as well as all the other terms and conditions relating to the carrying out of their work by the employees ». See generally: E.M.S. HOUH, *op. cit.*p. 54-55, espec. notes 369 and 370.

[138] H. COLLINS, *op. cit.* p. 178.

[139] The comment is valid for civil law countries as well as common law countries, which have seen the development of a duty to negotiate with care. H. COLLINS, *The Law of Contract*, LexisNexis, 4th edition, 2003, p. 179.

other party, of the possibility of entering into parallel negotiations and obliges the parties to respect an obligation of confidentiality[140].

2. During the performance of the contract

Good faith is also the basis for many obligations which complete those expressly contained in the contract: obligations of information, of confidentiality, to act fairly, of cooperation and security[141].

In addition to these "traditional" obligations, good faith has also provided the basis on which to develop more modern ancillary obligations, such as, for example, the obligation to mitigate one's loss[142]. Although this principle is not legally recognised under French law, it is in other legal systems[143]. However, whether it is recognised by statute or by the courts, good faith is generally presented as being the legal basis of the obligation. In France, the duty to mitigate was referred to, for example, in a judgment given on the 16th July 1998 in which the first civil chamber of the Cour de cassation stated that:"in letting the debt owed by Mr and Mrs Bergue as a result of the non-payment of their rent increase without taking action in due course against them or against Mr Chambon, Mr Lepelletier had deprived the latter of the possibility of paying the debt himself and then bringing an action for the cancellation of the lease, through the mechanism of subrogation, so as to allow him either to recover the amount paid, or at least to avoid the payment of future rent and hence to limit the level of debt guaranteed"[144].

A completive function is not the only function attributed to good faith. The notion also has an adaptive function.

B. The adaptive function of good faith

The adaptive function of good faith comes into play following an important change in the economic context which renders the execution of the contract either much more onerous or at least less profitable for one of the parties. In this respect, it appears that there is a divergence of positions with some States allowing the modification of contractual terms whilst others refuse to take into account economic fluctuations.

On one hand, France[145], Belgium, Quebec[146] and England refuse to allow the adaptation of contractual terms following such changes.

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[140] On these questions, see H. BEALE, A. HARTKAMP, H. KÖTZ, D. TALLON eds., *Cases, Materials and Text on Contract Law*, Hart Publishing, 2002, p.243 and following. Regarding the duty of confidentiality specifically, two cases should be distinguished: in the first, the parties have agreed beforehand on the confidential character of certain or all of the documents exchanged during the negotiations, in which case any divulgation or personal use of the informations will be treated as a breach of a contractual obligation, in the second, nothing has been provided in the contract by the parties, in which case the rule is that there is no confidentiality obligation. However, in this last hypothesis, the courts have sometimes found a duty of confidentiality included in the general duty to negotiate in good faith. This solution is accepted in most legal systems including under English law, but on the basis of equity (Seager v. Copydex Ltd. [1967] 2 All ER 415).

[141] These can be found in the case law of Germany, the Netherlands, Italy, France, Belgium, Quebec (For numerous examples, see M.W. HESSELINK, *op. cit.* p. 480 and following, Ph. JACQUES, o*p. cit.* note 6, p. 318-319; également B. JALUZOT, o*p. cit.*, n°1767 et s.). Certain equivalent obligations (notably the duty of collaboration) can be found in anglo-saxon mechanisms, such as implied terms.

[142] For a comprehensive bibliography on this topic and on the justification of its legal basis, see Y.-M. LAITHIER, *Etude comparative des sanctions de l'inexécution du contrat*, Preface Horatia Muir-Watt, L.G.D.J., 2004, n°351, p. 445, espec. note 121.

[143] §254 (2) BGB ; §1304 ABGB ; article 1227 (2) of the Italian Civil Code ; article 300 of the Greek Civil Code; article 6:101 BW. Belgian and Spanish laws, from their caselaw, appear to consider that the obligation to mitigate one's loss is a sub-category of a fault on the part of the obligee. The only self-standing legal obligation under Belgian law can be found in article 20 on the Law on Insurance contracts dated 25 June 1992.

[144] Cass. 1re civ. 16 July 1998, *Chambon c. Lepelletier*, *JCP* 1998, II, 10000, note B. Fages. For other examples, see B. JALUZOT, *op. cit.* n° 1795 to1799, 521 to 523.

[145] The statement should be toned down for various reasons, at least with regard to France. Firstly, with the emergence of an obligation to renegotiate based on the duty of good faith. The decisions in *Huard* (Cass.Com. 3

On the other hand, Argentinean[147], Polish[148], Portuguese[149] and Dutch[150] law accept the theory of revision for want of foresight.

German law was among the first to allow for the possibility to either end or modify a contract when its continuation in its original form would produce an intolerable result. According to a court decision[151], such contracts many only be ended if it is impossible to adapt their terms to the new economic situation. This solution is justified by reference to article §242.

German law and the theory of *Voraussetzung* have heavily influenced Italian law, and notably the notion of *presupposizione*. According to this theory, if the parties, at the moment of formation of the contract, consider an element of the contract to be essential and this element is substantially altered during the execution of the contract, the contract can be cancelled on the basis that one of its essential elements (*presupposto*) is now missing. The Italian Supreme Court of Appeal, in a decision dated 24th March 1998[152], put an end to a contract providing for the supply of petrol on the basis that following new local regulations the petrol station had to be built in a way which differed substantially from what had initially been agreed between the parties. The contract would only be held to be invalid if the essential element was altered due to circumstances totally unconnected to the parties (i.e. which the parties could not foresee at the time they entered into the contract[153]). The principle of *presupposizione* was entirely created by the courts. In order to justify their decision, the courts have referred alternatively to articles 1366 (contracts must be interpreted in the light of the principle of good faith), 1463 (*force majeure*) and 1467 (the occurrence of excessive costs). However, academics are in agreement to teach that the solution is stems from the principle of good faith[154].

In this respect, the debate is more academic than judicial, since contracts often contain hardship clauses[155] or force majeure clauses. Hence litigation is avoided at source.

C. The restrictive function of good faith

The very fact that a restrictive function should be attributed to the notion of good faith shows the difficult relationship which exists between the notions of abuse of right and good faith. This difficulty is mirrored both in the legislation and in case law. Far from aspiring to achieve an exhaustive study, it appears appropriate to present a broad outline of the relationship between good faith and abuse of right (**1**) before considering in more detail the specific case of unfair contract terms which bears witness to the permanent character of the problem (**2**).

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novembre 1992, *Bull. civ.*, n°338, p. 241), and *Chevassus Marche* (Cass. com. 24 novembre 1998, *Bull. civ.* n°277, p. 232) should be remembered. Furthermore, the *Catala Project* provides two new articles dealing with the remedies of the parties in the absence of contractual provisions allowing a renegotiation of the contract in the event of a change of circumstances. Article 1135-2 provides that: « In the absence of such a clause, the party who no longer has any interest in the contract can apply to the President of the grande instance tribunal to order a new negotiation ». Article 1135-3 provides that « Should the case arise, these negotiations would be treated as provided in Chapter 1 of the present section. A breakdown of such negotiations in the absence of bad faith would allow either party to rescind the contract without any liability for cost or damages ».

[146] Under Quebec law, certain legal provisions (consumer law, landlord and tenant law) allow a direct intervention in the contract on the part of the judge.

[147] Article I 198 of the Argentinean Code.

[148] Article 351.1 of the Polish Civil Code.

[149] Article 437 of the Portuguese Civil Code.

[150] Article 6 :258 of the BW. However, we should mention that Dutch caselaw had already reached the same solution under the old code by relying on the principle of good faith.

[151] RG 3 February 1922, RGZ 103. 328.

[152] Cass. 24 March 1998, n°3083, *in Giust. civ.*, 1998, I, 3161, note CALDERONI.

[153] Cass. 9 February 1985, n°1064, *in Foro it.*, 1986, I, 1981, note ESPOSITO.

[154] L. ANTONIOLLI, *op. cit.*, n°5, p. 54 .

[155] D. TALLON, « Hardship » in Towards a European Civil Code, Third Fully Revised and Expanded Edition, Kluwer Law International, 2004, p. 499.

1. General points on the relationship between good faith and the notion of abuse

Often presented as the corollary of good faith, the concept of the abuse of rights, although controversial, seems to be common to a number of legal systems[156].

In practice, few systems sanction the abuse of rights in a legal and general way. However, we should cite, for example, the Swiss Civil Code[157] and the Civil Code of Quebec[158] and to a certain extent the BGB[159].

What is instantly apparent is the intensity of the connection between good faith and the notion of abuse, to the extent that sometimes the concept of abuse is eclipsed totally by the principle of good faith, as found in the Greek (article 281 of the Civil Code), Portuguese (article 334 of the Civil Code)[160], Lebanese, Polish and Brazilian legal systems[161].

Under Belgian law, where the legal system is almost identical to that found in France, the question of the interaction between good faith and abuse of rights was not raised until the end of the 1960s. At first the relationship between the two notions was condemned by the author André de BERSAQUES, who was of the opinion that "the duties of solidarity and cooperation stem from the obligation to respect the principle of good faith. Good faith implies, necessarily, that the behaviour of the parties is sincere, loyal and honest. It is a standard that applies just as much outside of the contractual sphere as within it, regarding which article 1134 para. 3 imposes its application […]. The link between good faith and abuse of rights is therefore evident"[162].

On 19 September 1983 the Belgian Cour de cassation confirmed this view by stating that "the principle that agreements shall be performed in good faith, established by article 1134 of the Civil Code, prevents one party to the contract from abusing the rights conferred by the contract upon such party"[163]. Hence, under Belgian law, the notion of abuse of contractual rights is based upon article 1134 para. 3.

In France, article 1134 para. 3 was not automatically considered as the basis for the principle of abuse of rights in contract[164]. Nevertheless case law has found good faith to be a

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[156] Notably under Italian, French and Belgian law. See for example, F. RANIERI, « Bonne foi et exercice du droit dans la tradition du civil law », *RIDC* 1998, p. 1055-1092; P. STOFFEL-MUNCK, *L'abus dans le contrat. Essai d'une théorie*, Preface R. Bout, L.G.D.J., 2000, Tome 337.

[157] « Article 2. « (1) Each party must exercise his/her rights and perform his/her obligations in accordance with the principles of good faith. (2) The manifest abuse of a right is not protected by law ».

[158] Article 7. « A right cannot be exercised with a view to harming another person or in an excessive and unreasonable fashion, in breach of the requirements of good faith. 1991, c. 64, a. 7. ».

[159] Article §226 « The exercise of a right is illegal if its sole aim is to cause loss or injury to another person ». However, it would appear that §242 (objective good faith) is a more relevant basis for the theory of abuse of rights. M. MARKOVITCH, *La théorie de l'abus des droits en droit comparé*, Thèse Lyon, 1936, p. 206 quoted by P. STOFFEL-MUNCK, *op. cit*. n°57, p. 62. Furthermore, from a strictly terminological point of view, German law is surprisingly inconsistent. Indeed, caselaw refers indistinctly to illegal exercise of a right (*unzulässige Rechtsausübung*), to the abusive exercise of a right (*missbräuchliche Rechtsausübung*), to a defence based on illegal exercise (*Einwand der unzulässigen Rechtsausübung*) or to abuse of rights (*Rechtsmissbrauch*) or to illicit abuse of rights (*unzulässiges Rechtsmissbrauch*). See B. JALUZOT, *op. cit.* n°1409.

[160] Article 334: « The exercise of a right is illegitimate when its holder manifestly exceeds the limits imposed by the requirement of good faith, by standards of good behaviour, or by the social and economic purpose of the right ».

[161] See on these points, P. STOFFEL-MUNCK, *op. cit*. n°57, p. 61; C. MASSE, « La bonne foi dans les relations entre particuliers », *in La bonne foi, op. cit*. p. 217 and the various national reports quoted.

[162] A. de BERSAQUES, note under CA Liège 14 February 1964, *RCJB* 1969, 497, n°11, quoted by P. STOFFEL-MUNCK, *op. cit*. n°61, p. 65.

[163] Cass. 3ème ch., 19 September 1983, RCJB 1986, 282, n. J. L. Fagnart, quoted by P. STOFFEL-MUNCK, op. cit. n°61, p. 66.

[164] See in this respect, P. STOFFEL-MUNCK, *op. cit*. n°62 and following, also P. LOKIEC, *Contrat et Pouvoir. Essai sur la transformation du droit privé des rapports contractuels*, preface A. Lyon-Caen, L.G.D.J., 2004, n°246 p. 179 ; B. JALUZOT, *op. cit.* n°1408.

source of liability,[165] mainly in the context of a breach of contractual relations. It is often stated that "for contracts of repeated performance for which no duration has been stipulated, the unilateral termination of the contract by one party, except in the case of abuse sanctioned by article 1134 para. 3 of the Civil Code, is permitted"[166].

The law relating to cancellation clauses also highlights just how inextricably the notions of good faith and abuse are linked[167]. The ties between the two are also acknowledged with regard to clauses allowing a party to determine the price unilaterally. In 1994 the First Civil Chamber of the Cour de cassation stated that "an appeal court which annuls […] a contract […] when […] it has not been alleged that the supplier has abused his contractual right of exclusivity, has misjudged the rules regarding the determination of the price and the execution of contracts in good faith"[168]. The following year the Cour de Cassation in its full formation (*Assemblée Plénière*) held that the question should be considered from the point of view of "the abuse of rights in the fixing of the price", with a reference to article 1134 of the Civil Code in general, but in particular to its paragraph 3, according to the conclusions of the advocate general"[169].

The recognition of the link between good faith and abuse of right (*abuso del diritto*) also seems to present problems in Italian law. The concept of abuse of right in the Italian legal system is not a codified principle and its existence arises out of legal doctrine and case law based on article 833 of the Civil Code, regarding the abuse of right in property law. The abuse of right in contractual matters should be understood as the prohibition of a claim, which although legal per se, is brought purely to cause loss or damage to the other party. Italian judges and legal academics remain divided over the scope of application and the relationship between the theory of abuse of right and the notion of good faith.

However, it appears to be generally accepted that in order for an abuse of right to be characterized, the relationship between the benefits acquired through the exercise of a right and the loss or damage caused to the other party must be disproportionate[170].

From an analysis of Dutch and German law, certain authors have been able to define different categories of 'abuse of right'[171]: "Improper behaviour (exceptio doli specialis praeteriti), unclean hands (tu quoque), inconstant behaviour (venire contra factum propium) and Verwirkung"[172].

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[165] In France the issue of sanctioning bad faith in the contractual area is contraversial (see in this regard the thesis of Ph. STOFFEL-MUNCK cited above). However, the Commerical Chamber of the *Cour de* cassation has just delivered a very important decision on this question (Cass. com. 10 juillet 2007, n°06-14768, (unreported)). In effect, the decision holds, with regard to subsections 1 and 3 of article 1134 that: « Although the rule according to which contracts must be executed in good faith, allows a court to punish an abusive use of a contractual prerogative, it does not authorise the court to undermine the very substance of the rights and obligations legally contracted by the parties »).In this case, the estimed advocates held that the decision given by the *Cour d'appel*, should be quashed for violation of law, in this case charaterised by a a 'false application' of article 1134 ss3 and by a 'refusal to apply' subsection 1 of the same article. However, if it is to be understood from this decision that bad faith does not prevent the creditor from remaining a creditor, it is not clear to this author, in any sense, what the nature of the sanction for 'abusive use of a contractual perogative'might be.

[166] See for example Cass. 1ère civ., 5 February 1985, *Bull. civ*. I, n°54, p. 52 ; *RTDC* 1986, 105, obs. J. MESTRE; Cass. com., 8 April 1986, *Bull. civ*. IV, n°58 ; Cass. com., 20 January 1998, *Bull. civ*. IV, n°40 ; *D.*, 1998, 413, note. Ch. JAMIN; 1999, som. 114, obs. D. MAZEAUD. For other references, see P. STOFFEL-MUNCK, *op. cit*. n°76 note 380.

[167] « Although the judges are bound by a resolutory clause, the application thereof remains subject to the requirements of good faith in application of article 1134 of the Civil Code ». Cass. 1ère civ, 14 March 1956, *D.* 1956, jur., 449, note J.V.

[168] Cass. 1ère civ., 29 November 1994, *Contrats conc. consom*. 1995, comm. 24 obs. L. LEVENEUR ; *JCP* 1995, II, 22371, note J. GHESTIN ; *D*. 1995, jur., 122, note. L. AYNES.

[169] P. STOFFEL-MUNCK, *op. cit.*, n°78, p. 78 with references at note 390.

[170] L. ANTONIOLLI, *op. cit.* p. 5.

[171] Made possible thanks to the technique of *Fallgruppen*. See C. MAK, *op. cit.*,p. 49-50. Equally S. WHITTAKER, R. ZIMMERMANN, « Good faith in European contract law: surveying the legal landscape », *op. cit.* p. 24-25.

[172] *Ibid.* concerning this last category.

The principle of Verwirkung (the principle which forbids a party to contradict himself to the detriment of the other party, or coherence in contractual matters) is not expressly provided for in the law, but has emerged from the analysis of case law and of certain provisions in the legislation[173]. A recent example of its application occurred in a judgment from the Cour de cassation on the 8th March 2005[174]. This principle is accepted in a number of different legal systems, including Swiss[175], German, [176] Belgian[177] and Dutch law as well as in common law systems[178].

In any event, it is good faith which would appear to be the genuine basis for the sanction of incoherent behaviour. Indeed, although German law no longer recognises good faith as the basis for such an action and Dutch law has expressly codified the principle of Verwirkung, it would however appear that it is good faith which has directed the sanction of such behaviour.

Moreover, it should be noted that from a terminological point of view the Netherlands stand out again by using the concept of abuse of power rather than that of abuse of right[179], although in practice this variation only concerns the property law. With regard to the law relating to obligations, the reference texts are the second paragraphs of both article 6:2 and article 6:248 which refer to « reason and equity ».

2. The relationship between good faith and abuse in the legislation against unfair contract terms

In dealing with the relationship between good faith and abuse, it appears necessary to consider the issue of unfair contract terms, mainly in relation to the European directive 93/13/EEC regarding unfair terms in consumer contracts[180]. The directive refers to the notion of good faith at article 3.1 as one of the criteria used to determine whether a clause is unfair. The transpositions of the directive illustrate the different approaches to the application of good faith as a criterion for unfairness[181]. Although several jurisdictions refer to the criteria of

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[173] See generally the analysis of D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, Préf. H. Muir-Watt, PUAM, 2001 as well as the acts of the Colloque organized by the Centre de Droit des affaires de l'Université Paris V, le 13 janvier 2000, *L'interdiction de se contredire au détriment d'autrui*, M. BEHAR-TOUCHAIS (under the direction of), Economica, 2001.

[174] *Bull. civ*. n°44, p. 48, D. HOUTCIEFF, « Quelle sanction pour la contradiction? », *RLDC* 2005, n°18, p. 5-9.

[175] Through the bias of the principle of confidence. D. HOUTCIEFF, *Le principe de cohérence en matière contractuelle*, *op. cit.*n° 938, p. 719.

[176] See the adage *Non venire contra factum proprium* from which the case law has deduced a form of forfeiture (*Verwirkung*), D. HOUTCIEFF, *op. cit.* n° 943, p. 722. German case law provides numerous illustrations, for example: a lawyer cannot claim more in payment that what was previously announced (BGHZ 18, 340), a person cannot invoke an arbitration clause during proceedings before a State jurisdiction after having opposed arbitration on the grounds of competence. (BGHZ 50, 191). For more examples see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op. cit.,*p. 123.

[177] Through the application of *Rechtsverwerking* which, contrary to other examples of the prohibition of contradictory statements, sanctions those who oppose one attitude and a right rather than two attitudes. D. HOUTCIEFF. *Op. cit.* no 947, p. 724.

[178] Through the application of *estoppel,* D. HOUTCIEFF, *op. cit.* n°953, p. 727 ; B. FAUVARQUE-COSSON, « L'estoppel du droit anglais », *in L'interdiction de se contredire au détriment d'autrui*, M. BEHAR-TOUCHAIS (under the direction of), Economica, 2001, p. 3 ; D. MAZEAUD, « La confiance légitime et l'estoppel », *RIDC* 2006-2, p. 363.

[179] Article 3:13: « 1. The holder of a right cannot rely on a right which belongs to him to the extent that the exercise of such right constitutes an abuse. 2. An abuse of right occurs, inter alia, when such right is only exercised in order to cause loss or damage to another or with an intention which is different from that with which such right was granted, or when, if the holder of such right had considered the discrepancy existing between the interest favoured by its exercise and the interest which suffers as a result, he could not possibly have reached the decision to exercise it. 3. A right may be such, that its very nature makes it likely to be abused. » Voir D. DANKERS-HAGENAARS, *op. cit.*, p. 315.

[180] See *supra,* p.31.

[181] On the various stages of transposition of the directive in Member States see the report from the Commission on the Implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. COM (2000) 248 final.

good faith, as set out by the directive 93/13/EEC to control unfair contract terms, others have strongly opposed the introduction of the notion. In France and Belgium, as in Switzerland[182], the legislators have chosen not to refer to the notion of good faith in this context. Instead the criteria of 'a significant imbalance' is considered sufficient[183]. Consequently article L. 132-1 of the French Consumer Code states that: [...] are unfair, clauses which have for object or for effect to create, to the detriment of the non-professional or the consumer, a significant imbalance between the rights and obligations of the parties to the contract".

On the other hand, other legal systems use the notion of good faith to control unfair clauses. Article 1437 of the Quebec Civil code states, for example, that « An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause ». German law can equally be cited as an example of where good faith is one of the criteria used to qualify a clause as unfair. Before the reform of the German law of obligations, the question of unfair clauses was resolved by §9 of the AGBG, an article introduced by the law of the 9th September 1976 concerning the 'regulation of standard business terms'[184]. According to §9:

"(1) Any clause contained in standard business terms which, contrary to the requirements of good faith, unreasonably disadvantages the other party, shall be annulled.

(2) Where there is doubt, an unreasonable disadvantage shall be found where the clause

1. is incompatible with the fundamental ideas of the legislation from which the clause derogates, or

2. limits the essential rights and obligations resulting from the nature of the contract to the extent that the realisation of the contractual objective is threatened"[185].

This important German law has since been integrated into the BGB and is found at articles §305 - §310, and in particular at article §307. For a long time the majority of German authors have considered it necessary to rely on the principle of good faith:

"The need to turn to the notion of good faith in order to control unfair clauses in German law can only be explained by the particular structure of good faith in German law: good faith is the underlying support for the elements cited. Citing these elements without the accompanying notion of good faith would deprive them of what holds them together"[186].

Finally, English law has also introduced the notion of good faith as a criterion used to determine whether a clause is unfair even though it is not familiar with the principle[187].

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[182] The approach of Swiss law is didactic, in the same way as article 2 of the Civil Code which distinguishes clearly between the obligation of good faith and the abuse of rights. In Swiss law the limitative function that one attributes to good faith is assured by the concept of abuse of rights. There is a division of competence between the two notions.

[183] G. PAISANT, « Les clauses abusives et la présentation des contrats dans la loi n°95-96 du 1er février 1995 », *D.* 1995, chr., p. 99 ; *Adde* D. MAZEAUD, « La loi du 1er février 1995 relative aux clauses abusives : véritable réforme ou réformette? », *Dr. et patrimoine*, juin 1995, p. 42, n°17; *Adde* P. STOFFEL-MUNCK, *op. cit.* n°382; *Adde* B. JALUZOT, *op. cit.* n°868 et s.

[184] On the history of this law et and the previous application of article §242 BGB to control unfair clauses, see B. JALUZOT, *op. cit.* n°845 ; B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op. cit.* p. 164 et s.

[185] Translated into English from the French translation by A. RIEG, « Rapport de droit allemand » *in Les clauses abusives et les consommateur*, *RIDC* 1982, p. 926.

[186] B. JALUZOT, *op. cit*. n°865. For an overview of the application in case law see B.S. MARKESINIS, H. UNBERATH, A. JOHNSTON, *op. cit.* p. 175 et s.

[187] Regarding the relationship between English law and good faith see *infra*. It is nonetheless interesting to note that the English and Scottish Law Commissions have produced a report which proposes a common system treating unfair clauses in contracts. Among its propositions for reform the report suggests the avoidance of all reference to good faith, arguing that the tests of *reasonableness* and *fairness* suffice to meet the objectives fixed by the EC Directive. See *Unfair Terms in contracts. Report on a reference under section 3(1)(e) of the Law Commission Act 1965* found at http://www.lawcom.gov.uk/docs/lc292(1).pdf The government has recently accepted the diverse recommendations in the report and will implement them after an impact evaluation. See

III. GOOD FAITH, A BASIS FOR THE PROTECTION OF MISTAKEN BELIEF

This section deals with the psychological aspect of good faith: good faith as a subjective notion. This approach can be found in both the codes of civil law countries (**A**) and in certain common law provisions (**B**).

A. Civil law countries

Subjective good faith is found in various areas, including family law[188], the law relating to assets (where generally it is a question of the rights of persons of good faith who are in possession of assets) [189] and the law regarding restitution (in order to avoid or limit restitution) following the cancellation or rescission of a contract or a payment which was not owed[190].

Similarly the Dutch Civil Code contains several provisions regarding subjective good faith. Although the principle reference is found at article 3:11, the application of subjective good faith can also been seen at articles 3:86 para. 1, 5:73 and at articles 3:35, 3:36 and 3:44 para. 5.

It is interesting to note that a number of legal systems have intended to establish a distinction between objective good faith and subjective good faith by adopting different wording.

Indeed, German law distinguishes between *'Treu und Glauben'* (objective good faith) and *'Guter glaube'* (subjective good faith). A similar distinction is made in other countries, such as Dutch law. C. MAK, in his commentary[191], explains that the expression « reason and equity » is used to describe objective good faith so as to avoid confusion with the use of the concept in its subjective sense, as found for example at article 3:11 BW[192]. The new Dutch Civil Code has combined two concepts: that of *'goede trouw'* (article 1374 section 3 of the old BW) and *'billijkheid'* (article 1375 of the old BW) [193] in order to create the concept of *'redelijkheid en billijkheid'* which is now found at articles 6:2[194] and 6:248[195] of the new BW, setting out the elements constituting objective good faith.

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http://www.dti.gov.uk/files/file34128.PDF Generally see, the Law Commission's website: http://www.lawcom.gov.uk/unfair_terms.htm.

[188] See the following non-exhaustive examples: Swiss Civil Code: articles 92 (engagements), articles 304 et 327 (parental authority), articles 528, 547, 579, 600 (Successions); Belgian Civil Code: articles 201, 202 (Putative marriage), 316, 334ter (on the effect of marriage with regard to third parties of good faith), 373, 376, (parental authority); Quebec Civil Code: articles 382 à 388 (Putative marriage), article 447 (on the effects of marriage); articles 603, 624, 793 et 835 (Successions); French Civil Code: articles 201, 202 (Putative marriage); articles 222, 372-2 (effects of marriage with regard to third parties of good faith), article 515-5 (PACS).

[189] Non exhaustive examples: Swiss Civil Code: articles 661, 673, 674, 714, 728, 738, 866, 867, 874…, Quebec Civil Code: articles 931, 932, 959, 961, 963, 992, 1093, 1137…; French Civil Code: articles 549, 550, 555 ou encore 1141 et 2269…; Belgian Civil Code: 1141.

[190] Generally see: French Civil Code: articles 1844-16, 1935, Belgian Civil Code: 1380; 1691.

[191] D. BUSCH, E. HONDIUS, H. van KOOTEN, H. SCHELHAAS, W. SCHRAMA (W.) eds., *The Principles of European Contract Law, A Commentary*, Kluwer Law International, 2002, p. 47.

[192] Article 3 :11 BW: « In the event that the good faith of a person is required in order for a legal consequence to take effect, good faith will be found to be lacking not only if the person knew of the facts or law to which that person's good faith relates, but also if in the circumstances that person should have known of them. The impossibility of verifying a particular fact or law does not prevent the person who had good reasons to doubt to be treated in the same way as a person who should have known that fact or law ».

[193] Articles 1374 section 3 and 1375 of the old BW are the exact translation in Dutch of articles 1134 al 3 and 1135 of the French Civil code. The Dutch legislator in 1838 more or less reproduced the precepts of Domat. For an analysis of the question see D. DANKERS-HAGENAARS, « Rapport Néerlandais », *in La bonne foi*, *op. cit.*, p.311 ; equally M.E. STORME, « Rapport Néerlandais », *in La bonne foi*, *op.cit.* p. 163.

[194] Article 6 :2 : « 1. The obligor and the obligee are required to behave towards one another in accordance with reason and equity. 2. The rule to which their relationship is subject by virtue of the law, custom or a legal transaction does not apply if, in the circumstances, this would be unacceptable following criteria of reason and equity ».

B. Common law countries

Countries with common law traditions are rather reluctant to introduce a concept that is quite as malleable as that of good faith. However, an examination of the legislation of these countries reveals a certain use of good faith, albeit a use which is different from what is traditionally found in relation to unfair contract terms and which is arises out of a European influence.

Rather surprisingly, it is the subjective good faith which is found in various pieces of legislation from common law countries. For example the *Sale of Goods Act 1979* makes use of the notion of good faith exclusively in its subjective sense. (i.e. article 23: *« When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title »*; article 24: *« Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same »;* article 25 *« (1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner »*)[196].

The subjective approach to good faith can also been found in several articles of the U.C.C. For example, article §2-403 (1) states that *'... A person with voidable title has power to transfer a good title to a good faith purchaser for value…'*, whilst according to article §2-506 (2): *'The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular'*.

The analysis of different legal systems shows that the distinction between objective and subjective good faith is a problem which is found to either a greater or lesser extent in every system. However, good faith in its subjective form appears never to have been a source of difficulties. It is the objective version of good faith which has caused and remains a source of apprehension and the object of debate, especially in certain common law countries.

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[195] Article 6:248: « 1. The contract does not only produce legal effects which are as agreed by the parties, but also those which, depending on the nature of the contract, arise out of the law, custom or requirements of reason and equity. 2. The rule to which their relationship is subject in accordance with the contract does not apply to the extent that, in the circumstances, it would be unacceptable following criteria of reason and equity ».

[196] See also articles 14(2) and 61(3) of the *Sale of Goods Act* 1979. Article 61(3) is particularly important as it defines one element of the wider concept of good faith: 'A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not'.

IV. ALTERNATIVES TO GOOD FAITH: THE SPECIFIC CONTRIBUTION OF ENGLISH LAW[197]

The recognition of the principle of good faith (in its objective sense) is often presented as one of the points of divergence between the civil law and the common law. However, it would be wrong to believe that common law systems, and in particular English law, remain isolated from recent European developments concerning the idea of 'contractual justice'[198] (**A**). Therefore, despite the fact that, strictly speaking, there is no obligation of "good faith", both case law and academics have used other mechanisms in order to promote 'fairness' in contractual relations[199] (**B**).

A. Ideological considerations

As in French law and a certain number of other civil law systems[200], English contract law has evolved from its initial liberal approach (**1**) to one which promotes a principle of 'fairness' (**2**).

1. The traditional reasons for the reticence in England to the importation of the concept of good faith

« The malleability of the good faith doctrine can undermine the goals of certainty and predictability in ordering one's affaires. This tension between the desire to infuse some measure of morality or community norms into contractual relations and the need to construct predictable outcomes has been central to the debate over the meaning of good faith in recent years »[201].

Generally speaking, the central idea which tends to emerge from anglo-saxon legal commentaries is the fear that the introduction of the general principle of good faith will create legal uncertainty. The notion of good faith in itself could be accepted, but in a measured way, and not as a basic principle running through all contractual relations. In addition, the

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[197] Can equally be consulted : J.F. O'CONNOR, *Good Faith in English Law*, Aldershot, Dartmouth Publishing Company, 1991, Spec. Chap. 3; THE HON JOHAN STEYN, « The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy ? » [1991] *Denning LJ* 131; R. GOODE, « The concept of "good faith" in English Law », Centro di Studi e Richerche di Diritto Comparato e Straniero, Saggi, Conferenze e Siminari 2, Rome 1992. Also of interest are the talks given during a conference entitled « Good Faith and Fairness in Commercial Contract Law », London, September 1993 in the *Journal of Contract Law* [1994] 7 et [1995] 8; H. COLLINS, *The Law of Contract*, 4th edition, London, Butterworths, 1993, spec. Chap. 13; J. BEATSON, D. FRIEDMANN eds, *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 1995; J.N. ADAMS, R. BROWNSWORD, *Key Issues in Contract*, London, Butterworths, 1995, spec. Chap. 7; R. BROWNSWORD, *Good Faith in Contracts "Revisited"* [1996] 49 *Current Legal Problems* 111.

[198] E. HONDIUS, « The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis », *Journal of Consumer Policy* 2004, n°27, p. 245; T. HARTLIEF, « Freedom and Protection in Contemporary Contract Law », *Journal of Consumer Policy* 2004, n°27, p. 253; D. STAUDENMAYER, « The Place of Consumer Contract Law Within the Process on European Contract Law », *Journal of Consumer Policy* 2004, n°27, p. 269.

[199] H. COLLINS, *The Law of Contract*, Fourth edition, LexisNexis, 2003, p. 20, p.270.

[200] It appears as though French law prefers a less individualistic approach to contract, thus applying the teachings of R. DEMOGUE who considered that contracts were not the result of opposing interests, but 'a little society where everyone must work towards a common objective which is the sum of all the individual aims pursued by the contractors'. (R. DEMOGUE, *Traité des obligations en général*, t. 6, 1931, n°3). Regarding contractual solidarity, see generally, L. GRYNBAUM, M. NICOD (directed by), *Le solidarisme contractuel*, Economica, 2004; C. JAMIN, D. MAZEAUD (directed by), *La nouvelle crise du contrat*, Dalloz, 2003; D. MAZEAUD, « Loyauté, solidarité, fraternité: la nouvelle devise contractuelle? », *in L'avenir du droit, Mélanges en hommage à François Terré*, Dalloz, 1999, p. 603 ; C. THIBIERGE-GUELFUCCI, « Libre propos sur la transformation du droit des contrats », *RTD civ.* 1997, p. 357.

[201] J.NEFF, *op. cit.* p.121-122.

integration of such principle is perceived as a threat to the principle of contractual autonomy of the parties, each party being limited in the pursuit of his own personal interest[202].

Moreover, « the fear is that good faith, at least on some formulations, gives the courts a wide and therefore unpredictable exercised discretion to do justice as they see fit »[203]. Finally it is generally considered that English law already holds various tools which serve the same function as that ascribed to good faith. Why therefore introduce a new concept which merely duplicates the functions already assured by these other mechanisms?

On the other hand, certain authors are of the opinion that recognising a proper doctrine of good faith would avoid resorting to contortions and subterfuges[204]. In the same vein Robert SUMMERS has proposed that « without a principle of good faith a judge might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalising existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability. In addition, fiction can divert analytical focus or even cast aspersions on an innocent party'[205]. This school of thought receives some support today in England.

2. The Recent Evolution of English Law

The anglo-saxon approach in general, and the English one in particular, is reputed to perceive contract law through notions such as economic efficiency and to accept as a necessary corollary an exaggerated application of the theory of autonomy. However, it would appear that a change has taken place and that new ideas based on the notion of fairness are being defended by both the courts and the legislator. The concept of fairness appears to be composed of three main notions: « injustifiable domination, the equivalence of the exchange and the need to ensure co-operation »[206].

An analysis of the decision in *Schroeder Music Publishing Co Lts v Macaulay*[207] provides an illustration. In this case a young composer had agreed to give all his songs to his editor for a renewable period of five year in exchange for the remuneration gained through the publication of his works. However, no promise was made concerning the obligation of the editor to publish the works. The House of Lords annuled the contract by relying on restraint of trade, on the basis that the weaker position of the composer caused him to agree to an inequitable agreement according to which the obligations of the editor were minimal whilst those of the composer were maximal. According to the traditional economic analysis of English law the contract was valid and therefore should have been enforced. However, such an analysis would not have permitted the court to take into account the realities of the legal situation, including the respective positions of the parties, loyalty and co-operation. Due to the fact that the career of the composer was entirely dependent on the discretionary power of the editor during a period of up to 10 years, the degree of subordination with regard to the editor was considered to be a form of unjustifiable domination. The absence of an obligation to publish the works rendered the contract too unequal to be fair.

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[202] 'To act in Good Faith is to take into account the legitimate interests or expectations of the other party'. R. BROWNSWORD, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law', in Good Faith in Contract: Concept and Context, R. BROWNSWORD, N.J. HIRD, G. HOWELLS Eds., Ashgate, 1999, p. 15.

[203] J. WIGHTMAN, op. cit., p. 47.

[204] R . POWELL, « Good faith in contracts », [1956] 9 *Current Legal Problems* 16.

[205] R.S. SUMMERS, 'Good Faith in General Contract Law and the sales provisions of the Uniform Commercial Code', [1968] 54 *Virginia Law Review* 195, spec. 198-199. By the same author, 'The General Duty of Good Faith – It's recognition and Conceptualisation', [1982] 67 *Cornell Law Review* 810.

'The normative version of good faith does not see it as derived from the tacit understandings of the parties in their contractual community, but essentially as a canon of contractual justice which is imposed on the parties. […] This was the basis of the decision in *Dalton v Educational Testing Services […]* (see J. WIGHTMAN, *op. cit. p. 45.*).

[206] H. COLLINS, *op. cit.* p. 28-29.

[207] [1974] 3 All ER 616, [1974] 1 WLR 1308, HL.

In addition, since the composer could not terminate the contract during a predetermined period, he had no leverage by which to ensure that the editor would at least take reasonable measures so as to ensure the composer received some benefit from the contract, through publishing and carrying out the promotion of his work. This case is proof of a renewal in the philosophy of contract law in England, but without attacking the traditional autonomist and economic theories put forward in the past. The House of Lords has simply taken account in a more modern way of new values such as equity, the equivalence of the exchange and the duty of co-operation between contracting parties – values which are generally guaranteed by the duty of good faith in civil law systems.

It is an evolution which has been underlined and strengthened by statutory references to good faith – even if these result more often from an obligation due to the primacy of European law and the obligation to transpose European Directives than from intentional actions[208].

One of the traditional examples, which comes under the category of *uberrimae fidei* contracts, is found at section 17 of the Marine Insurance Act 1906:

'A contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party'[209].

Moreover the Regulations adopted in order to transpose European directives also refer expressly to the concept of good faith.

Hence Regulation 4 of the Commercial Agents Regulations 1993 provides that the « principal in dealing with his agent is obliged to act dutifully and in good faith ». Regulation 5 states that the parties cannot derogate from the obligation of good faith.

In the same vein, *The Unfair Terms in Consumer Contracts Regulations 1999*, which transposes the Directive 93/13, defines in article 5, an unfair clause as:

« (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer ».

Caselaw supports this provision, as appears in *Director General of Fair Trading v First National Bank plc*[210] in which the court noted that:

« good faith was not an artificial or technical concept but connoted fair and open dealing, which required terms to be expressed fully and clearly, without hidden pitfalls and with appropriate prominence being given to matters which might operate disadvantageously to the customer, and required the supplier not to take advantage, deliberately or unconsciously, of factors indicative of the consumer's weaker bargaining position ».

Finally the Consumer Protection (Distance Selling) Regulations 2002 state at article 7(2) that the obligation of information towards consumers must be carried out '*with regard…. to the principles of good faith in commercial transactions*'[211].

B. Technical alternatives to the rejection of a general principle of good faith

Sir Thomas Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd*[212], after having noted that legal systems which have recourse to the concept of good faith do so

[208] See the developments relative to EC and international law acquis. II. A. 3.

[209] More generally insurance law recognises the principle of good faith through the imposition of an obligation of information. *Carter v Boehm* (1966) 3 *Burr.* 1905, 1910; *Court of Appeal, Bank Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* (1999) I QB 665, 700. More recently the principle has been toned down by the House of Lords in *Banque financière de la cité SA v Westgate Insurance Co Ltd* (1990) 3 WLR 364.

[210] [2002] 1 AC 481, [2001] 1 All ER 97 (HL).

[211] Generally, regarding this question, see W. TETLEY, '« Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering », [2004] 35 *JMLC* 561*;* H. COLLINS, « Good Faith in European Contract Law », [1994] 14 *Oxford J. Legal Stud.* 229; G. TEUBNER, « Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences », [1998] 61 *Mod. L. Rev*. 11.

[212] [1988] 1 All ER 348 at 353 (CA).

in order to import a sense of equity to business affairs, finds that English law arrives at a near identical solution through the development of 'piecemeal solutions in response to demonstrated problems of unfairness'[213]. Thus English law[214] simply employs different mechanisms in order to achieve a sense of equity in commercial relations. The following mechanisms can be cited: *« consideration »*, *« incorporation of terms »*, *« undue influence and unconscionability »*, *« interpretation and implied terms »*, *« mistake and representation »; « duress and undue influence »; « waiver and estoppel »*, *« fiduciary obligations »; « unjust enrichment and restitution »*[215].

Consequently, although lawyers across the Channel remain largely reticent when it comes to undermining the principle of autonomy, English law is not inequitable. Contractual fairness is protected by a reliance on notions which are different from, and to a certain extent, more precise than, the notion of good faith.

[213] « English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways ».

[214] It appears from a study carried out by William TETLEY (*op. cit*.) that other common law countries are less reticent to accept a general principle of good faith (i.e. Australia, Canada and the USA).

[215] For a more detailed analysis see W. TETLEY, *op. cit.,* p. 13 as well as H. COLLINS, *op. cit.,* 270 and E. POILLOT, *op. cit.,* no 645 and no 964.