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GOOD AND BAD FAITH IN CONTRACT NEGOTIATION AND PERFORMANCE, IN THE NEW CIVIL CODE AND COMPARAIVE LAW

Thesis Summary

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THESIS SUMMARY

I. FOREWORD:

When someone mentions good faith in contracts, they will unavoidably lean towards the manifestations of bad faith, because relations with a happy ending do not make their way into history books, the law being concerned mainly with conflictual situations.[1] Good faith is considered a shape-shifting concept that can manifest itself in all fields of law and at all contractual stages ("good faith as an alligator"), bu it is also a uniform but multifaceted concept that can adapt to diverse branches of law, a mimetic notion ("good faith as a chameleon").[2]

There is also a scientific necessity in treating this subject, concerning the absence of a recent monograph in Romanian law literature that deals with the matter of good faith or bad faith in contract law[3], and the scarcity of foreign language monographs dealing specifically with bad faith in contracts[4], the existing ones being concerned with a wider sphere than contract negotiation and performance. The previous scholarly works deal mainly with good faith[5], the concept of bad faith being frequently treated superficially, as a common "by-product", its effects looking like simple mirror images of the opposing concept. The overlapping of the two concepts is not perfect because there are a lot of gray areas between them, which deserve distinct consideration[6], and their effects are not always diametrically opposed.

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[1] Y. Loussouarn, *Rapport de synthèse* în *Travaux de l'Association Henri Capitant – Journées Louisianaises 1992 – La bonne foi – t. XLIII, Litec, Paris*, 1994, p. 9

[2] Ibidem

[3] In regard to good faith in contracts, there is only one monography, which is over 30 years old: D. Gherasim, *Buna-credinţă în raporturile juridice civile,* Ed. Academiei, Bucureşti, 1981

[4] J. Bédarride, *Traité du dol et de la fraude en matière civile et commerciale,* 2e édition, 4 volume, Achille Makaire - imprimeur-éditeur, Aix, 1867; more recently G. Raoul-Cormeil, *La mauvaise foi dans les relations de droit privé interne,* Thèse, Université de Caen-Basse Normandie*,* 2002, Biblioteca Cujas

[5] C. Arthaud, *De la bonne foi et de ses effets en matière civile,* Teză doctorat, Paris, 1874; D. Gherasim, *Buna-credinţă în raporturile juridice civile,* Ed. Academiei, Bucureşti, 1981; J.J.E. Millet, *De l'Erreur et de la bonne foi en droit romain et en droit français*, thèse pour le doctorat, Faculté de droit de Paris, Typographie Lahure, Paris, 1871; J. Wertheimer, *Des Avantages attribués à la bonne foi relativement aux biens en droit civil*, thèse pour le doctorat, Faculté de Droit de l'Université de Paris, Libraires-Éditeurs V. Giard & E. Brière, Paris, 1899 and the literature mentioned by L. Pop, *Tratat de drept civil. Obligaţiile, Vol. II. Contractul,* Ed. Universul Juridic, Bucureşti, 2009, p. 513, nota 2

[6] B. Lefebvre, *La bonne foi: notion protéiforme,* Revue de Droit de l'Université de Sherbrooke (Québec), Vol. 26, nr. 2/1996, pp. 331-333; D. Gherasim, op. cit., pp. 30-33

For the study of good faith and bad faith in contracts, I chose the two contractual stages where these two notions were mentioned more often: the stage of contract negotiations and the stage of contract performance, leaving outside the scope of this paper the stage of contract formation, when an offer is made and accepted, and the post-contractual stage, the latter deserving a distinct approach.

This paper concerns itself with classical private law and will approach good faith and bad faith in common contracts, where the parties are presumed to be on equal footing and none of them has any special legal status, leaving to other works the vast and continually expanding problem of consumer law. The starting thesis is that the good faith/bad faith tandem in contracts represents a "safety valve" which carries the moral values of the society inside the contracts, with the purpose of insuring their usefulness both for the concerned individuals and for society as a whole, answering their reasonable expectations and maximizing economic value.

The structure of this work reflects a historical approach to good faith and bad faith in contracts and an analysis of their functions, dimensions and approaches at the stage of contract negotiations and performance, at each step taking into account the evolutions in other continental or Common Law systems, the French civil law being considered a fundamental point of reference due to the similarities between the relevant legal provisions (art. 1134 al. 3 and art. 1135 C.civ. fr.) and the previous Romanian legal provisions in force until October 1st, 2011 (art. 970 C.civ.), also the commonalities between French legal literature and case law and the new Romanian legal provisions.

Even if our civil law system is not estranged from the concepts of good faith and bad faith in contracts, because prestigious authors have written since the end of the last century about the duty of good faith in contracts and the resulting obligations of loyalty and cooperation[7], the evolutions of the French legal literature and case law led me to believe that the current detailed provisions of the NCC regarding duties of good faith in contracts deserve an analysis of the possibilities and the sphere of these concepts in comparative law. For this analysis I have made references, besides the French Civil law which I have treated as an "anchor" and the common law which has fed our legal literature for over 150 years, to the civil law of the French-speaking Canadian province of Québec[8],

[7] L. Pop, *Drept civil. Teoria generală a obligaţiilor,* Ed. Lumina Lex, Bucureşti, 1998, pp. 62-63
[8] B. Lefebvre, *La bonne foi dans la formation du contrat*, Les Éditions Yvon Blais Inc., Cowansville, Québec, Canada, 1998

that has benefited since 1994 from a modern Civil code and which had an ancient Code from 1866 inspired by the Napoleonic Civil code, to German civil law as the continental legal reference system in regard to good faith[9], to the Common Law of England as a reticent but concerned system in regard to this concept and to the partially codified system of the United States of America, where the model Uniform Commercial Code[10] has ample provisions in regard to good faith in contracts.

Besides the national law systems, the last decades have witnessed a proliferation of scholarly transnational codes, which have synthesized the evolutions from a series of continental and Common Law systems, advancing common principles of regulating contracts at European level or at international trade level. Of all these scholarly codes, I have made substantial references to the UNIDROIT principles[11], the Principles of European Contract Law (P.E.C.L.) and to the Draft Common Frame of Reference (D.C.F.R.)[12].

II. Historical view on the legal approach to good faith and bad faith in contracts

The inseparable tandem of good faith/bad faith in contracts has known a treacherous evolution along the history of written European law, passing through low and high tide, being used to represent various situations and promoted or demoted with very eclectic arguments. At the beginnings of Roman law, the good faith notion was running against the obstacle of material and procedural formalism of a primitive law system, but the evolution transformed good faith in the key to opening contract law to morality but also to economic and social efficiency.

[9] B. Markesinis, H. Unberath, A. Johnston, *The German Law of Contract - A Comparative Treatise,* Second Edition, Hart Publishing, Oxford and Portland, 2006

[10] R.S. Summers, J.J. White, *Uniform Commercial Code*, Sixth Edition, West - Thomson Reuters, 2010

[11] B. Fauvarque-Cosson, *Les contrats du commerce international, une approche nouvelle: Les principes d'Unidroit relatifs aux contrats du commerce international,* Revue internationale de droit comparé, vol. 50, nr. 2/1998, pp. 463-489

[12] C. von Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, M. Storme, S. Swann, P. Varul, A. Veneziano and Fryderyk Zoll (edited by), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR),* 2009, available at ec.europa.eu/justice/contract/files/ european-private-law_en.pdf; B. Fauvarque-Cosson, D. Mazeaud, (edited by), *European Contract Law - Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Sellier. European Law Publishers, München, 2008

After the fall of the Western Roman Empire and the beginning of the Middle Ages in Western Europe, the whole contract law passes through a stage of deep regress and atrophy, the contracts of ancient German law and early Middle Ages being highly formal. After the rediscovery of Roman civil law by Western Europe starting with the 11th century, it is read in a philosophical and Christian perspective, which gradually amplifies the importance due to good faith, thus beginning its consecration as a fundamental principle of contract law.

The next very subtle attack against the good faith principle began in the 19th century, with the emergence of the theory of the autonomy of the will and economic liberalism, both of which sanctify the freedom of contract and the individual to the detriment of contractual morality. The principle of good faith, together with other general principles of contract law, were also undermined in the 19th century by the French exegesis school, which put forth their newly adopted Civil code, and the German school of conceptual jurisprudence (*Begriffsjurisprudenz*). The recent tide of good faith in European law, with the tendency of becoming a true tidal wave, seems to have its roots in the late 19th century, in various theories like the French contractual solidarity or the German Free Law movement (*Freirechtsbewegung*), the post-war contractual case law having been gradually overtaken by this principle, which has even crossed the ocean and found a fertile new home in the United States of America, especially beginning with the Uniform Commercial Code of the 1950s.

In early Roman law, like in many other ancient and medieval law systems, good faith and bad faith tended to have almost no legal meaning[13], because the vast majority of contracts were either solemn or real contracts (if we accept the tripartite classification dividing contracts in solemn, real and consensual), the formalities that were accomplished (which included the transfer of the goods or a symbolic object)[14] rendering irrelevant the moral and psychological judgments implied by the good faith and bad faith of the contracting parties, at least at the time of the initial agreement. The decadence of formalism, which had already begun in classical Roman law, that recognized the existence of purely consensual contracts rendered mandatory by their endowment with the right to sue[15], accentuated in the 13th century under the influence of the Catholic church, canon law

[13] B.Lefebvre, *La bonne foi dans la formation du contrat,* Les Éditions Yvon Blais, 1998, p. 15

[14] P. Viollet, *Histoire du droit civil français: accompagnée de notions de droit canonique et d'indications bibliographiques*, Seconde édition, Éditeurs L. Larosse & Forcel, 1893, p. 589-599

[15] Idem, p. 600; E.-D. Glasson, *Précis élémentaire de l'histoire du droit français*, Éditeur F. Pichon, Paris,

and their interest in the avoidance of sin[16], gradually transforming in mandatory contracts all consensual pacts which had not been previously endowed with legal force. In this context arose a new interest in the study of good faith and bad faith, understood mainly in connection with factual or legal mistake in regard to the deficiencies of title concerning adverse possession.

The final affirmation of the validity of consensual contracts in the 15th century gradually opened the way for an increased interest in studying the psychological and moral aspects of contract formation, the main focus being, up until the 19th century, on studying good faith and bad faith concerning possession and as a prerequisite for short term adverse possession.

Since the 19th century, there has been an increased preoccupation for studying good faith and bad faith as autonomous concepts from good faith possession, contractual bad faith being examined from the perspective of deceit, fraud[17], civil liability and later abuse of rights.

The contemporary view on contractual good faith and bad faith has been influenced by the decline of the theory of the autonomy of the will, by the affirmation of the theory of contractual solidarity[18] and the development of consumer law beginning with the latter half of the 20th century, the contractual bad faith going beyond the limited realm of deceit, fraud and abuse of rights, any breach of the duties of loyalty and cooperation mandated by the new theory of contractual solidarity being regarded as a manifestation of contractual bad faith, as well as any objective failure to comply with the obligations mandated for the professional by the overreaching consumer law.

The content of good faith and bad faith is defined in legal literature by enumerating more or less thoroughly the whole range of duties or obligations which the parties have to comply with: loyalty, cooperation , tolerance, coherence, patience, sincerity, honesty and perseverance.[19] The evolution of the legal approach to contractual good and bad faith in the last two and a half millennia is marked by a permanent interaction between law and the

1904, p. 132

[16] J. Wertheimer, *Des Avantages attribués à la bonne foi relativement aux biens en droit civil*, thèse pour le doctorat, Faculté de Droit de l'Université de Paris, Libraires-Éditeurs V. Giard & E. Brière, Paris, 1899, p. 23

[17] J. Bédarride, *Traité du dol et de la fraude en matière civile et commerciale,* 2e édition, Achille Makaire, imprimeur-éditeur, Aix , 1867

[18] L. Pop, *Tratat de drept civil. Obligaţiile, Vol. II. Contractul,* Ed. Universul Juridic, Bucureşti, 2009, p. 57-61

[19] P. Ancel, *Les sanctions du manquement à la bonne foi contractuelle en droit français à la lumière du droit québécois,* Revue Juridique Thémis (Québec), vol. 45, nr. 1/2011, p. 92

social or religious morals that have permeated it. The rigour and rigidity of purely legal concepts eventually gives way to social pressure. Legal norms are frequently a "snapshot" of the society's vision at the time of their enactment and therefore there is a need for flexible general concepts as good or bad faith, which can function as true "safety valves" that allow the synchronization between contract law and the evolution of morals and social-economic necessities. Modern scholarly codes like the Unidroit principles, the Principles of European Contract Law (P.E.C.L.) or the Draft Common Frame of Reference (D.C.F.R.) enact an objectively-tinted view of contractual good faith, closer now more than ever to the classical Roman view on *bona fides* or the German concept of *Treu und Glauben*.

III. The intertwined concepts of contractual good faith and bad faith in the new Romanian Civil code and comparative law

Good faith and bad faith in contracts have received an increased importance in our civil law system since the new Civil Code came into force on October 1st, 2011. In order for these principled statements from our freshly enacted code not to remain dead letter norms in a similar manner to the old rules of art. 970 al.1 C.civ. (1864), it is necessary to discern what these concepts could mean in contract law by examining law systems closely related to ours, like the French one or the Canadian civil law from Québec, as well as more distant law systems, like German civil law or the Anglo-saxon Common Law, the latter having thoroughly examined concepts which seem fundamentally alien, irritating or empty[20].

In defining bad faith in contract negotiation and performance, we can begin from the dual meaning of the complementary concept of good faith, which is seen either from an intellectual standpoint as an erroneous belief or a legitimate ignorance of a right or a fact (*croyance érronée, Guter glaube)*[21]*,* worthy of protection, or more often as a conduct requirement in the formation and performance of contracts (*Treu und Glauben),* the latter

[20] Relevant studies that announce a certain hostility towards the good faith principle: G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences,* Modern Law Review, vol. 61, nr. 1/1998; E.M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?,* Utah Law Review, nr. 1/2005

[21] Y. Picod, *L'exigence de bonne foi dans l'exécution du contrat,* p. 58 in *Le juge et l' éxecution du contrat,* Presses Universitaires d'Aix Marseille, 1993

allowing the insinuation of morality in contract law.[22]

No matter which perspective we choose to approach them, it is a widely renowned truth that any statutory enactment of fluid concepts like good faith and bad faith is a true delegation of normative powers to the judiciary.[23] Good and bad faith are used by the courts to attenuate the rigour of the statute, in a similar manner to concepts like urgency or force majeure. The legal system needs these "safety valves" to avoid the excesses of an overly thorough or technical rule, in order to maintain a just balance between legal truth and factual reality.[24]

Another problem that arose in regard to the two complementary concepts, good faith and bad faith, was whether they have any conceptual autonomy or one of them is a simple mirror image of the other[25], in other words if good faith is merely a lack of bad faith[26] or the autonomous concept is good faith and bad faith is broadly just a lack of good faith.[27] It has been told that the notion of bad faith is not even necessary to cover a distinct legal reality, the "shape-shifting" notions of good faith, deceit, intentional tort, fraud and abuse of rights being more than enough to express all the situations in which the law takes into consideration this kind of dishonesty.[28]

Although some authors deny the link between the legal concept of good faith (directly or by referring to good faith) and morals[29], proclaiming its purely psychological nature, others define the good faith/bad faith tandem from a purely moral point of view[30], deliberately ignoring at first its legal and psychological meanings. One of the few monographs that specifically deals with bad faith in civil law[31] tries to approach the

[22] Idem, p. 59
[23] M.A. Grégoire, *Économie subjective c. Utilité et intérêt du contrat – Réflexions sur les notions de liberté, de responsabilité et de commutativité contractuelles, à la suite de la codification du devoir de bonne foi,* La Revue juridique Thémis (Québec), vol. 44, nr. 1/2010, p. 37
[24] C. Gabet, *La vérité, l'apparence et la rétroactivité en matière immobilière* în *La verité - Rapport annuel 2004 de la Cour de Cassation,* La documentation Française, 2004, pp. 63-64
[25] G. Raoul-Corneil, *La mauvaise foi dans les relations de droit privé interne,* teză, Université de Caen-Basse Normandie, 2002, Biblioteca Cujas, p. 6
[26] For futher reading on excluder analysis R.S. Summers, *The conceptualisation of good faith in American contract law,* pp. 125-129 în R. Zimmermann, S. Whittaker (coordonatori), *Good Faith in European Contract Law,* Cambridge University Press, 2000
[27] G. Raoul-Cormeil, op. cit., pp. 6-7
[28] Idem, p. 8
[29] R. Vouin, *La bonne foi : Notion et rôle actuels en droit privé français*, Paris, L.G.D.J., 1939, p. 243-244
[30]C. Arthaud, *De la bonne foi et de ses effets en matière civile,* thèse pour le doctorat, Faculté de Droit de Paris, 1874, p. 1-2; J. Wertheimer, *Des Avantages attribués à la bonne foi relativement aux biens en droit civil*, thèse pour le doctorat, Faculté de Droit de l'Université de Paris, Libraires-Éditeurs V. Giard & E. Brière, Paris, 1899, pp. 1, 29
[31] G. Raoul-Cormeil, op. cit.

definition of bad faith from multiple angles, without ever reaching a synthetic conclusion. Bad faith is an expressive concept, but any of its expressions is constraining, insufficient or imprecise. Bad faith is a lack of sincerity, a gap between what is said and what is thought, fraud by omission, incoherence, infidelity, frequently escaping any rational analysis and being marked by subjectivity[32].

This paper, in trying to define bad faith, will unavoidably refer to good faith, the latter from a strictly contractual point of view, eliminating from the debate the good faith that comes from an erroneous belief (*guter Glaube, croyance eronée, pure heart and empty head*) which is more adequate in the context of real estate and possession.

From this multitude of divergent approaches to good faith and bad faith in contracts, we can at least agree that these two concepts should be analyzed as an unbreakable tandem, each one of them permanently referring to the complementary concept. In contract law, it is not admissible to analyze these two concepts as perfect opposites, because between them there is a gray area of lack of good faith, which is broader than bad faith. On the other hand, I cannot agree with the extreme views which deny any individuality to one of these two concepts, stating that any one of them can be defined solely as the opposite of the other, without any peculiarities. The notion of complementarity best defines the relationship between these two concepts, none of them being able to be fully understood and enforced without continuously looking at the other.

IV. Good and bad faith at the pre-contractual stage of negotiated contracts

The classical contract view almost totally ignored the very existence of a pre-contractual stage, contracts coming into being from "nothingness", by the sudden meeting of the minds, by directly sending a final, firm and precise offer which happily encountered an acceptance without reservations and thus gave birth without delay to the final contract.

Even if this view is not totally antiquated even today, specially in the context of everyday contracts[33], I believe there is a „pre-contractual" stage that is legally relevant, even beyond the defects of consent, which are traditionally analyzed as pre-contractual but

[32] Idem, p. 5
[33] F. Terré, P. Simler, Y. Lequette, *Droit civil. Les obligations,* 6e édition, Ed. Dalloz, Paris, 1996, p. 142

which give rise to legal effects only if the final contract is concluded.

Any chronological examination of the manifestations and effects of contractual good faith and bad faith should begin with what I call "the pre-contractual stage"[34]. This stage can apparently be totally absent or have a very brief duration for the numerical majority of contracts, especially those of little value, but it can also enjoy an extensive contractual or statutory provision and a long duration, on the order of months and years, for contracts that implicate high monetary values.[35]

Although "pre-contractual" in relation to the main contract that will be concluded, this stage can include proper contracts, which either regulate by the parties' own will and in detail the way in which the negotiations and other preparations will take place (negotiation contracts), either establish the points upon which an agreement has been reached (preliminary agreements) or they anticipate the conclusion of the main contract (preparatory contracts)[36].

In most cases, the pre-contractual stage is not conventionally regulated, and the majority of the examined law systems treat the manifestations of bad faith at this stage not as a contract breach but according to the common rules of tort liability[37], any action that has caused damages to another engendering tort liability, even for the slightest negligence, according to art. 1.357 al. 2 NCC or art. 998-999 C.civ. (1864).

Even in the phase of pre-contractual negotiations, before the formation of any contract, the negotiating parties must have a loyal attitude, especially when negotiations are interrupted and abuse may arise[38], but also during negotiations, when they have to abide to a general duty of good faith, divided into a series of specific obligations: information, counseling, confidentiality, seriousness.

The good faith obligation is mandatory during all stages of contractual life, including during its formation, every party having to act in a reasonable manner in exercising their right to reach an agreement and not abuse this right. When the parties are

[34] I. Albu, *Răspunderea civilă precontractuală,* Dreptul, nr. 7/1993, p. 39-45

[35]L.Pop, *Despre negocierile precontractuale şi contractele preparatorii,* Revista română de drept privat nr. 4/2008, p. 96; J. Schmidt-Szalewski, *La période précontractuelle en droit français,* Revue Internationale de Droit Comparé, vol. 42, nr. 2/1990, p. 545; F. Terré, P. Simmler, Y. Lequette, op. cit., p. 143; L. Péloquin, C.K. Assié, *Droit contractuel – La lettre d'intention,* Revue juridique Thémis, vol. 40, nr. 1/2006, p. 175

[36]J.M. Mousseron, M. Guibal, D. Mainguy, *L'avant-contrat,* Ed. Francis Lefebvre, Paris, 2001, p. 33

[37] L. Pop, *Despre negocierile precontractuale şi contractele preparatorii,* Revista română de drept privat nr. 4/2008, p. 101; B. Lefebvre, *La bonne foi dans la formation du contrat*, Les Éditions Yvon Blais Inc., Cowansville (Québec, Canada), 1998, p. 149; L. Péloquin, C.K. Assié, loc. cit., pp. 191-192

[38] R. Loir, *Les fondements de l'exigence de bonne foi en droit français des contrats,* Mémoire DEA droit des contrats sous la direction de Christophe Jamin, Université de Lille II, 2001-2002, p. 8

unequal in their ability to protect their own interest in negotiating the contract, the party with a superior bargaining power must use this superiority in a way that objectively respects the rights and interests of its partner, as required by good faith, which means that drafting the contract must be done with the concern not to prejudice the other contracting party.[39]

The moralizing tendency of the law in the last few decades, also manifested in Romania under the influence of European law systems, led to establishing a series of duties for the parties to a future contract, duties that include the duty to inform[40], to self-inform, confidentiality, counseling, loyalty[41] and cooperation.

At the pre-contractual stage, two apparently contradictory principles are manifest: freedom of contract and good faith[42], principles which the French case law joined together to mean that every negotiating party is free to interrupt negotiations, but they will be liable when negotiations are intrerrupted in an abusive manner, meaning that one of the negotiators acts in bad faith or even with reckless disregard during the negotiations.[43]

In regard to the effects of pre-contractual bad faith, the new Civil code does not bring any change of vision as compared to the old Civil code of 1864. The latter also considered voidable an act which had been passed by intentionally deceiving the future contract partner (art. 960) and any illegal deed which had caused damages led to civil liability, no matter the form of guilt (art. 998-999), even if it was a pre-contractual illegal act. The only difficulty was in establishing the illicit character of acts from the pre-contractual stage, because there was no explicit enactment of a pre-contractual duty of good faith. In the case of contractual liability for not fulfilling the obligations from preliminary agreements, the debtor's bad faith aggravated his liability, extending it to unpredictable damages (art. 1185).

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[39] M. A. Grégoire, loc. cit. 2010, pp. 38-39

[40] D. Chirică, *Obligaţia de informare şi efectele ei în faza precontractuală a vânzării-cumpărării*, Revista de drept comercial nr. 7-8/1999, p. 50-58; M.-D. Bocşan, *Consideraţii asupra dolului în materie de liberalităţi,* Dreptul nr. 7/2001, p. 82; I.-F. Popa în L. Pop, I.Fl. Popa, S.I. Vidu, op. cit., p. 93-94; A.-A. Moise în Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole,* Ed. C.H. Beck, Bucureşti, 2012, p. 1223

[41] L. Pop, I. Turcu, *Contractele comerciale. Formare şi executare,* vol. 1, op. cit., pp. 65-71

[42] L. Pop, *Despre negocierile precontractuale şi contractele preparatorii,* Revista română de drept privat nr. 4/2008, p. 99; F. Terré, P. Simler; Y. Lequette, op. cit., p. 143

[43] F. Terré, P. Sumler, Y. Lequette, op. cit., p. 143

V. Good and bad faith in contract performance

The existence of a good faith obligation in contract performance enjoyed a specific provision since the beginning of modern civil law, reflected both in art. 970 al. 1 C.civ. (1864), as well as in art. 1134 al. 3 C.civ.fr. This provision was "emptied" of any meaning in classical legal literature, because it was seen either as a late and clarifying reaction to the old-fashioned Roman distinction between strict law contracts and good faith contracts, establishing that all civil contracts are good faith contracts[44], either as a particular effect of the principle *pacta sunt servanda* from art. 969 C.civ. (1864) and art. 1134 al. 1 C.civ. fr., meaning that the parties and especially the debtor must fulfill their obligations as they were agreed. The Romanian case law examined good faith mainly in regard to real estate and possession[45], its capabilities in regard to contract performance having been only marginally noted.

Good faith and bad faith work as true "safety valves" of contract law also at the stage of contract performance. Even if the flexibility and omnipresence of these morally-tinted concepts has been often criticized, promoting their replacement with more precise notions like reasonableness[46], abuse of rights[47], loyalty[48], coherence[49], I believe that none of the alternatives has the range and versatility of these concepts, their moral tint being sometimes just an illusion, but this appearance offers them an increased legitimacy to embed in law and tradition the various scholarly and case law innovations.

Good and bad faith always begin with a moral and equitable view on contracts, the excesses of contractual solidarity and altruism being compensated by the economic and utilitarian tint which these two inseparable concepts have gained in the latter half of the 20th century. Under the influence of utilitarian philosophical trends and the North American school of Law and Economics, these traditional and multi-millenial concepts have been

[44] J.P. Chazal, *De la puissance économique en droit des obligations*, teză, Université Pierre Mendes - Grenoble II, 1996, disponibilă la http://spire.sciencespo.fr/hdl:/2441/5l6uh8ogmqildh09h80cg0932/resources/these-jean-pascal-chazal.pdf, p. 502

[45] N.E. Grigoraş, *Buna-credinţă. Practică judiciară*, Vol. I, Ed. Hamangiu, Bucureşti, 2007

[46] H. Ramparany-Ravololomiarana, *Le raisonnable en droit des contrats,* L.G.D.J., Paris, 2009

[47] P. Stoffel-Munck, *L'abus dans le contrat – Essai d'une théorie,* L.G.D.J., Paris, 2000

[48] Y. Picod, *Le devoir de loyauté dans l'exécution du contrat,* L.G.D.J., Paris, 1989

[49] D. Houtcieff, *Le principe de cohérence en matière contractuelle,* Thèse, Université de Paris XI, 2000, Biblioteca Cujas; D. Houtcieff, *L'importance d'être constant: vers une consécration du principe de cohérence,* Recueil Dalloz, nr. 29/2009, pp. 2008-2009

"reevaluated" as quasi-objective landmarks of the contractual relationship, the relational and non-antagonistic view of contracts being closer to economic reality, where long-term and perpetuating contracts abound.[50]

In analyzing the effects that good faith and bad faith have on contract performance, I can identify at least three traps: the altruism trap ("contractual brotherhood"[51], "the contract as a micro-universe"[52]), the cynicism trap (good faith is an empty notion[53]) or the formality trap (good faith and bad faith are only moral and subjective contracts, which unfortunately overlap and sometimes even obstruct the action of better established and much more precise institutions: abuse of rights[54], reasonableness[55], loyalty[56]).

In the classical analysis of the Napoleonic Civil code and its derivatives, good and bad faith in contract performance referred only to the debtor's behaviour, who was called upon by the principle *pacta sunt servanda* to honour his word and fulfill exactly his obligations, good faith helping to solve the dilemma if a specific contract performance had been truly adequate and useful or if the debtor had acted in bad faith or at least with a lack of good faith. The modern view extends to the creditor the duty of good faith and the duty to avoid any bad faith behaviour, because in bilateral contracts he is also a debtor and also because he could be endowed with discretionary rights or simple factual opportunities to influence the way in which the other party performs his obligations, thus being able to hinder or facilitate performance, or he could avail himself of unilateral rights for contract termination.

VI. General conclusions

Good and bad faith are everlasting but not very rigid concepts in contract law, their

[50] A se vedea J.J. White, *Good Faith and the Cooperative Antagonist (Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code),* Southern Methodist University Law Review, vol. 54, nr. 2/2001, pp. 683-684, 690-695
[51] C. Thiebierge-Guelfucci, *Libres propos sur la transformation du droit des contrats*, RTD Civ nr. 2/1997, n. 31-32, p. 357
[52] R. Demogue, *Traité des obligations en général*, t. VI, Librairie Arthur Rousseau, Paris, 1932, p. 9
[53] E.M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?,* Utah Law Review, nr. 1/2005; M.W. Hesselink, *The New European Private Law, Essays on the Future of Private Law in Europe,* Kluwer Law International, The Hague, London, Boston, 2002, pp. 193-223
[54] P. Stoffel-Munck, op. cit. supra
[55] H. Ramparany-Ravololomiarana, op. cit. supra
[56] Y. Picod, op. cit. supra

importance having oscillated along the centuries from essential principles of contract law to mere marginal rules of interpretation, without any specific meaning. Their power and fascination come exactly from their inner flexibility, which has allowed them to fulfill in different civilizations the role of contractual “safety valves” that admitted the ever-changing morals of the society at large to permeate the parties' agreement and the default rules.

The two concepts are not perfect opposites and the circular definitions that good faith means behaviour devoid of bad faith or that bad faith is a lack of good faith must be rejected because they tend to over-simplify a complementary conceptual tandem. The two concepts have a common source, initially in religious morality and afterward in the lay morality of society, their roles and dimensions being in a tight bond that must not lead to confusion.

In a principled civil law system like ours, both under the Civil code of 1864 and the new Civil code which came into force on October 1st 2011, the recourse to this type of general concepts with a moral overtone is unavoidable. The main merit of the conceptual tandem to which this paper is dedicated is that it represents an over 2000-year-tradition, where its deeper meanings have been thoroughly explored by a hundred generations of lawyers and scholars on several continents, from all possible angles, from the religious to the purely economical, passing through the moral perspective and equity (*ius est ars boni et aequi*).

Good faith and bad faith in contracts are concepts with the role of "safety valves", that fill the unavoidable gaps in statutes which come from their inescapable abstract and incomplete character as compared to the variety of private law disputes, complete the contracts that were stigmatized by the economic analysis of law as being intrinsically incomplete in relation to real-life situations, attenuate conflicts especially when the legal or contractual *ad litteram* solutions violently collide with the society's need for equity, good faith being called the "drop of social oil"[57] which insures the functionality of private law and its adaptability to new challenges.

Any rule that specifies the vague and flexible principle of good faith will gradually gain autonomy from the original concept and eventually separate itself from its source. A specific rule developed on the foundation of good faith in order to compel a party to take

[57] M. Auer, *The Structure of Good Faith - A Comparative Study of Good Faith Arguments,* 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=945594, p. 25

into account the other party's interests will have at some point to be corrected on the basis of the same good faith principle, compelling the second party whose interests had been taken into consideration to return the favor to the first party. Historically, the initial role of good faith was to compel parties on the basis of informal contracts, even without consideration, to prioritize the meaning given by the parties to the contract over its literal meaning, to promote substantial equity over the parties' agreement.[58]

Good faith in contract law generally has three dimensions: the substantial dimension of defining obligations in contractual ethics, the formal dimension of good faith as a flexible standard, the institutional dimension of allowing the judge to create law on the basis of open standards. These three dimensions of good faith can be named differently, the substantial dimension being replaceable with the obligation to cooperate, the formal dimension being replaceable with reasonable expectations and the institutional dimension being replaceable with equity. The contradictions appear between an individualistic ethic, that promotes freedom of contract, and the altruistic preoccupation for the fate of the other, between the danger of judicial arbitrariness and the need for jurisdictional flexibility to promote equity, between the legitimacy of judge-made norms and forbidding the judge to make new law.[59]

There is a tendency to restrict the meaning of contractual good faith only to its substantial dimension and transform it into an ethical concept, expressing a rule of altruistic morality. The content of good faith would thus gain a traditional subjective tint, which narrows good faith to the absence of bad faith as malice (*animus nocendi*), but this view is in favor of restricting the use of good faith by the courts.[60]

Another limiting tendency affirms that good faith has no substantial meaning, that there is no inner logic to the so-called rules of good faith and and that any rule of law could be based on this principle. Under the cover of good faith there is the sum of all corrections made to previous case law by the courts, whatever their specific content. The only role of a good faith provision is to remind all that courts do make law.[61]

Good faith and bad faith in contracts can be used both from a moral/equitable perspective as well as a utilitarian and economic one, reaching in the end, on different

[58] M.E. Storme, *Good Faith and the Contents of Contracts in European Private Law*, Electronic Journal of Comparative Law, vol. 1, nr. 7/2003, pp.3-4
[59] Idem, pp. 1-2
[60] J.J. White, R.S. Summers, op. cit., pp. 11-13
[61] M.W. Hesselink, op. cit., pp. 208-220

roads but with the same conceptual tandem as a guide, the same final goal of contracts, which can only be a positive one from a social and economic standpoint: maximizing usefulness for every individual participating in contracts and, indirectly, for society at large.

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