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The Principle of Good Faith in Italy and in China

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ABSTRACT

The object of this dissertation is the analysis of the principle of good faith in general and of its application in Italian and in Chinese jurisprudence in particular.

In the first chapter I started introducing a definition of the principle in general and according to the Italian legal system. I made a brief historical excursus of the principle of good faith, describing the distinction between subjective and objective good faith and its expanding process in Italy from 1865 to the contemporary legal system. I underlined the differences of the conception of the principle of good faith within common and civil law countries and analyzed its application in contracts, including all the stages of life of the contract, its formation, execution, modification, annulment or termination. In the second chapter I analyzed the notion of good faith in China, its introduction and development. I started analyzing the introduction of the general clause of good faith in China and how this principle has changed in Chinese perception becoming more and more important and widespread so that, since 1990s, has been defined as the "queen of the general clauses" (帝王 条款 diwangtiaokuan). Then I described the development in China of Contract Law and the importance of good faith according to this new law and its applications in contracts.

In the last chapter I decided to make concrete examples of the violation of the principle of good faith analyzing different cases of non-fulfilment of duties of the parties within Chinese contracts.

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论文导论:

我选择诚实信用作为我论文的主题。诚实信用是民法的基本原则之一。诚实信用是民法的基本原则之一。它是正义理念在民法的具体化,是在遵守交易道德基础上谋求当事人之间的利益平衡,以及当事人与社会的利益平衡。《中华人民共和国民事诉讼法》规定,民事诉讼应当遵循诚实信用原则。

首先,我分析了诚实信用在意大利的内涵。在论文的第一章我阐释了诚实信用在意大利民法典中的定义,包括它的历史渊源以及多年来此概念的演变。我分析了诚实信用在意大利法律与其他法律有什么区别,特别是英美法系(普通法,common law)与大陆法系(民法, civil law)的诚信。诚实信用是民法中的帝王条款,直接代表了民法的价值追求和社会正义;该原则包含了其他的民法原则,甚至被认为是一些大陆法系国家的唯一原则;它孕育了民法的基本制度;它使民法富有弹性,通过诚实信用原则,法官获得较多的自由裁量权。然后,我阐释了诚实信用的适用范围与应用。

诚实信用的适用范围逐步扩大,不仅适用于契约的订立、履行和解释,而且最终扩及于一切权利的行使和一切义务的履行,成为民法的基本原则。诚实信用的实质,是将道德规范与法律规范合为一体,兼有法律调节和道德调节的双重功能,使法律条文具有极大的弹性,法院因而享有较大的裁量权,能够据以排除当事人的意思自治,而直接调整当事人之间的权利义务关系。

诚信原则在司法领域中的应用向来是学界研究的重点之一。学界一般认为,诚信原则意味着承认司法活动的创造性与能动性,意味着承认法官的自由裁量权。在第一章的结尾部分,我还分析了国际贸易法中的诚实信用原则。特别是诚实信用在商人法(lex mercatoria)和国际统一私法协会国际商事合同通则(也被称

为通则,Unidroit Principles)之间的应用。商人法是国际商事交易中普遍适用的体现在国际立法和国内立法中的当事人意思自治、诚实信用原则和守法原则等基本原则和体现这些基本原则的各项有关行为规则的总称。

在第二章,我分析了诚信原则在中国的引入以及此原则的进化。诚实信用原则 在中国很近。中国法学家区分"善意",也称为主观诚信,和诚实信用,也就是客 观诚信。

关于诚信原则的内涵,主要有以下四种学说:

- 1、一般条款说。该说认为诚信原则乃外延不确定的但具有强制力的一般条款。其作为一般条款来指导当事人正确进行民事活动,来授予法官<u>自由裁量权</u>以填补法律空白。
- 2、双重功能说。其认为,究其本质,<u>诚实信用原则</u>,由于将道德规范与法律规范合为一体,兼具有法律调节和道德调节的双重功能,使法律条文具有极大的弹性,法院因而享有较大的裁量权,能够据以排除当事人的<u>意思自治</u>,而直接调整当事人间的权利义务关系。也就是说诚信原则具有<u>法律调整</u>和道德调整的双重功能。
- 3、利益平衡说。徐国栋先生认为,诚信原则要求民事主体当以善意心理状态从事民事活动,行使民事权利,履行民事义务。在进行民事活动,履行民事义务时,既要维系各方当事人的利益平衡,还要维系当事人利益和社会利益的平衡。即诚信原则谋求的是民事活动中当事人之间及当事人与社会之间利益的平衡。而这三方利益平衡的实现,有赖于人们以诚实之心理善意的行使权利,履行义务,并通过法官之公正的创造性的司法来最终加以维护。
- 4、语义说。其认为诚信原则是对民事活动参加者不进行任何欺诈,恪守信用的要求。

亦有人认为还有"衡平说"一说。

因此,"诚信"是一种新的表达方式,它被引入到汉语词汇中,使用的是迄今 为止与西方概念不同的概念和原则。在中国古代典籍中,早就出现了"诚信" 一词。《商君书•靳书》把诚信与礼乐、诗书、修善、孝弟、贞廉、仁义、非兵、羞战并称为"六虱"。

诚信的概念进入中国的确切时间尚不能确定,但可以肯定的是,它并没有包括在清王朝最后一段时期的民法典草案中,只有在 1931 年,随着艺术的引进。 219 民国民法(中华民国中华民国民法闽发),诚信的理念在中国首次出现。 在第二章我也分析了中国合同,中国新的合同法以及其中的诚实信用原则。 诚信原则在合同的每一个阶段都是非常重要的:在合同的形成过程中,它的执行和终止。

然后我解释了中国的新五大原则,也就是平等原则,自愿原则,等价有偿原则, 诚实信用原则,公平原则。

在第三章我继续研究分析了一些案例以便更好地理解此原则的应用。 我分析了 在合同执行中的诚实信用,签订合同以后的诚实信用以及诚实信用作为道德准 则的情形。

最后我翻译了一个设计商标权和财产权的诚实信用案例研究。

总之,关于诚实信用作为一般的条款,我们可以理解的是,虽然诚实信用没有一个明确的定义,可是这个原则在国际贸易法中是非常重要的。这是因为它是每个人必须承担的道德义务,以便更好地履行其义务。

为了更好理解诚实信用的重要,我想在结尾引用新民法五大原则的诚实信用的定义,即:将真实情况告知对方,禁止隐瞒或欺骗诚实信用。恪守信用,认真履行民事义务,发生损害时双方当事人都应当采取补救措施,避免或减少给对方造成的损失。诚实信用原则,将最低限度的道德要求上升为法律要求,要求处于法律上特殊联系的民事主体应忠诚、守信,做到谨慎维护对方的利益、满足对方的正当期待、给对方提供必要的信息等,以谋求个人利益与社会公共利益的和谐。因为现代社会日益成为一个商业社会,维持有效率又安全的市场环境必须要靠不同主体之间建立充分的信赖。《民法通则》第 4 条规定,民事活动应当遵循诚实信用原则。将诚实信用原则规定为民法的一项基本原则,在法律上号称"帝王条款",具有适用于全部民法领域的效力,对当事人的民事活

动起着指导作用,确立了当事人以善意方式行使权利、履行义务的行为规则,如果当事人行使权利违背诚实信用原则的要求,即构成权利的滥用。

CHAPTER 1. GOOD FAITH WITHIN ITALIAN JURISPRUDENCE AND INTERNATIONAL PRACTICE

1.1 Introduction to the principle of good faith.

The concept of good faith, that is readily accepted in almost every legal system, has always been difficult to define and its function, as well as the other ideas of justice and equity that are always present in contracts, is to provide a correct attitude in some situations in which the application of law has undesirable results. The good faith doctrine, for example, can be useful for the decision-maker to arrive to a conclusion on difficult issues where other solutions can also be possible. In other cases this principle is used as a justification to a conclusion taken to solve difficult or conflict issues. In other words, law has principles and values that emerge over its rules to ensure that the application of such rules would not lead to unfair results. A legal system can operate only when there are such clauses, as the good faith notion, that impose specific values on international actors and ensure internal coherence and consistency in the law itself.

Since the principle of good faith provides values which are normative in international law, it is really useful and can provide guidance in some contested areas of international law such as, for example, the international law on foreign investments. Anyway, sometimes this principle gives only a minimal aid in controversies, but generally speaking, in the context of general law, good faith is relevant because it can have a role in law that can be defined harmonizing.

In contract law the principle of good faith is very important because it represents the presumption that the parties to a contract will deal with each other honestly, fairly and so in good faith. This means that the other party (or parties) has the right to receive the benefits of the contract.

The formation of a contract passes through different phases: negotiation, drafting, execution or entry into force, performance and enforcement. The first phase, negotiation, is the one in which the parties discuss and agree upon the content of the contract (for example price, conditions, rights, obligations). It is a pre-contractual phase and the principle of good faith stays at the very basis of this

phase. During the negotiation phase there is no contract yet and there are no obligation between the parties, but there are some business moral obligation and the most important is the duty of negotiate in good faith.

In civil law countries, in Roman-German tradition countries (Europe, but also China, Japan and all the countries which are not under the British tradition) the principle of good faith is very strong. The parties are really presumed to be in good faith, every act against good faith requires the payment of the damages. Common law countries are more restrictive, in British countries even more than in the USA. In those countries the parties have no obligation and are free to interrupt the negotiation and to carry on, for example a negotiation with a third part until the contract is concluded and has been signed. Article 2.1.15 of the Unidroit Principles states that at first a party is free to negotiate and is no liable for failure to reach an agreement; however a party who negotiate in bad faith is liable for the losses caused to the other parties and it is bad faith for a party to enter into or continue a negotiation when intending not to reach an agreement with the other party.

Good faith can be relevant during the procedural and jurisdictional phases of arbitration in international investment law because the identification of the standing of the claimant is one of the most pressing problems in what concerns with investment arbitration. In this case good faith is relevant in a particular situation, that is when there is clear dishonesty in the use of some legal doctrines in establishing jurisdiction.

Transparency and other values between the parties are essential in reaching these goals and the establishing of rules that are able to ensure such a favourable climate between the parties are really important, and for this reason almost every country has tested their rules on the basis of whether they were including principles such as equity and good faith within their legal systems.

Some critics disapprove on the fact that usually arbitrators are keen on favouring business over the public interest in the host country in order to build some standards of transnational governance in the host state and justice becomes a secondary task. In these cases good faith can be a corrective means to solve this pro-business award attitude of arbitrators, but there still are critics that say that sometimes good faith can be manipulated in their favour.

The principle of good faith is so important because it permeates every legal relationship, both international and domestic. It is important for a peaceful coexistence of individuals and nations, because without good faith international relations are doomed to fail. In this new economic world that is constantly expanding, good faith can be considered also as a means of ensuring a higher degree of cooperation between the international actors involved. In the international disputes settlement plays the role of a facilitating agent:

"it helps, on the one hand, to infuse predictability and reasonableness into state behaviour, furthers due process, and serves as an interpretative tool for international courts and tribunals, while on the other hand it restrains legal formalism and arbitrariness."

The good faith principle is of course an important tool among the international legal principle, but is also an abstract notion, difficult to define.

"There is little doubt that the principle of good faith can be considered both a general principle of law within the meaning of article 38(1)(c) of the Statute of the International Court of Justice (ICJ) and a general principle of international law." ²

The difficulty lies not on the definition of this principle, but in giving shape to this concept. At first is important to distinguish between the legal and the extra-legal nature of good faith, that can be seen as the distinction between the political and moral nature of good faith.

"As for the legal notion of good faith, scholars agree that in the absence of further particularization the principle remains an abstract and value-oriented notion that combines moral elements such as trust, honesty, fairness, loyalty or reasonableness with 'more precise legal contents, eg the principle of reciprocity [or] the objective and purpose-oriented method of interpretation'. As long as it is not further particularized and thus rendered operational, its potential vagueness risks exposing the deciding tribunal to accusations of 'judicial activism'."³

"Good faith plays ... a role in international law comparable to that of a catalyst in a chemical reaction. Alone, the catalyst is completely passive. It must be added to other elements for a reaction to occur; without it, nothing will happen, even if all the necessary components are present in sufficient quantities. It is a bit the same with good faith ... It is always related to specific behaviour or declarations and it invests them with legal significance and legal effects ..."⁴

As emerges from this last note the principle of good faith is essential in the international legal panorama and in treaty relations from their beginning to their extinction, because the parties are somehow obliged to perform their duties in good faith, to negotiate and settle contract in good faith and abstain from pursuing their own objectives without thinking about the other party's ones.

The good faith principle is as general principle of law and of international law and it plays an important role in international treaty relations. Its concretization represents the essence of the "pacta sunt servanda" of the civil code, this expression, as estoppels, equity and abuse of rights, are really significant in the international adjudication. That has been declared during the Vienna

¹ Andrew D Mitchell, M Sornarajah, and Tania Voon, *Good faith and International economic law*, Oxford University Press, 2015, p. 9

² Andrew D Mitchell, M Sornarajah, and Tania Voon, *Good faith and International economic law*, Oxford University Press, 2015, p. 10

³ Andrew D Mitchell, M Sornarajah, and Tania Voon, Good faith and International economic law, Oxford University Press, 2015, p. 11

⁴ Michel Virally, 'Notes and Comments: Review Essay: Good Faith in Public International Law' American Society of International Law, 1983, 77 AJIL 130, 133.

convention on the law of contracts of 1969. In articles number 26 and 31 it states that the parties have the duty to perform the contract in good faith, but also the fact that the principles of good faith and pacta sunt servanda are universally recognized. The globalization process has increased the attention of the countries on the formation and application of contracts. As the international legal system is expanding continuously, countries must observe some standards as the good faith principle that is affirmed by courts as a principle of international law. Many countries have conformed their legal system on the good faith standards and also have tried to include them as constitutional rules (as in Japanese Constitution).

"The principle of good faith thus conceived finds manifestation in related principles or concepts such as legitimate expectations, pacta sunt servanda, estoppel, acquiescence, equity, abus de droit and others, some of which may overlap with codified expressions and/or mutually reinforce each other. Some of these principles or concepts are sometimes considered to have further manifestations, most often in procedural terms, such as the abuse of process doctrine with respect to the prohibition of abus de droit, the procedural estoppel (venire contra factum proprium) with respect to the principle of estoppel, the clean hands doctrine, etc." 5

Within international law, the task of the principle of good faith is to fill the gaps of treaty rules, because this principle has a law-making effect and it can be applied as a norm and has an independent normative basis. This, however, does not help on clarifying and determining the normative content of good faith.

"In other words, the normative classification of good faith does not help in identifying the precise content of an independent good faith obligation, which a state would have to respect under given circumstances. This content would depend on both the substantive obligations under interpretation—the applicable law—and the interpreting tribunal's mandate or its jurisdictional limitations. In particular, the latter would seem to explain the conservative position of most tribunals towards a normative autonomy of the principle of good faith, seeking to attach specific good faith content only to treaty-based obligations or one of the principle's particularizations. Thus, the gap-filling function (and thus law-making effect) that the principle of good faith has in theory remains in practice negligible." 6

The opposite to the concept of good faith is the one of bad faith or *mala fides*. As its opposite, the concept of bad faith has not been defined properly and it is not applied in an univocal way.

Within its doctrinal jurisprudential applications it is worthy to pay attention to the theory according to which bad faith is related to rationality in reasoning. The rationality, within the scientific reasoning, proceeds according to concepts which are basically univocal, linked to some criteria of coherence and/or of empiric verification. Vice versa, a decision in bad faith take into consideration different

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⁵Markus Kotzur, 'Good Faith' (Bona fide) in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (OUP), www.mpeil.com, Robert Kolb, 'General Principles', La Bonne Foi en Droit International Public, Presses Universitaires de France, 2000

⁶ Andrew D Mitchell, M Sornarajah, and Tania Voon, *Good faith and International economic law*, Oxford University Press, 2015, p. 15

factors from the ones that are logically relevant, without considering arguments that can demonstrate the mistake of one action or of one position.

The concept of bad faith includes a mental attitude assumed in actions or positions in which we can find a trick, ambiguity, falseness, dishonesty, in addition to irrationality and free will, as it is well mentioned in an enouncement of a Canadian courts:

"Good faith and its opposite, bad faith, imports a subjective state of mind, the former motivate by 'honesty of purpose' and the latter by ill-will"

And of an arbitrator:

"Bad faith has its core in malice and ill will, at least touches, if not wholly embraces, the related concepts of unreasonableness, discrimination and arbitrariness".8

1.2 A brief historical excursus of the concept of good faith.

The theme of the general clauses and, in particular, the one of good faith, is subject of a huge debate in the experience of the various continental orders. Over the centuries, also following the historical and political events and the evolution of European cultures, the legal role and the social function attributed to the general clauses have changed over time, they have been transformed, expanded, developed in relation with the variable necessities of law. The general clauses are particular norms, also called "white norms", because they are distinguished by their generic and elastic expression that allows the judge to interpret the principle underlying law in an evolutionary way. They constitute a legislative instrument that allows the organization to evolve and adapt to the needs of society, through a jurisprudential activity of self-integration of some regulatory gaps.

http://www.duhaime.org/LegalDictionary/B/BadFaith.aspx

⁷Collins v. Transport & Allied Worker's Union, Duhaime Legal Dictionary, *Bad Faith Definition*, 1991

⁸ Re Alcan Wire & Cable and U.S.W.A., cit. *ante* note n. 8, See also McKinnon v. Ontario (Ministry of Correctional Services) January 30, 2007. In the doctrine cf., D. A. LUBLIN, *Wrongful Dismissal - Bad Faith Damages in Canadian Employment Law, Honda Canada Inc v. Keays, in 59 University of New Brunswick Law Journal*, 2009, p. 153-165

Thanks to the use of those tools it is possible to implement a fitting between positive norm and ethical and social values; thanks to the elastic nature of the general clauses, these values inspire directly certain legal models, permanently incorporated in the regulatory system.

"Le clausole generali costituiscono particolari norme, dette anche "norme in bianco", che si caratterizzano per la loro espressione generica, vaga, elastica che permette al giudice di interpretare i principi sottesi al diritto in chiave evolutiva. Esse costituiscono uno strumento legislativo che permette all'ordinamento di evolvere e di adeguarsi alle esigenze della società, attraverso un'attività giurisprudenziale di autointegrazione di alcune lacune normative, per loro natura strutturali. Grazie all'utilizzo di tali strumenti tecnico-concettuali è possibile attuare un raccordo, ovvero un contemperamento, tra norma positiva e valori etico-sociali; infatti, grazie alla natura elastica delle clausole generali, tali valori ispirano direttamente determinati modelli giuridici, permanentemente recepiti nel sistema normativo."9

The general clause is conceived and used in a different way depending on whether we are in a civil law or common law system. In the civil law regulations, the general clauses constitute a true, somewhat recurrent legislative technique, used to improve the operational capabilities of the other rules and to give greater elasticity to the structure of codification.

In these systems, the general clauses identify general guidelines through which the lawyer can regulate, in accordance with the rules, the relations between individuals by resorting to elastic and dynamic concepts capable of supporting the evolutionary nature of law.

Despite the structural and functional diversity that characterize the general clauses in the individual legal systems, it is possible to find a common concern in the various legal systems, as opposed to the interpretative and applicative issues arising from these legislative instruments; the use of general clauses, in fact, raises interpretative problems of not easy solution.

Expressions such as "good faith," "correctness," "diligence" appear, in some ways, so generically and vaguely formulated that they may become abstract statements in some instances without any practical remarks.

The greatest danger is represented by a certain degree of indeterminacy in the content of such clauses, which, in some cases, conditions the definition of the relevant boundaries of application.

Among the general clauses, the good faith has a peculiar role, since it represents a conceptual and technical tool conceived by the theory and the practise of various ordinances, so that it goes through all the field of the fundamental institutes of civil law and in particular the area of contracts. The good faith cannot be reduced to a single formula that includes all its multiple aspects; in addition to these qualification difficulties, what is much more relevant is the issue of specifying its application modes.

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⁹Ivana Musio, *Breve analisi comparata sulla clausola generale della Buona Fede*, 2010, p. 1 http://www.comparazionedirittocivile.it/prova/files/ncr musio buonafede.pdf>

Good faith is a notion that has experienced periods of minor or greater importance in the various legal systems, depending on the historical and cultural period, but in the course of the centuries has enjoyed a constant and growing interest in jurisprudence. Good faith (bona fides) is born with Roman law, which essentially recognized two application areas: on the one hand, that of real rights, in which it is defined as a good subjective faith, or the psychological state of the subject, its belief that it will not violate any right; on the other hand, that of contracts, in which it becomes a good objective belief, that is, the obligation of conduct for contractors, beyond the obligation to comply, according to general standards of fairness and loyalty. With the evolution of Roman society from an agricultural society into a commercial society, the focus of the law shifted from the real right to contractual law, by sanctioning a greater applicability of the good faith belief that is still fomenting doctrinal and jurisprudential elaborations.

Bona fides, meant in the sense of good faith, was born on the basis of the relationship between ius civile and ius honorarium, with the affirmation of c.d. iudicia bonae fidei which were judgments made up of Roman praetors in substitution and as an alternative to typical civil law proceedings. These judgments deeply changed the Roman law of contracts by introducing superior protection based on socially recognized needs. The bona fidei iudici allowed us to take into account ethical and social values, by introducing rules of fairness which, for the first time, enjoyed procedural defence. While it is difficult to accurately trace back to the historical period in which the concept of bona fides has been consolidated through bona fidei iudici (according to some scholars already in the third century BC, according to others still at the beginning of the first century BC it was not yet clearly outlined), most authors agree on its origins, that of the discipline of commercial trade between Roman citizens and foreign merchants.

After its appearance, and up to the 6th century BC, the scope of the bona fidei actio expanded more and more, mainly through the introduction of a clear distinction between the obligation to perform and the parties' obligations to behave.

Bona fides, as a rule of mere respect for the word given, became a true rule of compulsory relationship, assuming the stand as an autonomous source of the bond, distinct from the old ius civil. In the medieval age, the bona fides acquired new vigor; in fact, during the period of the "Intermediate law", it was not only recognized legally, but also assumed a more complex and important role.

"La bona fides, intesa nel senso di buona fede oggettiva, nasceva sulla base del rapporto di connessione tra ius civile e ius honorarium, con l'affermarsi dei c.d. iudicia bonae fidei che erano giudizi costituiti dai pretori romani in sostituzione ed in alternativa ai tipici procedimenti di diritto civile. Tali giudizi modificavano profondamente il diritto romano dei contratti, introducendo una superiore tutela basata su esigenze socialmente riconosciute, a prescindere dagli elementi sostanziali e

formali tipici dello ius civile. Di fatto, i iudicia bona fidei permettevano di tenere conto di valori etici e sociali, attraverso l'introduzione di regole di correttezza che godevano, per la prima volta, di difesa processuale."¹⁰

Particularly with the term bona fides, three main types of conduct were described: the parties' obligation to adhere to the word given, the ban of the parties to take advantage from their unfair behaviour, and finally the parties' duty to fulfil those obligations in the contract which, even if not expressly provided, would be considered right by an honest and fair person.

As part of the consolidation of the concept of good faith, the canonical law played an important role, according to which bona fides principle always coincided with the one of conscience and morality, so that the jurists of the "intermediate period" often ended up identifying the concept of bona fides with that of equitas, and they started to widen the use of good faith beyond the limits of the interpretation of ius strictum.

During the Middle Ages, bona fides played an increasingly central role in trade, particularly in international commerce, and in that sense became a valued criterion to all effects. The majority and most authoritative comparative doctrine states that medieval lex mercatoria is the most important channel through which good faith is recognized, albeit in different forms, even in Anglo-Saxon law.

1.2.1 The expanding process of the good faith principle in Italy: good faith in the Italian civil code of 1865.

In Italy the concept of good faith has always been difficult to be determined, but this has not stopped its development. The sign of the evolution can be caught from the comparison between the importance of the legislative reference of good faith in the norms of the Italian civil code of 1942, and the much more contained legislative contemplation of good faith in the civil code of 1865. In the code abrogated in fact, the recall to the behaviour rule of good faith ended up with the article 1124

¹⁰Ivana Musio, *Breve analisi comparata sulla clausola generale della Buona Fede*, 2010, p. 3 http://www.comparazionedirittocivile.it/prova/files/ncr musio buonafede.pdf>

that prescribed that "contracts have to be performed in good faith" (to which it was only added the specific application of annulment of the company's contract contained in art. 1733 and 1734).

Within the criteria of interpretation of the contract, enounced in art. 1131-1139, the criterion of good faith was not contemplated, it was introduced in the current code in art. 1366, and there were not recalls to the good faith principle also in the discipline of the contract, introduced in our current code in art. 1358 and 1460, nor in the fulfilment of the obligations, introduced in our current code in art. 1175, nor was enounced a duty of behaviour in good faith in the negotiation phase.

It is true that in the previous code there were dispositions that, without containing an explicit recall to the principle of good faith and of correctness, were inspired by principles in compliance with the good faith rule: so art. 1169, or art. 36, 3° co., of the commercial code, that brought back to the principle of good faith the responsibility consequent to the suspension of the proposal or the acceptance in case of the beginning of the execution made by the other party. However in the previous code there were not legal data that could consent the assumption of the good faith principle as a general rule of behaviour out of the range of the execution of the contract enounced in art. 1124.

"È pur vero che nel sistema previgente non mancavano disposizioni che, senza contenere un espresso richiamo alla buona fede o alla correttezza, apparivano tuttavia ispirate a ragioni omogenee a quelle su cui si fonda la regola di buona fede: così l'art. 1169, che prendeva la finzione di avveramento della condizione nel caso in cui l'evento dedotto fosse stato impedito dal debitore obbligato sotto condizione; o l'art. 36, 3°co., del codice di commercio, che affermava la responsabilità conseguente alla revoca della proposta o dell'accettazione nel caso di inizio dell'esecuzione posto in essere dall'altra parte, norma ricondotta infatti, da una parte della dottrina, al principio di buona fede. Ma tuttavia mancavano nel sistema dati legislativi che consentissero di assumere la buona fede a regola generale di comportamento al di fuori dell'ambito dell'esecuzione del contratto segnato dall'enunciazione dell'art. 1124."11

Within the doctrine born during the validity of the code of 1865, the good faith in the objective sense and so of general rule of behaviour, appear so far from the awareness of the successive civil culture reached with the coming into force of the new code.

The enunciation of art. 1124 was deprived and banalized. It was said the term of good faith up to that moment had been used improperly, and this notion was absorbed in the notion of equity.

More interesting is the attitude of who in the civil culture of the period, taking inspiration to the Roman notion of *bonae fidei*, in which the legal duty was extended over the concept of stipulation, assumed the good faith principle as the foundation of the extension of the obligation content, from what was expressed in the contract also to all the consequences that, according to equity, derived

¹¹ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988 p.2-3

from its use according to art. 1124. In this way, linking together the two propositions of art. 1124 (the precept of execution in good faith and the extensive enouncement of the content of the obligation) in one unique and unitary meaning, good faith ended up to have the function of historic and cultural support of equity and its uses as integrative elements of the content of obligation.

"La chiara enunciazione dell'art. 1124 fu in vario modo svuotata e banalizzata. Si parlò al riguardo di un uso «improprio» del termine buona fede e si volle assorbirne la nozione in quella di equità.

E, se non mancarono posizioni esplicitamente polemiche circa l'opportunità della contemplazione normativa della buona fede contenuta nell'art. 1124, di cui si affermò la superfluità e l'inopportunità, tuttavia può dirsi che atteggiamento diffuso fu quello della non considerazione o della minimizzazione della portata del riferimento normativo contenuto nell'art. 1124; tanto che non mancano trattazioni monografiche sulla buona fede che, con riguardo a tale norma, si limitano ad una pura parafrasi o ad una mera citazione della norma.

Più illuminante tuttavia circa l'atteggiamento della cultura civilistica dell'epoca appare l'opinione di chi, rifacendosi alla nozione romanistica di contratti *bonae fidei*, nei quali il vincolo giuridico si estendeva oltre lo stretto contenuto espresso dalla pattuizione, assumeva la buona fede a fondamento dell'estensione del contenuto dell'obbligazione, da quanto espresso in contratto «anche a tutte le conseguenze che secondo l'equità, l'uso e la legge ne derivano», secondo l'enunciato dello stesso art. 1124. In tal modo, legando, in un significato unico e inscindibile, le due proposizioni dell'art. 1124 (il precetto di esecuzione secondo buona fede e l'enunciazione estensiva del contenuto della obbligazione), la buona fede finiva col risolvere la propria funzione in quella di supporto storico-culturale del richiamo all'equità, agli usi ed alla legge, quali elementi integrativi (questi soltanto) del contenuto dell'obbligazione."¹²

This orientation of that doctrine can be understandable if we consider the cultural climate of that period that was dominated by the influence of German "pandettistica" (great German legal movement of XVIII and XIX sec.), and the will of solving every problem of the contract relation in *quaestio voluntatis*. Considering that is easy to understand the doctrinal conversion of an objective rule of behaviour in a criterion of interpretation of the parties' will.

On the one hand the sign of this will of the parties can be seen also in the opinion of who, with reference to the good faith within contacts, identifies the good faith with the absence of the subjective element (dole or fault in a subjective sense) of the contractual responsibility.

The law that has been formed under the abrogated code is also signed by the contrasted relation between the evolutionary potentialities contained in art. 1124 and the resistances to the cultural climate of the time. But, however, even denouncing uncertainties, the legal routine reveal the sign of the evolution and the extension of the good faith principle, that had to consolidate in normative expression of the code of 1942.

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¹²Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988 p. 3

Also in the jurisprudence there is the sign of a subjective orientation that can be seen in the consideration of good faith as the criterion of interpreting contracts, or of determining the correspondence of the negotiating declaration of the awareness of the subject on the content of the contract. And is also present the concern that the use of good faith would not alter the content of the agreements and that would operate only in the range of the terms of the relation, as has been decided by the parties.

On the other hand, connected with a subjective conception of good faith on what is concerned with the performance of the contract, appears the legal orientation that brings back good faith to the to the evaluation of the subjective state of the non-fulfilling party in terms of dole or fault in a subjective sense.

And however, within the resistances and the misunderstandings denounced, it was not too late that a new genuine objective conception of good faith was affirmed as a rule of behaviour within the performance of contracts, with specific applications to the exception of non-fulfilment, to the evaluation of the relation and of the comparison of mutual non-fulfilments of the parties, to the exercise of the rights derived from criminal clauses, to the evaluation of the congruity of the period of recession in ongoing execution contracts, and with a particular connection with the principles of commercial fairness.

At this point it is important to focus briefly on the difference between good faith in a subjective sense and good faith in an objective sense.

1.2.2 The distinction between subjective and objective good faith.

To understand what the principle of good faith is, it is important to analyze the difference between its subjective and objective nature.

A starting point could be analyzing the Italian meaning of this principle consulting some dictionaries of legal terms. The definition of the term "buona fede" according the Italian *Dizionario dei termini giuridici*, is that the good faith principle is the state of blameless ignorance of the illegality of a certain situation. The ignorance can be due to fault, negligence or carelessness from the person who was required to inquire; or it can be a consequence of a blameless entrustment, determined by the behavior of a third party or a counterparty, and this is the situation from which good faith comes out.

In civil law is considered as reason of exclusion or reduction of injurious consequences in charge of who is expected to perform a certain performance (for example the return of properties, refunds, compensations) or as useful element which leads to the consolidation of rights (effects of possession). In criminal law it is to rule out the dole. The good faith excludes the fault only when it results from inevitable ignorance and determined by the positive fact of a third party.

"È lo stato di incolpevole ignoranza dell'antigiuridicità di una determinata situazione. L'ignoranza può essere dovuta a colpa, per negligenza o trascuratezza di chi era tenuto ad informarsi; oppure può conseguire ad un affidamento incolpevole determinato dal comportamento di terzi o della controparte ed è questa la situazione che da luogo alla buona fede vera e propria.

Nel diritto civile la buona fede è presa in considerazione quale ragione di esclusione o di riduzione di conseguenze dannose a carico di chi è tenuto ad eseguire una certa prestazione (ad esempio, di restituzione di frutti, di rimborsi, di risarcimento) oppure quale elemento utile per fattispecie che conducono al consolidamento di diritti (effetti del possesso).

Nel diritto penale essa vale ad escludere il dolo. La buona fede esclude la colpa, secondo la giurisprudenza, soltanto quando è conseguente ad una ignoranza inevitabile e determinata dal fatto positivo di terzi (ad esempio, da dichiarazioni formali della pubblica amministrazione)."¹³

In the Italian *Nuovo Dizionario Giuridico*, that is the new legal dictionary, appears a first distinction between subjective and objective good faith. According to this dictionary good faith is a psychological situation which is relevant for the right since it has juridical consequences. It can be seen in a dual sense: subjective, as unjustified ignorance of offending someone else's legal position; objective, as general duty of fairness and reciprocal loyalty in the relation between the parties.

Then the definition goes on saying that good faith points out the numerous institutes of the general theory of contract in relation with the formation, interpretation and execution of contract. It is also recalled in the relation between debtor and creditor on bond issues. Regarding the theme of possession the good faith has an important consequence: according the article 1153c.c., the person to whom the movable property is alienated by the non-owner acquires the property by possession, provided that he is in good faith at the time of delivery and there is a right to transfer the property.

"È una situazione psicologica rilevante per il diritto in quanto produttiva di conseguenze giuridiche. Essa può essere intesa in un duplice senso: soggettivo, quale ignoranza incolpevole di ledere una situazione giuridica altrui; oggettivo, quale generale dovere di correttezza e di reciproca lealtà di condotta nei rapporti tra soggetti.

La buona fede rileva i numerosi istituti della teoria generale del contratto: in relazione alla formazione (art. 1337 c.c.), all'interpretazione (art. 1366 c.c.) e alla esecuzione (art. 1375 c.c.) del contratto. Essa è richiamata anche nei rapporti tra debitore e creditore in tema di obbligazioni (art. 1175 c.c.). Una importante conseguenza della buona fede si ha in materia di possesso: in base all'articolo 1153c.c.,colui al quale sono alienati beni mobili da parte di chi non è proprietario ne

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¹³ Angelo Favata, Francesco Bartolini, *Dizionario dei Termini Giuridici: Una raccolta di vocaboli, istituti, termini,espressioni e definizione giuridiche*, XX edition, Casa Editrice la Tribuna, 2001, p. 65

acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà."14

But the best definition in my opinion is the one of the "Treccani Giuridica".

The reference to good faith in many norms of the civil code is not susceptible of a unitary allencompassing reconstruction of the diversity of the *ratio legis*, of the variety of the nature of conflicts of interests regulated, of the heterogeneity of the meanings that the expression of good faith assumes in the civil code.

This differentiate normative use of the term, induced to a general and fundamental distinction between good faith in a subjective sense and good faith in an objective sense. So we distinguish the good faith that is (objective) rule of behaviour, from the good faith which is (subjective) state of awareness. In this second sense, the subjective state, time after time, takes the shape of (erroneous) certainty of acting in a way that is conformed to the right, as a sort of ignorance of damaging the right of the others, as a sort of entrustment to an apparent legal situation (different from a real one). And the legal effect to which the subjective good faith leads to consist in the conservation of the situation or the juridical effects in which the subject had trusted, so in the limitation or exclusion of the responsibility or of legal effects which are negative for the subject. So art. 128 c.c. preserve the effects of marriage, even if declared invalid, in case the spouses had contracted it in good faith and so ignoring the invalidity cause.

The norms within the theme of possession consent particular juridical effects on the possess which is assisted by good faith, that consist in the ignorance of damaging the legal right of the other and recognizing, within some conditions, the acquisition of the property *a non domino*. Not different effects are recognized to good faith within the theme of the transfer of credits. (art. 1994 c.c.).

Within the matter of compliance of the obligations law (art. 1189 c.c.) ratifies the liberation of the debtor that had paid the creditor in good faith, while the good faith of the accipiens affects the range of the obligation of the restitution in case of undue payment.

And, within the contractual matter, good faith is assumed to protect the third party on the efficacy of the simulation (art. 1415 c.c.) and the annulment (art. 1445 c.c.) of the contract in his regards.

This brief and non exhaustive review on the norms of the civil code that contemplate good faith in a subjective sense allows the verification of the wide variety of legal theories, which had suggested different classifications. But any of unification is useless exactly because of the heterogeneity of the theme and of the rules.

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¹⁴ Federico del Giudice, *Nuovo Dizionario Giuridico, Enciclopedia di base del diritto*, VII edition, Esselibri Simone, 2008, p. 115

"Il riferimento alla buona fede in numerose norme del codice civile non è suscettibile di una ricostruzione unitaria onnicomprensiva, a ragione della pluralità degli istituti cui le norme hanno riguardo, della diversità della *ratio legis*, della varietà della natura dei conflitti di interesse regolati, della stessa eterogeneità dei significati che l'espressione buona fede assume nel codice civile.

Questo differenziato impiego normativo ha indotto ad una distinzione generale e fondamentale, ormai corrente, tra buona fede in senso oggettivo e buona fede in senso soggettivo. Si distingue in tal modo la buona fede che è regola (oggettiva) di comportamento dalla buona fede che è stato (soggettivo) della coscienza. In questo secondo significato lo stato soggettivo si atteggia, volta a volta, come convinzione (erronea) di agire in conformità al diritto, come ignoranza di ledere un altrui diritto, come affidamento in una situazione giuridica apparente (difforme da quella reale). E l'effetto giuridico che allo stato soggettivo di buona fede la legge riconduce consiste, volta a volta, nella conservazione della situazione o degli effetti giuridici nei quali il soggetto aveva confidato, ovvero nella limitazione od esclusione di responsabilità o di effetti giuridici negativi per il soggetto.

Così l'art. 128 c.c., preserva gli effetti del matrimonio, pur dichiarato nullo, qualora i coniugi lo abbiano contratto in buona fede e cioè nell'ignoranza della causa di invalidità.

Le norme in tema di possesso consentono particolari effetti giuridici I possesso assistito dalla buona fede, consistente nell'ignoranza di ledere l'altrui diritto, riconoscendo, a determinate condizioni, l'acquisto della proprietà *a non domino*. Effetti non dissimili sono riconosciuti alla buona fede in tema di circolazione di titoli di credito (art. 1994 c.c.).

In tema di adempimento delle obbligazioni la legge (art. 1189 c.c.) sancisce la liberazione del debitore il quale in buona fede paghi al creditore apparente, mentre la buona fede dell'accipiens incide sull'ampiezza dell'obbligazione restitutoria in caso di pagamento d'indebito.

E, in tema contrattuale, la buona fede è assunta a condizione della tutela de terzo rispetto all'efficacia nei suoi confronti della simulazione (art. 1415 c.c.) e dell'annullamento (art. 1445 c.c.) del contratto."15

Differently, the intimacy that subsist within the different norms of the civil code that assume good faith (in an objective sense) as rule of behaviour, consents to analyze and consider good faith in a unitary way.

Within the range of good faith in an objective sense, as rule of behaviour, are included the norms that are expressed in art. 1375 c.c., that ratifies that the contract has to be performed in good faith, in art. 1358 c.c., that assumes good faith as a rule of behaviour of the parties of the contract, in art. 1460, 2° co., that identifies good faith as the criterion of legitimate exercise of the discretion of refusing the fulfilment because of the non-fulfilment of the other party and in art. 1337 c.c., that impose to the parties to behave in good faith during the negotiation phase and during the formation of the contract. And, even with other terms, to the good faith in an objective sense is brought back the hermeneutic concept of good faith enounced in art. 1366c.c.

The meaning, more or less identical to the one expressed in art. 1375 c.c., has to be conferred to the rule of behaviour within correctness enounced in art 1175 c.c., with particular attention to the realization of the obligatory relation from debtor and creditor. The affirmation of the identity of

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¹⁵ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988 p. 1

correctness of good faith prevails in the doctrine. And within the jurisprudence it is common to use good faith and correctness as synonyms, while there are not expressions of the contrary.

In the legal system there are finally rules that, even if they do not refer directly to good faith or correctness, are inspired by the same principles.

"Diversamente l'apparentamento sistematico che sussiste tra le diverse norme del codice che assumono la buona fede (in senso oggettivo) a regola di condotta, ne consente una ricostruzione ed una trattazione unitaria.

Nell'ambito della buona fede in senso oggettivo, quale regola di condotta, si inscrivono le norme espresse nell'art. 1375 c.c., che dispone che «il contratto deve essere eseguito in buona fede», nell'art. 1358 c.c., che assume la buona fede a regola di comportamento dei contraenti in pendenza di condizione, nell'art. 1460, 2° co., che individua nella buona fede il criterio dell'esercizio legittimo della facoltà di rifiutare l'adempimento a ragione dell'inadempimento dell'altro contraente nell'art. 1337 c.c., che impone alle parti di comperarsi secondo buona fede nello svolgimento delle trattative e nella formazione del contratto. E, pur se in diversi termini, alla buona fede in senso oggettivo è generalmente ricondotto il canone ermeneutico di buona fede enunciato nell'art. 1366c.c.

Significato sostanzialmente identico a quello espresso nell'art. 1375 c.c. deve essere attribuito alla regola di comportamento secondo correttezza enunciata dall'art. 1175 c.c., con riguardo all'attuazione del rapporto obbligatorio da parte del debitore e del creditore. L'affermazione della sostanziale identità di contenuto e di ambito di operatività di buona fede e correttezza è ormai prevalente in dottrina. E, in giurisprudenza, è frequente l'uso delle espressioni buona fede e correttezza quali sinonimi, mentre non si rinvengono pronunce che affermino una distinzione tra le due formule.

Non mancano infine nell'ordinamento norme che, pur senza un esplicito riferimento alla buona fede o alla correttezza, appaiono ispirate ai medesimi principi."¹⁶

The Uniform Commercial Code within its numerous provisions, contains also a definition of good faith which means:

"honesty in fact and the observance of reasonable commercial standards of fair dealing." 17

Within this simple definition we can already find a subjective and an objective component of good faith. The first part of the definition "honesty in fact" represents the subjective component, that stands for whether the party is ignorant or not of, for example, the fact that a transaction is not authorized, while "reasonable commercial standards of fair dealing" represents the objective component of the definition and imposes an objective standard, that is represented by the fact on whether the parties are performing their duties in good faith.

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¹⁶ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988, p. 1

White, James J., *Uniform Commercial Code UCC* (2011), General Definitions, § 1-201 (20), art. 5, Legal Information Institute (LII), Open access to law since 1992 https://www.law.cornell.edu/ucc/1/1-201

1.3 Good faith in the contemporary Italian legal system and in other legal system.

Considering the expansion of the field of application of the good faith principle in relation with the normative data, the doctrinal conceptions and the legal orientation of the current code, we can realize the size of development of this principle.

From a controversial field of application, that consisted in both performing and interpreting contracts, in the code of 1942, we arrive to a clarification regarding the interpretative function of good faith and its role as autonomous rule of execution of contracts, and also to a extension of the principle also to other fields of application as obligatory relations outside the contract.

"Rispetto ai dati normativi, alle concezioni dottrinali ed agli orientamenti giurisprudenziali anteriori al codice vigente, la semplice considerazione delle ricordate disposizioni di quest'ultimo e della estensione, da esse segnata, del campo di applicazione della regola di buona fede rivela la misura dell'evoluzione e dell'espansione del principio.

Da un controverso ambito di applicazione, che comunque si poneva tra esecuzione e interpretazione del contratto, si perviene, nel codice civile del 1942, ad una chiarificazione circa la funzione interpretativa della buona fede e circa il suo ruolo di regola autonoma (distinta dall'equità e dagli usi) dell'esecuzione del contratto, nonché ad un'estensione del principio all'attuazione dei rapporti obbligatori di fonte non contrattuale ed alle trattative pre-contrattuali: mentre, per altro verso, si enucleano rilevanti ipotesi specifiche di applicazione del principio (artt. 1358 e 1460 c.c.)."18

The consolidation of the expansion of the principle of good faith on a theoretical level can be caught from the conception of good faith-correctness as a general clause. With this qualification good faith became the foundation of a general principle of the relations between privates, whose importance goes beyond the field of the specific norms of law, and is characterized by elasticity and flexibility that is typical of the general clauses and that enriches its potential applications.

The interest of the doctrine towards the good faith principle can also be caught in the opinion of who, with the purpose of inscribing good faith in the system of constitutional values, indicates its relation with the principle of solidarity enounced in art. 2 Cost. and confers content, dimension and political-constitutional value to the rule of good faith. This can both be seen in a positive and problematic way. Within the new current code we can also find legal decisions that, at least on the level of the enouncement of the principle, confer to good faith an important role in dealing with privates' relations, and assuming this principle as the fundamental rule of behaviour in the execution phase of every legal relations.

¹⁸ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988, p. 3

But, as we will see afterwards, the expanding process of the principle is however characterized by many resistances that limit its applications. The lack of an homogeneous definition of the content of good faith, in fact, gives rise to mistrusts, and makes the application of the principle precarious and needs therefore a further effort of detailed analysis.

A significant contribution to the comprehension of the expanding process of good faith in the Italian set of rules can be found in considering the legal experiences of others set of rules.

The § 242 of the BGB (Bürgerliches Gesetzbuch, German civil code), «the debtor is obliged to execute the performance as good faith requires and considering also the commercial uses», enounces the rule of behaviour according to the principle of good faith (Treu und Glaube) of the fulfilment of the obligations.

In the cultural climate matured in the environment of the German codification, the norm contained in the § 242 establishes a point of reference and a normative support that has been decisive in the recognition of a precise operative value of general clauses, as abuse of right and good faith.

In German set of rules has been consolidated such a wide interpretation of the norm so that the judges can form the right applicable to the contractual relations, anytime the principle of Treu und Glaube needs a modification in the relation to adapt it to the changing situations.

But also within the German civil code it is possible to perceive a indefiniteness of the Treu und Glaube in term of simple feeling of correctness.

"Nel clima cultural maturate nell'ambito della codificazione tedesca la norma contenuta nel § 242 costituì un punto di riferimento ed un supporto normativo determinante nel superamento della concezione volontaristica propria della dottrina pandettistica del negozio giuridico e nel riconoscimento di un preciso valore operativo a clausole generali, quali «abuso del diritto» e «buona fede».

Nella giurisprudenza tedesca si è consolidata un'interpretazione della norma così ampia da consentire ai giudici di «formare il diritto da applicarsi al rapporto contrattuale», tutte le volte che il principio di *Treu und Glaube* richieda una modificazione del rapporto tale da adeguarlo a mutate circostanze.

E tuttavia, nello stesso ambito della civilistica tedesca, non si è mancato di avvertire l'indeterminatezza di un riferimento a *Treu und Glaube* in termini di puro e semplice «sentimento del giusto» ed i conseguenti rischi di arbitrio connessi al ricorso a criteri di giudizio eminentemente equitativi."¹⁹

Also the Anglo-American experiences are significant. In fact in the legal doctrine of the Anglo-American jurisdiction there are several models of decisions taken considering the good faith judgment. In particular within the negotiation theme and the formation of consensus matter, it is clear the use of good faith as a tool of controlling the exercise of the initiative that is not different from the good faith judgment favoured by the norms of the continental rights. While, within the non-

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¹⁹ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988, p. 4

fulfilment discipline, the integration of the regime of common law with a set of rules of equity, has determined the progressive consolidation of a principle of good faith that assumes the aspect of a real general clause.

And, however, the traditional resistances persist, and they turn to circumscribe the use of a standard of good faith and a test of fairness in a series of exception theories.

The sign of the expansion of the good faith principle if we consider the general recognition that the principle receives in international arbitrates and the affirmation of the principle in the current sets of rules of all the major trading countries that ended up to form a rule of transnational commercial law.

1.3.1 The principle of good faith within civil law and common law.

In the codifications of the various contemporary civil law ordinances, the concept of good faith always finds space, even though it is never explicitly described in its content, in accordance with the elastic and evolutionary nature of the general clause. On the contrary, in the common law system, the same results are achieved through an implicit and indirect formulation and, however, conceptually different from good faith.

In English law, and in particular in contract law, it is entirely original to recognize the concept of "continental" good faith established in the rest of Europe. "Buona fede" in England is called good faith, and the term is intended both in a "subjective" or "objective" sense. In the first case, there is no difference between good faith and the continental subjective good faith, so that in both cases common rules are set up to protect the owner and buyer in good faith. The sense of "objective good faith" is, however, profoundly different from the notion of objective good faith used in civil law countries, where it sets out the objective criteria for assessing the behaviour of the contract parties. Talking about the contractual discipline of common law system, the good faith principle and its

Talking about the contractual discipline of common law system, the good faith principle and its concept is very different from the one used so far by civil law set of rules.

This peculiarity arises, first of all, from the anguish of Anglo-American jurists in relation to the objective good faith concept, linked to a set of factors relevant to the common law legal tradition, whose background is composed by practical cases on which the law of contract is developed and articulated.

Understanding the structural differences that insist on the two civil law and common law systems becomes an indispensable premise to understand the peculiarity of the conception of good faith. One of the most important differences between the two systems is that, while in civil law legal systems the starting point is the analysis and definition of subjective rights, in the English legal order the relevance is attributed to the "remedies" elaborated over time by the two jurisprudence, common law and equity. Remedy is a crucial concept of the Anglo-American legal system, as it is the basis for the recognition of a right and is not the effect of the law itself.

Regarding the historical origins of good faith, it is traced back to the medieval English period, and in particular to the historical, political and cultural times that led to the birth and, subsequently, to the development of the right of equity, when according to the customs of the time, the king had the task, with the help of a Chancellor (with a prevailing role), of preserving peace and administering justice. Leaving aside a detailed historical excursus that has determined the affirmation of the jurisdiction of equity, what is important to mention is that is in this context that the concept of good faith has done its first formal entry. The Chancellor identified by the King was an ecclesiastical, almost always a bishop, whose jurisdiction consisted in the application of Roman law and canon law. In fact, the first chancellors of the Court of Chancery, like the canonical lawyers of the ecclesiastical courts, turned to the canon law that good faith was recognized as a moral foundation in particular, it was believed that a promise could be binding on the sole basis of being such for the conscience of man; the rules applied were predominantly those of Christian morals, which made it important to maintain and respect the word given. The jurisdiction of equity intervened, therefore, in the name of conscience and morality, in order to give a party a certain behaviour; The Chancery Court, in fact, indicated positive or negative evaluation criteria of conduct on the basis of ethical or moral values. Progressively, between the 14th and 15th centuries, in the field of good faith, the work of the ecclesiastical chancellor, counsellor and confessor of the king, became increasingly decisive, able to judge the petitions presented by the subjects, offering solutions in harmony with the natural right. The Chancellor scrutinized the minds of the parties and their intentions in order to ensure respect for good faith in the name of conscience and equity. The general duty of good faith, underlined by the engagement of the bond and the agreement, therefore inspired the judges of the Chancellery.

Subsequently, between the seventeenth and nineteenth centuries (epoch that was later defined by modern jurists, "crystallization of equity"), under the influence of the historical, political and cultural climate of the rest of Europe, in England, as a consequence, took place a gradual evolution of the activities carried out by the Chancellors, which approached the logic of a justice guided by a moral order, a guided jurisdiction and deductible from its previous decisions; thus, equity, as well as the common law jurisdiction, began to be linked to the principle of the previous jurisprudential.

Within the natural evolution of the English judiciary, the main merit of the jurisdiction of the Equity lies in the continuing relevance of general clauses, including those of good faith. Even today, it can be said that good faith finds recognition in the jurisdiction of equity, as is clearly deducible from the inspirational criteria of that jurisdiction.

Once that we have analyzed the particular historical contest in which the good faith has been gradually recognized by the equity jurisdiction, is interesting now to focus the attention on the recognition of this general clause in the common law jurisdiction.

In the English system the answer to this query is certainly negative; in fact within the remedies expected by the common law jurisdiction, the "general positive duty of good faith" does not exist.

"Gli ultimi orientamenti dottrinali e giurisprudenziali inglesi, in merito al principio di buona fede nella common law, sostengono che essa non trova applicazione nel diritto dei contratti. L.J. Potter(L. J. POTTER, Historical Introduction to English Law, London, 1958.) ha affermato che non esiste una dottrina generale della buona fede nella disciplina inglese dei contratti, pertanto le parti contrattuali sono libere di agire nel modo che esse ritengono migliore, con l'unico vincolo di non violare le regole contrattuali. La negazione nel diritto inglese di common law di un dovere generale, a negoziare o ad eseguire un contratto secondo buona fede, è strettamente collegata ad un altro principio, tutto inglese, che consiste nel generale rifiuto della teoria dell'abuso del diritto. A tal proposito, una parte importante della dottrina ammette il principio secondo cui il titolare di un diritto, derivante da un contratto o da un altro atto, possa esercitarlo "per una buona ragione, per una cattiva ragione, senza ragione" (Person). Nello stesso senso, anche Lord Ackner, nel noto caso Walford v/Miles77, affermava, con una forma inconcepibile per i civil lawyers, che "il dovere di concludere negozi secondo buona fede è per sua natura contrario alle posizioni contrattuali ed è qualcosa di irrealizzabile nella pratica". E' importante specificare, tuttavia, che, per comprendere l'approccio dei sistemi di common law verso la clausola di good faith, è necessario non solo svolgere un'attività deduttiva rispetto ai cases, ma anche utilizzare diverse qualificazioni rispetto alle nostre categorie civilistiche, al fine di evitare che formulazioni generali possano rimanere incomprese. I common lawyers, infatti, non sono estranei ai valori sottesi alla good faith, ma sono resistenti ad una introduzione universale di buona fede come "panacea di tutti i mali", imposta dall'alto nella disciplina generale del contratto, senza effettuare nessun tipo di differenziazione a seconda delle tipologie contrattuali e delle fattispecie concrete. In altri termini, il diritto inglese non punta a tutelare la buona fede intesa come "una francescana rinuncia di un soggetto di perseguire i propri interessi, per aiutare l'avversario a raggiungere i suoi"."20

In the first part of this citation it is explained that the latest British doctrinal and jurisprudential guidelines on the principle of good faith in common law claim that it does not apply to contract law. L.J. Potter (LJ POTTER, Historical Introduction to English Law, London, 1958) argued that there is no general doctrine of good faith in English contract discipline, so contractual parts are free to act in the way they think is the best, the only constraint is to not violate the contractual rules.

²⁰ Ivana Musio, Breve analisi comparata sulla clausola generale della Buona Fede, 2010, p. 33-34 http://www.comparazionedirittocivile.it/prova/files/ncr_musio_buonafede.pdf

The denial in the English right of common law of a general duty to negotiate or perform a contract following the principle of good faith is strictly linked to another principle that consist in the general refusal of the theory of the abuse of right.

The end of the citation says that the common lawyers are not extraneous to the good faith values, but they do not want to introduce this principle as "panacea di tutti i mali" (remedy of all damage), imposed by the contractual discipline without making any kind of differentiation according to the different kind of contractual forms. In other terms, the English law does not want to support the good faith intended as a "Franciscan renunciation of a subject to pursue his own interest, in order to help the other party to obtain his own ones".

The particularity of the English legal system is to recognize the good faith only when it is useful and relevant at a practical level and considering each single case. In fact every single contract is unique itself and for this reason they require different kind of rules.

In this perspective the English law recognize the principle of good faith in the "uberrimae fidei" contracts; these contracts are characterized by a particular confidence relationship that links together the parties.

An evident example is represented by the insurance contracts, where one or more subjects are obliged to communicate (disclosure) those facts (material facts) that could affect the other party's decision of concluding or not the agreement. Talking about insurance contracts, good faith is the objective parameter of honesty in the case of life insurance contracts, in which is relevant the information held by the insured about his possible health conditions.

Beyond those specific cases, however, the application and the recognition of the good faith in the common law jurisdiction of English courts, is excluded; the common law prefer different concepts, as the one of fairness and reasonableness.

In particular, the terms of good faith and reasonableness must not be considered as synonyms, as they refer to different principles: in the first case is a criterion of evaluation of a behaviour on social and ethical basis; in the second case, reasonableness refers to the rationality, however limited, of man, recalled during all the contractual phases. Part of the civil law doctrine was wandering if reasonableness in common law could operate as criterion of evaluation of behaviour in the same way as in our set of rules we turn to the good faith principle. The answer to this question is of course negative, because, if it is true that the good faith and the reasonableness offer two criteria of evaluation of contractual behaviours, in the first case those criteria lead back to absolute values (ethical and social), while in the second case they only refer to the rationality and the common sense of a common man.

Within this argument, however, we must underline the different approach of North American Courts that do not follow the English approach and they show openness to the good faith clause.

In every contract there is an implicit pact in which none of the contractual party can damage or limit the right of the other to receive advantages from the contract itself, that means that in every contract exist an implicit pact of good faith.

The decisions made by the North American Courts in which the principle of good faith is recalled, are numerous. The North American common law, in fact, seems to be in a different position than English law, in a direction that is definitely closer to that of civil law.

The North American law adopts the good faith, recognizes the indeterminacy of the notion, and admits the existence of an implicit pact of good faith underlying each contract.

However, apart from the specific North American guidelines, it is important to affirm that common law systems propose, in particular, other remedies than good faith to regulate cases where third-party reliance and good faith are noted. In this respect, it is worthwhile to deepen, among other things, two institutes in particular, that of the estoppel and the misrepresentation.

The estoppels (which can assume different forms of estoppels by conduct and promissory estoppels) is a term that expresses in a direct way a principle that is well known in the civil law, which is the *exceptio doli generalis*. The estoppel institute defines certain hypotheses in which one party is precluded from affirming or denying a particular circumstance, allowing in some cases to take into account the trust of third parties and good faith.

"A prescindere, però, dagli specifici orientamenti nord-americani, è importante affermare che i sistemi di common law, propongono, principalmente, rimedi diversi dalla good faith per disciplinare casi in cui rilevi l'affidamento dei terzi e la buona fede. In tal senso, vale la pena di approfondire, tra i vari, due istituti in particolare e cioè quello dell'estoppel e quello della misrepresentation.

L'estoppel, che assume le diverse forme di estoppel by conduct e promissory estoppel, è un termine di difficile traduzione nella lingua italiana, che esprime, in maniera indiretta, un principio ben noto nel civil law, quello dell'exceptio doli generalis. L'istituto dell'estoppel definisce determinate ipotesi in cui ad una parte è preclusa la possibilità di affermare o negare una determinata circostanza, permettendo in determinati casi di tener conto dell'affidamento dei terzi e della buona fede." ²¹

Even if it is difficult to find a unitary definition of the estoppels by conduct, it can be intended as a legal situation determined by a subject that, with declarations or behaviours induce, on purpose or carelessly, the other contractual party to make choices, then ignore those same declarations or initial behaviour, causing a prejudice to whom without any fault had trusted him. The estoppel by conduct

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²¹ Ivana Musio, Breve analisi comparata sulla clausola generale della Buona Fede, 2010, p. 37 http://www.comparazionedirittocivile.it/prova/files/ncr_musio_buonafede.pdf>

can consist also in a silence or omission that is able to mislead the other party violating the duties of communication and information.

The promissory estoppels, instead, indicates the hypothesis in which the promulgator is precluded from denying a promise that, even if taken in the absence of consideration, has created a trust in the person who makes the promise or a third party. In this case the promise is binding for the person who makes it.

The misrepresentation is a category of the common law that identifies a series of legal situations that in the continental tradition are conceived in an incoherent way. With the term of misrepresentation is intended a false, erroneous declaration made by a contractual party called representor during the phase of negotiation, in order to induce the other party, called representee, to conclude the contract as a result of a reasonable reliance.

The misrepresentation differs itself from the concept of dole expected by the Italian set of rules, that indicates and assumes deceptions, machinations. The misrepresentation, instead, consist in a incorrect declaration done during the negotiation phase, in order to induce the other party to contract. The misrepresentation can be innocent or fraudulent; the first consist in an incorrect declaration put in place by the party without any intentionality; the misrepresentation fraudulent, instead, consist in an incorrect declaration put into place with awareness. The consequences are different and, in the first case, the representee would have the possibility to chose a rescission or the compensation of the damages, whether in the second case would have the possibility to ask for both the remedies.

"La misrepresentation è una categoria della common law che identifica una serie di situazioni giuridiche che nella tradizione continentale sono concepite in maniera slegata. Con il termine misrepresentation si suole indicare una inesatta, falsa, erronea dichiarazione posta in essere da una parte contrattuale (representor) durante la fase delle trattative, al fine di indurre l'altra parte (representee) a concludere un contratto per effetto di un ragionevole affidamento (reasonable reliance). La misrepresentation si differenzia dal concetto di dolo previsto nell'ordinamento italiano, che indica e presuppone raggiri, manovre, macchinazioni. La misrepresentation, invece, consiste in una dichiarazione inesatta fatta nel corso delle trattative, tale da indurre l'altra parte a contrarre. La misrepresentation può essere innocent e fraudolent; la prima consiste in una dichiarazione inesatta posta in essere dalla parte senza alcuna intenzionalità; la misrepresentation fraudolent, invece, consiste in una inesatta dichiarazione posta in essere con consapevolezza. Le conseguenze sono differenti, ed, infatti, nel primo caso il representee potrà optare per la rescission o, in alternativa, per il risarcimento dei danni, mentre nel secondo caso potrà richiedere entrambi i rimedi."²²

While the jurisdiction of equity seems to recognize directly the relevance of good faith, the analysis of the estoppel and of the misrepresentation as an example, show how, even in cultural, structural

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²² Ivana Musio, *Breve analisi comparata sulla clausola generale della Buona Fede*, 2010, p. 38 http://www.comparazionedirittocivile.it/prova/files/ncr_musio_buonafede.pdf

and procedural differences between the English system and the "continental" ones, the concept of good faith has found a proper expression also in the common law jurisdiction.

While remembering that in the common law the general clause of good faith have not found a proper space in the context of the contractual discipline, it seems clear enough that the principles underlying the objective good faith have confirmed also in this case, even though with some difficulties related to the cultural and procedural diversity, the necessity of specific institutes capable to preserve the parties' reliance.

In conclusion, even in common law countries, good faith seems to find, on a much less porous cultural ground, its own ways, even though not immediately visible or clear, but in any case able to guarantee, case by case, a special systems that preserve directly the parties' interests, and indirectly the social need of the contract.

1.4 Application of the good faith principle.

The process of expansion of the principle of good faith has always been accompanied by an unsurpassed indefiniteness of its contents, and this allows to understand the justifications to the resistances on its use. What is sure is that none of the definitions already proposed offer clear and concrete indications on the content of the directives expressed by the general clause of good faith. Within the enouncements of the jurisprudence itself, that has conferred several concrete applications to the principle of good faith, it is difficult to find enough elements to determine this rule.

The attempts of determining the content of good faith ended up to several, not at all significant, formulations: so here the maxim «the duty of correctness impose a behaviour in order to not damage the interest of others beyond the limits imposed by the legitimate defence of the own rights», where the attribute of the legitimacy of the defence of the personal interest does not appear clearer than what is in itself the concept of good faith.

The resistances of a widespread use of the general clause of good faith, are still present in our jurisprudence panorama. So it has been stated that a behaviour which is contrary to the duties of loyalty, correctness and social solidarity, could not be the source of responsibility for damages which are not the concrete manifestation of the violation of the right of others, already recognized by other

rules. This principle was affirmed in a contest that used to confuse and overlap good faith and the precept of *neminem laedere* and to apply to the first the maxims related to the second.

But, despite the critics of that orientation, the misunderstandings persisted and the maxim of right consolidates with an even more explicit reference to contractual good faith. According to this orientation, the principle of good faith result deprived from any potentiality, and the violation of the legal consequences on the level of the remedies and the responsibilities, that are already ensured by the existence of contractual rights, can be seen as the behaviour opposite to good faith. According to this conception, the principle of good faith and the relative norms of correctness would not be susceptible to the analogical interpretation, and would be identified as fundamental norms of behaviour in the phase of the execution of all legal relations.

Only the effort of determining the contents of good faith can contain the arbitral risks related to the use of the general clause, that for its nature is elastic, and so to win the resistances that persist within the legal orientations.

If good faith as general clause, would extend its purposes not only in relation with the parties, and so as a simple rule of behaviour, but also in relation with the judge, as model of decision, would be recognized as a norm which plays the role of directive or support to the judgment. But the indefiniteness of the directives and the parameters of judgment are the principal cause of the fact that the decisions of judges cannot be monitored and also the results of the decisions of judges are indefinite.

Of course the nature itself of the general clause impede the identification of element of judgment which are strict and rigorous, and this would limit the function of good faith of integrating the contract and law to overcome the lack of specific contractual and legal norms. But, within the limits signed by the nature and the function of good faith, an effort to rationalize the good faith clause and to determine its content is indispensable to consolidate its use in legal systems and it constitutes the legitimacy of its use.

The importance of good faith due to its several legal recalls, represented not only by the specification of the directive function of the principle, but also by the consequent recognition of good faith as a general clause, induces to confer to the principle a field of application which is much more extended compared with the one of the single norms. On the other side, the largeness of the normative size of the principle included in art. 1175, 1375 and 1366 c.c. impose the recognition of the applicability of the principle, at least in the field of the right of bonds and of contracts.

In the field of study of jurisprudence it would be useful to start from taking into consideration the theories not codified of the use of the principle of good faith.

If we consider the jurisprudence in a general way, it would appear that the alternation of the denial of use of good faith whereas we are not in the presence of legal positions which have already been recognized by specific legal norms, with the recognition of good faith as a rule of behaviour in all legal relations, is contradictory and it would be useful to identify the real range of decision that can be led to good faith.

To this purpose it is worthy to mention the orientations that deal with the theme of "presupposition". The existence and the survival of circumstances which are not expected by the parties that, even though they would not determine the non-fulfilment of the contract, compromise the performance of the contract, determine the rise of disputes of difficult solution and give rise to a legal problematic that can be called *quaestiones voluntatis*.

This problematic and the research of a solution of those disputes, in the form of the implicit will of the parties of finding these solutions, has always been a constant in the different sets of rules. However, the awareness of the inadequacy of a subjective approach, had caused the substitution of the traditional technique of finding solutions to these disputes, with other techniques of control that move from the configuration of the problem as a question of distribution of risks and damages and to the development of an evaluation of the interests of the parties.

Within this developing process, the doctrine has indicated in the judgment of good faith the technique offered by law to operate in objective terms the evaluation of compatibility between circumstances and fulfilment. And the recent jurisprudence has recognized the operation of the good faith principle in the field of conflict resolution traditionally brought back to the theme of presupposition.

And is also significant the fact that, even in the lack of an explicit clarification of the contents of good faith and of a aware use of the objective techniques to control the compatibility between the circumstances and the fulfilment, the parameters of evaluation in an objective sense of the principle of good faith, have clearly developed. And so, beyond the qualification of the legal tools used, is more and more frequent to read in sentences, within the theme of presupposition, objective argumentation related to the economic relations of the performances, the need of distributing equally risks and damages between the parties, the need of ensure the equilibrium of the private autonomy etc.

From this theme of presupposition within the jurisprudence, a first concrete indication of the content of good faith judgement has been enounced. It seems that the jurisprudence confide in the good faith principle, considerations related to the nature of the "agreement" and its economic assets, and a strong decision-making power inspired by the economic equilibrium of interests within the contract.

"Nell'ambito di tale processo evolutivo la dottrina ha indicato nel giudizio di buona fede la tecnica offerta dalla legge per operare in termini oggettivi la valutazione di compatibilità tra circostanze e adempimento. E la giurisprudenza più recente non ha mancato di riconoscere l'operatività del principio di buona fede nella soluzione dei conflitti tradizionalmente ricondotti alla tematica della presupposizione.

Ed è significativo che, pur nella carenza di un'esplicita chiarificazione circa i contenuti della buona fede e di un organico e consapevole impiego delle tecniche oggettive del controllo di compatibilità tra circostanze ad adempimento, al riconoscimento del ruolo della buona fede nell'ambito di tale apprezzamento facciano riscontro chiari sintomi di un'evoluzione in senso oggettivo dei parametri di valutazione. Così, al di là della qualificazione degli strumenti giuridici impiegati, sempre più frequentemente si leggono nelle sentenze in tema di presupposizione argomentazioni d'ordine oggettivo circa il rapporto economico tra le prestazioni, l'esigenza di ripartire congruamente i rischi tra le parti, la necessità di assicurare il «programmato equilibrio dell'autonomia privata», di valutare la frustrazione «del funzionamento del sinallagma contrattuale» e di sventare «ingiuste locupletazioni».

Dall'esame della giurisprudenza in tema di presupposizione sembra così enuclearsi una prima concreta indicazione, pur non esauriente, circa il contenuto del giudizio di buona fede. Sembra infatti potersi desumere che la giurisprudenza affidi al giudizio di buona fede e assorba in esso considerazioni relativa alla natura dell'affare ed al suo assetto economico e ragioni di decisione ispirate alla garanzia dell'equilibrio economico coerente all'assetto di interessi proprio dell'operazione economica che si è stanziata nel contratto."²³

An overall consideration of the jurisprudence within the theme of pre-contractual responsibility consents a reconstruction of the content attributed from judges to the rule of good faith expressed in art. 1337 c.c.

Within the evaluation of the behaviour of the parties during the negotiation phase of the stipulation of the contract, it is important to recognise the effort of the parties to define a criterion of application of good faith. The approval index elaborated by the jurisprudence, as, on one side, the seriousness and the conclusion of the negotiating phase, and the consequent rationality of the entrustments, and on the other side the existence of Just cause or justified motive of annulment of treaties, appear more detailed in content than what is expressed in art. 1337 c.c. about good faith.

However, the need of a clear definition of the principle is more evident whereas, with reference to the Just cause or justified motive of annulment of the contract, other indeterminate or not less general formula are used on behalf of good faith.

In the light of those facts it is important now to focus our attention on the contractual good faith, the interpretation and the execution of the contract.

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²³ Giovanni Treccami, Istitituto della Enciclopedia Italiana, Enciclopedia Giurdica, Mario Bessone, Andrea D'Angelo, *Buona Fede*, Treccani Giuridica, Roma 1988, p. 6

1.4.1 Contractual good faith.

The range within good faith operates for what concerns contracts is wide, it operates, in a more general sense, as a criterion of interpretation of contracts (art. 1366 c.c.) and as rule of behaviour in their execution (art. 1375 c.c.).

Within the theme of the interpretation of contracts according to good faith the jurisprudence does not offer concrete indications on the contents attributed to good faith. The persistence of enouncements that end up in a generic recall to the entrustment of the parties, beyond the fact that it does not offer a contribute in the determination of a concrete content of good faith, reduce the complex notion of the principle to a mere objective rule of behaviour.

The decisions that apply the role of good faith in the execution of contracts offer a wide range of cases, such as: the responsibility of the mediator that had given for concluded a contract which in reality is not, and the responsibility of the contractor that refuses to proceed to the ratification of a material mistake committed during the stipulation process, and of the creditor that, having received the guarantee for the fulfilment of future obligations and subsequently having known of unexpected economic difficulties of the debtor, continues to give him credit without exposing the circumstances that have occurred, and of the contractor that refuses to give to the other party the necessary information to fulfil the contractual performances of its own party.

Within the comparative evaluation of the mutual non-fulfilment of the parties in the execution of the contract, the jurisprudence (beyond the application of the self-protection tool expected by art. 1460 c.c. which consist in the suspension of the fulfilment) has individuated in the principle of good faith the approved criterion to identify which is the responsible party of the non-execution of the contract obligations.

Within the range of the integration of the contract, according to art. 1374 c.c., has been given the application of the principle of good faith to the affirmation of the responsibility of the constructor and seller of properties to give to the buyer a parking area that must be coherent to the urban prescription. And in more general terms, within the theme of presupposition, good faith can be considered as the criterion of the effort made by the parties in trying to overcome the difficulties came out during the execution of the contract.

This premise leads us to analyze a theme that, for its name, must be analyzed before the contract itself which are the pre-contractual duties of the parties.

The parties are substantially free to negotiate the terms of contracts and are free to create a binding contract that reflects their purposes, but this freedom has also a negative aspect because the parties

are free until the binding contract has not been concluded. In other terms the positive freedom of the parties consist in the fact that they can choose all terms of the contract that they are stipulating together, but there are some necessary preconditions that consist in not violating those terms after the signature of the contract.

Of course this freedom of setting the terms of the contract is not absolute because, for example, violence or fraud destroy the idea of positive freedom of the parties. A contract which is concluded by fraud or violence must be avoided, and is not considered as the result of the free will of the parties who want to stipulate a contract. So there are some pre-requisites that guarantee the positive freedom of the contract and this desire has encouraged almost every legal system to impose some rules in order to avoid violations to the minimal pre-conditions that guarantee this positive freedom of contracts. In this perspective the duty to act in good faith can be considered as an important pre-condition in order to maintain this positive freedom of the contract.

The creation of a contract is of course governed by fixed rules that must be followed by the parties. One of them is certainty and other one refers to the requirement of consideration. This rules have a mandatory nature and is interesting to analyze until what point the parties are free to deviate from these rules.

A legal system which is based on good faith uses this principle and the pre-contractual duties to mitigate the rigour of these rules, this because good faith is a standard that can override such rules. But of course if the rules in question are imposed for the public benefit, it would be unlikely to violate them. The formal rule of certainty, for example, was firstly imposed to guarantee the true intentions of the parties, but then its application destroyed that initial purpose.

"The clash between fixed requirements embodied in rules, and the principle of fairness embodied in the duty of good faith, reveals the advantages and the disadvantages of rules when counterposed to standards. Rules save the courts from the need to employ discretion and, further, accelerate the judicial process." ²⁴

Negotiation is characterized by its non-binding attribute but good faith plays an important role during this pre-contractual phase because, even if non-binding, during this phase the parties are somehow required to act in good faith. But this is not valid for all legal systems because, as we have seen talking about good faith according to common law or civil law legal systems, in English law parties can break the promises during the negotiation phase, while is not permitted to break a promise after the signature of the contract.

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²⁴ Jack Beatson, Daniel Friedmann, *Good Faith and Fault in Contract Law*, Oxford, Calendrun Press, 2002, p. 53

The rules that regulates the formation and the execution of the contract are usually accompanied by other rules that formulate a general criterion of behaviour of the parties. These are the rules that impose to the parties to act in good faith: good faith in the development of negotiation and in the formation of the contract (art. 1337); good faith in the interpretation of the contract (art. 1366); good faith in the execution of the contract (art. 1375); good faith in opposing the exception of the non-fulfilment (art. 1460, co. 2°).

"Alle norme che regolano, in modo analitico e circostanziato, la formazione e l'esecuzione del contratto si accompagnano altre norme, le quali formulano un generale criterio di comportamento delle parti contraenti. Sono le norme che impongono loro di comportarsi, l'una nei confronti dell'altra, secondo buona fede: buona fede nello svolgimento delle trattative e nella formazione del contratto (art. 1337); buona fede nell'interpretazione del contratto (art. 1366); buone fede nella esecuzione del contratto (art. 1375); buona fede, se si tratta di contratto sottoposto a condizione sospensiva o risolutiva, in pendenza della condizione (art. 1358); buona fede nell'opporre l'eccezione di inadempimento (art. 1460, comma 2°)."²⁵

The meaning of "good faith" in these rules consists in loyalty and correctness. The general duty of contractual good faith, as the even more general principle of correctness between creditor and debtor (that is valid for all the obligations, not only for those of contracts), has the duty to fill the legislative gaps: law in fact is not able to predict all the possible situations, and so is not always able to prevent, with specific norms, all the abuses that the parties can commit one against the other. The law can predict only the most recurring situations and can prevent only the most frequent abuses. The general principle of correctness of good faith consents to identify other prohibitions and other obligations in addition to the ones that are predicted by the law and it offers the criteria to fill the gaps that the legal systems can reveal from the variety of the economical and social situations.

The non written rules of correctness and loyalty are rules of custom: they correspond to what a contractual party feels to do or not to do, and it would be necessary to consider the medium level of correctness of the social and economical branch to which the contract refers to (for example the insurance branch or the one of credit etc.). In the end is the judge that has to decide whether a situation is happened following the criterion of good faith or not; but the judge has not his own concept of good faith and correctness; he must consider the custom's rules that can be also more elastic and flexible than his own concept of loyalty.

The application of the general clause of good faith is not the application of law, it is the application of the *regulae iuris* created by the judge, qualified then by law.

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²⁵ Francesco Galgano, Il Dovere di Buona Fede e l'Abuso del Diritto, p. 21 http://www.csm.it/documents/21768/81517/quaderno+89/cc6cf981-3e29-4194-ab7e-02f403fee000

The need of classification of good faith is even stronger within the contractual theme. As long as the use of good faith has arrived late in our experience, it is in any case possible to classify a series of *regulae iuris* to which the judges are concerned if they consider the behaviour of the parties in relation with the contractual good faith, even though they are more evident if we consider the single contracts then contracts in general.

"Il dovere generale di buona fede contrattuale ha, come quello ancor più generale di correttezza fra debitore e creditore (che vale per tutte le obbligazioni, e non solo per le obbligazioni da contratto), la funzione di colmare le inevitabili lacune legislative: la legge, per analitica che sia, non può prevedere tutte le possibili situazioni; non può sempre prevenire, con apposite norme, gli abusi che le parti possono commettere l'una a danno dell'altra. La legge prevede solo le situazioni più frequenti, sventa gli abusi più ricorrenti: molti riprovevoli comportamenti sfuggirebbero alle pur fitte maglie della legge, se si dovesse considerare permesso ogni comportamento che nessuna norma vieta ("la legge non lo vieta, dunque posso farlo"), o solo facoltativo ogni comportamento che nessuna norma di legge rende obbligatorio ("la legge non lo impone, dunque posso non farlo"). Il principio generale della correttezza e della buona fede consente di identificare altri divieti e altri obblighi oltre a quelli previsti dalla legge; si realizza, come si dice, la "chiusura" del sistema legislativo, ossia offre criteri per colmare le lacune che questo può rivelare nella varietà e molteplicità delle situazioni della vita economica e sociale. [...] L'applicazione della clausola generale di buona fede non è, se non in senso quanto mai lato, applicazione della legge; è, propriamente, applicazione di regulae iuris create dal giudice, a ciò abilitato dalla legge."²⁶

During the phase of stipulation and formation of the contract, good faith assumes first of all the shape of the duty of one of the parties to inform the other: parties are somehow obliged to inform the other about all the circumstances that can be ignored by the other parties, such as that the other party had known those circumstances would have not concluded the contract or would have stipulated a different contract according to other conditions.

The duty of information is accompanied by the figure of the reticence: the violation of the duty of information can cause the annulment by omission dole.

Another theory that must be included in our classification is the termination or withdraw without a just cause from the pre-contractual negotiations. It is considered opposite to good faith a sudden and not justified termination of negotiation, whereas the party relying on the conclusion of those negotiation by other party had made some expenses to cope with the fulfilment of the contractual obligations or had renounced to sign another contract.

The principle legal rules that preside over this matter are:

a) It is necessary that, even within simple negotiations, the parties have took into consideration the essential elements of the contract that they hope to stipulate;

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²⁶ Francesco Galgano, Il Dovere di Buona Fede e l'Abuso del Diritto, p. 22 http://www.csm.it/documents/21768/81517/quaderno+89/cc6cf981-3e29-4194-ab7e-02f403fee000

- b) The eventual short term of the meetings or the number of meetings between the parties is irrelevant, whereas the termination of the negotiation by one of the parties results not justified so that the entrustment by the other party to conclude the stipulation of the contract results vane.
- c) If the terminating party adduces circumstances that were already known at the beginning of the negotiation is not considered as a just cause of termination;
- d) If one of the parties believes that has been induced to a stipulation of a contract by dole from the other party, that had already alienated the same good to a third party, is considered as just cause of termination;
- e) There is not just cause of termination by the public administration if this, after having invited the other private party to begin the execution of the performance waiting for the administrative authorization of the conclusion of the contract, terminates the negotiation for a different reason that is not the failure in obtaining the authorization.

The party who, violating the principle of good faith during contractual negotiations, caused a damage for the other party, is required to refund the other party. This is the pre-contractual responsibility: its source derives from an illicit fact that has preceded and accompanied the formation of the contract (the fact for example of not having informed the other contracting party). The size of the damage that has to be refunded is determined by the negative contractual interest.

For the jurisprudence is difficult to conceive a contractual responsibility that derives not from the non-fulfilment of obligations of a contract that has already been concluded. But the so called contractual responsibility is, in reality, the responsibility that derives from the non-fulfilment of an obligation, whatever contractual or not contractual, from which the non-fulfilled obligation derives. Here there is a non-fulfilled obligation: the one that finds its source in the legal fact of the instauration, between the parties, of a pre-contractual negotiation that has as its object the parties' behaviour according to the principle of good faith. Therefore the doctrines expressed in terms of contractual responsibility are largely discussed. No doubts for what concern the theory of the fact that a negotiation could have been preceded by a contractual program, which is itself a contract: in this case, the attitude of the parties in relation to that contract can be evaluated as the execution of a contract, and it is possible to talk about contractual responsibility if for example the omission of information can be considered as a cause of the non-fulfilment of an obligation born from the program of the contract. And likewise it must be said for what concern the violation of further duties, that sometimes are expected from the contractual program, usually in a very meticulous way.

A specific theory of the pre-contractual responsibility is ratified in art.: the party that comes to know of the need of a cause of invalidity of the contract, is expected to pay the damages of having entrusted in the validity and the efficacy of the contract. The other party, once discovered the mistake of the other, can require the annulment of the contract, with the restitution of the performance eventually executed, but this could also have not recovered all the damages incurred that may consist in the expenses incurred. The other party, if is able to prove to have suffered such damage, has the right to be refunded.

1.4.2 Good faith in the execution and integration of the contract.

The norm that imposes to the parties to act in good faith can be considered as a norm which is inherent to the formation of the contract and its legal content according to art. 1374; so the violation of the duty of the execution of the contract according to good faith is considered as a violation of the contract, contractual non-fulfilment.

Two specific applications of the principle of good faith within the execution of the contract are:

- a) The obligation to behave in good faith according to the condition, to conserve the motivation of the other party (art. 1358), and so safeguarding the thing alienated under condition of suspension or acquired under condition of resolution.
- b) The denial of refusing the performance of the contract, availing oneself to the exception of non-fulfilment, if the refusal is not in good faith.

"La norma che impone alle parti di eseguire il contratto secondo buona fede è comunemente considerata una norma che concorre a formare il contenuto legale del contratto, a norma dell'art. 1374; sicché la violazione del dovere di esecuzione secondo buona fede è violazione del contratto, inadempimento contrattuale. Due specifiche applicazioni di legge della buona fede nell'esecuzione sono:

a) l'obbligo di comportarsi secondo buona fede in pendenza della condizione, per conservare integre le ragioni dell'altra parte (art. 1358), ossia custodendo con diligenza la cosa che sia alienata sotto condizione sospensiva o acquistata sotto condizione risolutiva (qui non opera l'art. 1177 perché, fino a quando la condizione non si avveri, l'obbligazione di consegnare non è ancora sorta);

b) il divieto di rifiutare la propria prestazione, avvalendosi della eccezione di inadempimento, se il rifiuto è contrario alla buona fede (art. 1460, comma 2°)."²⁷

In this case is necessary to consider the circumstances: for example an electric company or a telephone company can suspend the supply of electricity or the telephone connection to the consumers that are not paying taxes (art. 1565); but is contrary to good faith the suspension of the performance if the tax not paid is for example of the month of august when the consumer is on vacation.

Beyond this double legal classification, there is a wide legal range of cases that are related mostly to the single contracts, as the work contract or the joint stock company contract, than the contract in general. This can also be considered as the sign of a particular nature of the duty of good faith in contracts, which binds the parties of each contract, but that is susceptible to classification only in relation with single contracts.

There are three main categories:

- a) Good faith in the execution of the contract consist in the duty of the parties to realize the contractual interests of the other party and avoid to damage the other party, even fulfilling obligations which are not related to the law or the contract itself, as the obligation of performing extra obligations outside the contract (an example could be the one of who, having located an apartment to a disabled person, has the duty to provide a sliding entrance to consent to the lodger to easily enter and exit his residence).
- b) The good faith in the execution of the contract include the obligation of informing the other party about circumstances that the other party is not able to know. So if the performance from one of the parties has become impossible, this party must inform immediately the other, to consent the other party to reach the performance in a different way or to act in a way to not suffer damages caused by the non performance of the other party.
- c) The violation of the duty of good faith in the execution of the contract can be considered as an abuse of right: this is going to happen when a party exerts towards the other some rights that derives from law or from the contract to realize a different purpose to the predestined one.

²⁷ Francesco Galgano, Il Dovere di Buona Fede e l'Abuso del Diritto, p. 28 http://www.csm.it/documents/21768/81517/quaderno+89/cc6cf981-3e29-4194-ab7e-02f403fee000

To the violation of the duty of good faith it would correspond the obligation to refund the damage caused to the other party. This violation can also cause different consequences that are due to the application of the duty of good faith.

"In sede generale possono solo indicarsi queste tre generiche categorie:

a) la buona fede nell'esecuzione del contratto implica il dovere di ciascuna parte di realizzare l'interesse contrattuale dell'altra o di evitare di recarle danno, anche con l'adempimento di obblighi non previsti dalla legge o dal contratto (16), come l'obbligo di prestazioni accessorie rispetto a quelle contrattuali (si può fare l'esempio di chi, avendo locato un appartamento ad un handicappato, ha il do vere di dotare l'ingresso di uno scivolo che consenta all'inquilino di entrare e di uscire sulla carrozzella);

b) la buona fede nell'esecuzione del contratto importa l'obbligo di informazione su circostanze sopraggiunte che la controparte non è in grado di conoscere. Così se la prestazione di una parte sta per diventare temporaneamente o definitivamente impossibile (si pensi alla somministrazione di beni, come l'energia elettrica, o di servizi, come i trasporti di linea, che viene temporaneamente sospesa o che cessa per ragioni interne all'impresa del somministrante), la parte dovrà darne pronta notizia all'altra, per consentirle di procurarsi altrimenti la prestazione o, comunque, di attrezzarsi in modo da non subire danno. In rapporto alla fideiussione omnibus sono a suo luogo indicati doveri di informazione incombenti sulla banca;

c) la violazione del dovere di buona fede nell'esecuzione del contratto può anche configurasi come abuso del diritto: accade quando un contraente esercita verso l'altro i diritti che gli derivano dalla legge o dal contratto per realizzare uno scopo diverso da quello cui questi diritti sono preordinati. Egli, ad esempio, vuole sciogliersi da una vendita che ritiene per sé non vantaggiosa e, per poterne ottenere la risoluzione, esige il prezzo scegliendo ad arte il momento di una temporanea difficoltà economica del compratore (che non potrà più adempiere dopo l'altrui domanda di risoluzione)."28

The integration of the contract follows the analogical procedures elaborated to integrate law. In fact, as within the set of rules the lacks were filled thanks to the potentiality of current rules, so within the range of contracts the lacks were determined by the lacking of a contractual regulation and could be filled by the expansive force of the same regulation.

The two systems, the legal system and the contractual one, were regulated by the self-integration principle and were founded respectively, the first on the analogy and the second on the integration, tools that, for their nature, are entrusted to the same subject: the judge.

This setting postulate the distinction, not current anymore, between public sector, controlled by the law, and private one, controlled by the contract as law of the parties.

If it is true, as ratified in art. 1322 of the civil code, that the parties are free to determine the content of the contract within the limits imposed by law and that they can also conclude contracts that are not disciplined directly by the legislator, as long as their purposes are worthy according to the set of rules, it is important to highlight that, according to art. 1374, the contract binds the parties not only

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²⁸ Francesco Galgano, Il Dovere di Buona Fede e l'Abuso del Diritto, p. 29-30 http://www.csm.it/documents/21768/81517/quaderno+89/cc6cf981-3e29-4194-ab7e-02f403fee000

within the limits of its content but also to all the consequences that can derive from the contract according to the legal system, the uses and equity.

To the integration of the contract the current civil code dedicates only art. 1374 that does not give a definition of it, but it indicates only its function. The range of the execution of the previous norm has been discussed and is still discussed, and in particular is discussed the fact of if the integration is related to the content and the effects of the contract. The theory that limits the effectiveness of the norm to the range of the effects of contracts founds its foundation in art. 1374; in fact a part of it is dedicated to the content of the contract while another one is dedicated to its effects. This is coherent with the traditional orientation according to which the relation between the will of the parties and the intervention of the set of rules is solved in attributing to the first to the content of the contract, as the law and the other sources could never oppose themselves to the consensus. In an opposite sense, is sustained that the systemic collocation chosen from the legislator is not binding, even if the interpret could feel free to reconstruct the system based on a global and wider vision, which is suitable to individuate and define the inherent issues.

According to this theory, the want to relegate the intervention of law, uses, equity and good faith within the range of the effects would be a mere fiction for what concern the simple realization that the content of the contract is made also by the normative intervention.

According to that doctrinal position, art. 1374 of the civil code constitute the normative data on which the legislator indicates the sources of the regulation of the contract, and which establishes the fact that the content and the effects of the contract are inseparable. The integrative clauses result to be contractual agreements as the ones exposed to the normal remedies within the theme of nonfulfilment and expected in the safeguard of the contract; consequently the non-fulfilment of the duty to behave in good faith in an objective sense would lead to the contractual responsibility, as long as this obligation is legal. It also sustained that, in case the violation of the principles of good faith and correctness are configured as abuse of right, the sanction can consist in the paralysis of the execution or in the loss of the right itself.

It is affirmed that the recall to the law contained in art. 1374 of the civil code is extended to the prevision of art. 1375 with the clarification that the interrelation between the previous norms does not imply that the integration of the contract according good faith can brought back to the integration through punctual normative previsions, considering that the nature of general clause of the principle of good faith and the role played by the judge imply the application of the concept creating an "integrative legal operation", founded on law and oriented by criteria that can be deduced from the normative contest to which the clause refers to.

This interpretation consent to archive also all the discussion on the "unhappy" formulation of art. 1374 of the civil code that literally does not include within its sources of integration of the contract the principle of good faith, included in the successive article concerning the executive phase of contract. Recently it has been sustained also that on the basis of the contractual integrative good faith can be found also the foundation of the duty of renegotiation of duration contracts in case of significant alteration of the contractual economy determined by external causes which were not expected.

If we focus our attention on the doctrinal elaboration of the last three decades, it is worthy to highlight that the orientation more recent, which prevailed up to the 80s, basing on the normative data and distrusting from the general clauses, denied to the principle of good faith the nature of source of integration of the contract and limited its function to the phase of execution as a mere rule of evaluation *a posterior* of the behaviour of the contracting parties; there were so the belief that good faith had to intervene at a later time of the one of the individuation of the content of the contract. On the basis of this reconstruction, the execution phase followed the individuation, through the integrative sources, of the contractual obligations and rights and the contractual agreements were intangible within the execution of the contract.

Later the conception that separates the integration from the execution of the contract has been overcome and gradually has been affirmed another consideration that is the one of the execution as a phase provided with normative precepts and juridical obligations designed to obtain economical and programmed results, with the consequence that this last phase does not postulate the intangibility but the completeness of the negotiating programme, so that, even in the course of it, rise some obligations having the function to make necessary the acts needed for the satisfaction of the interests deduced within the contract.

It was therefore diffused the idea that recognize to the objective good faith the role of source of integration of the contract that, linked directly to the principle of solidarity expressed by art. 2 of the Constitution, constitutes a general clause designed to fix the rules of behaviour to which the parties of the contract must respect.

So it is a general clause that, unlike the other sources of integration expected by art. 1374 c.c., is a wider tool that consent to the judge a wider margin of action to adapt the contractual agreements in order to individuate concretely the behaviour expected for what concerns loyalty and safeguard.

This clause is affirmed in particular in the general duty of each of the contracting party to cooperate to realize the interest of the counterpart and is the limit of any negotiable position, thereby fully determining the content and the effects of the contract.

In an even wider perspective, in good faith has be seen, besides as a criterion of integration of the contract, also a general limit in the execution of the private autonomy and, therefore, a tool to control the equilibrium of the contractual content. This perspective is supported by the interventions of the legislator directed to safeguard against the excessive imbalance of the contractual conditions, about it we can mention the norms within the theme of usury (law of 7 March 1996, n. 108), of consumer's rights (6 September 2005, n. 206) etc.

"Si è quindi diffuso l'indirizzo che riconosce alla buona fede oggettiva il ruolo di fonte di integrazione del contratto che, raccordato direttamente con il principio di solidarietà espresso dall'art. 2 Cost., costituisce una clausola generale volta a fissare le regole di condotta cui le parti del contratto devono attenersi. Trattasi, quindi, di clausola generale che, a differenza delle altre fonti di integrazione previste dall'art. 1374 cod. civ., é uno strumento di portata molto più ampia proprio nella misura in cui il carattere indeterminato del precetto consente al giudice notevoli margini di azione per adeguare le pattuizioni contrattuali in modo da individuare in concreto i comportamenti esigibili in base ai canoni di lealtà e salvaguardia. Tale clausola si sostanzia, in particolare, nel generale dovere di ciascun contraente di cooperare alla realizzazione dell'interesse della controparte e si pone come limite di ogni situazione negozialmente attribuita, determinando così integrativamente il contenuto e gli effetti del contratto. In un'ottica ancor più ampia, nella buona fede é stato ravvisato, oltre che un criterio di integrazione del contratto, anche un limite generale all'esercizio dell'autonomia privata, e, quindi, uno strumento di controllo della ragionevolezza e dell'equilibrio del contenuto contrattuale." 29

So the violation of the duty to behave in good faith, in case that a contract is settled by a contract by detriment of the other party, if the content is unbalanced and in contrast with the duty of social solidarity of which the good faith is the expression, this could cause, according to art. 1418 c.c., the invalidity of the contract or of the single clauses.

The prevalent doctrine retain that exist an identification between the principle of correctness of art. 1175 and the principle of objective good faith of art. 1375, that is different from the subjective good faith, as psychological fact defined by art. 1145 as ignorance of damaging the other party's right.

The general clause of good faith and correctness so intended operates both on the level of the overall asset of the interests that underline the execution of the contract, art. 1375, and on the level of the behaviour of debtor and creditor within the range of the obligatory relation, art. 1175, representing the meeting point between the need to combine the *lex private* to principle of *pacta sunt servanda* and the economical *ratio* pursued through the recognition of the private autonomy.

Requiring different behaviours in relation with the specific circumstances of the concrete case, the obligation of good faith is not predetermined within its content. The doctrine, on the basis of the legal elaboration, has in any case tempted a certain classification. In particular has been affirmed that the criterion of loyalty is embodied in three particular negative behaviours: the fact of not

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²⁹ Antonietta Scrima, Mario Rosario Morelli, Corte Suprema di Cassazione, *Contratti in Genere –Effetti del Contratto- Eterointegrazione*, 2010, p. 6 http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione 116 2010.pdf>

causing intentionally false entrustments, the fact of not speculating on those entrustments and the fact of not contesting reasonable entrustments which are not generated in the other party.

Moreover, in relation with the obligation of safeguard, there have been identified as typical behaviour of good faith:

- a) The execution of performances not expected by the contract but which are necessary to safeguard the utility of the counterpart, provided that they would not cause a sacrifice;
- b) The modification to once behaviour if it is necessary to safeguard the utility of the counterpart, as long as they do not determine a significant sacrifice;
- c) The tolerance to the modification of the performance of the counterpart, if this is not against the party's own interest;
- d) The duty of information and announcement of all the relevant circumstances for the execution of the contract and, in particular, of the circumstances that allow the counterpart to avoid extra expenses or an erroneous performance;
- e) The correct exercise of discretionary powers, that assumes particular relevance within the matter of promotions and disciplinary powers and results strictly connected to the theme of the abuse of right.

The principle of good faith has received intensive legal applications in relation with the contract of work. The first decision, that can be defined as fundamental, is to realize a legal control on the discretionary of the employer in promoting his employees, with a consequent pronouncement of invalidity of the act adopted violating the principle of good faith. To the good faith within the formation of the contract, instead of good faith within the execution of the contract, are connected the sentences that admit the use of a legal trade union on the contests for the employment of employees. Again, the good faith within the execution of the contract can be brought back to the legal control on the exercise of power conferred to the employer in the presentation of the notes of qualification to verify if, because of the discriminatory intent of the adopted judgement, there has been a violation of the correctness and of good faith in the execution of the contract of work; and, above all, in the choice of the employees to collocate in the so called unemployment insurance.

A particular meaning it seems to assume the jurisprudence that allows a second look, following the criterion of good faith, of the dismissal of the employee: here the duty of good faith is intended as duty of "not follow discriminatory intents and to not choose on reasonable reasons, as not inherent to the employee in his specific quality of worker".

Good faith in contracts, as already mentioned above, acts of a principle that binds the parties to behave in a correct way respecting the interests of the other party/parties and to do whatever is considered due to maintain a good relation with the other party.

The jurisprudence of work is moved by more specific needs of safeguard of the worker that goes beyond the protection of the contracting party: it respects a fundamental principle of the Constitution (art. 4,36) and a particular right that can be considered as an important right of man. Our Italian jurisprudence of work abstain from the application of the duty of good faith to the relation of work when its application could damage, rather than benefit, the employee.

Another different application concern the contract of the joint stock company. The English jurisprudence express the maxim according to which the vote must be exercised by the shareholder "bona fide within the interests of the entire company"; a variation of this maxim is the one according to which a judge can cancel a decision such as no reasonable person could consider it a benefit for the society. This sort of legal control of the vote is allowed also in our jurisprudence: it conduces to the annulment of the decision taken abusing the right to vote made not properly ruled by the so called "excess of power".

The duty of good faith in the execution of the contract has found its application within the surety *omnibus*: here the jurisprudence has imposed to the bank to observe towards the guarantor the rules of correctness and of good faith, penalty "the ineffectiveness of the duty".

1.5 Good faith within international trade law: the *lex mercatoria* and the Unidroit principles.

After having analysed good faith within contracts, it is important to focus now the importance and the impact of this principle within international trade law.

In order to do so it is important to understand what the lex mercatoria is.

The *lex mercatoria* can be defined as an autonomous supranational legal system, which is separated by state rights, and which can apply directly to contracts of international trade at the place of the dispositions of national rights.

The idea of recognizing the existence of a new *lex mercatoria* developed since 1960s, under the push of a variety of circumstances.

At first, it has played an important role the affirmation, within the international praxis of business, of contractual practices more and more uniform, phenomena that at first was limited only to some specific and closed sectors endowed of more homogeneity but that, after the second post-war period, has consolidated within contracts and clauses typical of international trade.

A second important point has been, along with the consolidation of autonomous from the national legislation, the development of the *lex mercatoria* the contest of contracts between privates and States (or State entities), especially within the field of petroleum concessions.

Lastly, the growing awareness of the inadequacy of national laws to answer the problems arising from more and more outsourced contracts, tend to put in the first foreground the commercial uses, as they represent the real necessities of the operators of international trade.

Even though, more than forty years have passed since its birth, the content of the *lex mercatoria* are still almost evanescent. Generally, the supporters of the new *lex mercatoria*, concord on the fact that the norms that compose it are: the diffused contractual practices, the commercial uses and the general principles of right. To them it is also possible to add the norms related to the uniform material law, the principle of right related to the obligations of the parties and the private codifications of the general principles within the range of contracts.

The general principles of right, also known as the general principles applicable to the international trade, represent the nucleus of the *lex mercatoria*.

They are constituted on the one hand by a series of general principles, derived in part from international law, as the one of the binding characteristic of contracts (*pacta sunt servanda*), that correspond to the obligation of performing contracts in good faith, the *exceptio inadimpleti contractus*, the duty of the other party to minimize the damage, just to indicate the most significant, to which are added other principles as the one of responsibility of the parent company for the actions of the subsidiary, or the principle according to which within the *lex mercatoria* rights are prescribed within a period to be determined in good faith.

"Essi sono costituiti da un lato da una serie di principi generalissimi, in parte derivati dal diritto internazionale, come quello del carattere obbligatorio dei contratti (pacta sunt servanda), l'obbligo di eseguire i contratti secondo buona fede, l' exceptio inadimpleti contractus, il dovere della parte danneggiata di minimizzare il danno, tanto per indicarne alcuni dei più significativi, cui si aggiungono principi man mano enucleati dagli arbitri internazionali, come quello della responsabilità, in certe circostanze, della società controllante per le azioni della controllata, o il principio secondo cui nella lex mercatoria i diritti si prescrivono entro un periodo da determinarsi secondo buona fede."

It is anyway important to consider the fact that not all the legal sentences, commonly cited to this purpose, contain a clear affirmation of one of these principles which are separated by the nation itself. In several cases arbitrators, deciding within a national set of rules, affirm principles that they consider as the expression of a universal rule, without specifying which specific norm they have adopted.

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³⁰ Fabio Bortolotti, *Manuale di Diritto Commerciale Internazionale, Diritto dei Contratti Internazionali,* third edition, first volume, CEDAM, 2010, p.46

In any case it is possible to identify a series of general principles which had been affirmed at an arbitral level and that can collocate the contract subject to the *lex mercatoria* within a contest of legal rules, even though not precise and slightly coordinated among themselves.

According to that profile it is only partially clear the critic according to which the *lex mercatoria* tends to push the arbitrators toward the equity: in fact, if on the one hand it is undeniable that the use of very general rules augments the discretional power of arbitrators, they are in any case rules of right, according to which the parties have the possibility to develop legal argumentation on which the arbitrators will have to take a position within the sentence.

Furthermore it is important to remember that, through the development of an arbitral jurisprudence that gradually incorporates within the *lex mercatoria* new principles of right, its content became more and more precise and gave rise to a legal system more and more structured.

Keeping in mind the rather vagueness of the principles of the arbitral jurisprudence, the question that arises is that those principles can be integrated with the more elaborated rules of national right. About this has been said that the general principles should not only be deduced by the arbitral sentences, but also from the inherent national rights.

This solution offers the possibility to consent the integration of the general principles of the arbitral jurisprudence with those, more articulated, contained within the national rules, always verifying that this principles are also included within the *common core* of the interested countries. It has been also criticized as this could lead to a micro *lex mercatoria* different for every contract or dispute and would be thereby slightly compatible with the universal character of the legal set of rules of the international community of merchants. Furthermore it is difficult to determine if and in what measure those norms are common within the different set of rules, adding a further reason of controversy between the parties.

By consequence, if the purpose pursued is that to integrate the *lex mercatoria* with a series of more structured rules within the range of contracts, it is preferable to refer to collections of rules, as the Unidroit Principles or the Principles of European Contract Law of the "Commission on European Contract Law", that have explained unitary solutions, allowing thereby to overcome the difficulties mentioned above.

"Questa soluzione offre l'indubbio vantaggio di consentire l'integrazione dei principi (sovente troppo) generali desumibili dalla giurisprudenza arbitrale con quelli, assai più articolati, contenuti nelle leggi nazionali, sempre con il correttivo di aver previamente accertato che questi appartengano al common core dei paesi interessati. Essa è stata però criticata in quanto porterebbe alla creazione di una micro lex mercatoria differente per ogni singolo contratto o controversia e sarebbe quindi scarsamente compatibile con il carattere universale che si pretende abbia l'ordinamento giuridico della comunità internazionale dei mercanti. A ciò si aggiunge la difficoltà di individuare in termini concreti (ed in particolare nel contesto di

una controversia in cui le parti avranno interesse a far valere tesi contrapposte) se ed in che misura certe norme siano comuni a più ordinamenti, aggiungendo ulteriori motivi di controversia tra le parti.

Di conseguenza, se lo scopo perseguito è quello di integrare la *lex mercatoria* con una serie di norme più strutturare in materia di contratti desumibili dalle leggi nazionali, è preferibile far riferimento a raccolte di norme (come i Principi Unidroit o i *Principles of European Contrac Law* della «Commission on European Contract Law») che, pur prendendo spunto dalle leggi nazionali, hanno enucleato soluzioni unitarie, permettendo quindi di superare le difficoltà sopraindicate."³¹

The Unidroit Principles can be collocated within the range of the tools of the so called "soft law", conceived by the international organizations to overcome the inconvenient of the sector-based harmonization of international trade law. The proliferation of conventions, uniform contractual terms, collections of international customs, that have a fragmented nature and limited application, led to the need to create a common core of general principles to which appeal for the interpretation and the coordination of the single tools of uniform right. Within this scenery, the Unidroit Principles represent an innovative tool that can provide a point of reference for a more coherent harmonization within the international trade.

The Unidroit Principles on International Contracts of Trade, have been edited by the International Institute for the Unification of Right (Unidroit), which is an institution of the United Nations with its headquarters in Rome and which principal purpose is to elaborate tools to harmonize and coordinate the private right and, in particular, the commercial law of the states. The Unidroit Principles are essentially a collection of common principles within the principal national set of rules which are conform to the particular necessities of international trade contracts.

Published for the first time in 1994 (reviewed in 2004 and in 2010), they apply exclusively to international trade contracts, and therefore to international contracts between entrepreneurs and so they do not find application within the transactions between consumers and between entrepreneurs and consumers.

The Unidroit Principles are an innovative instrument first of all because they are not included within the traditional categories of legal tools that have been conceived at international level up to this moment. They are not simple contractual terms, they have not been drafted in the form of international treaty: in fact they are not binding and find application only because of their persuasive power. They have been drafted on the model of the American Restatement, so that they can be considered as a form of Restatement of contracts on a global level

The Restatement is a tool of harmonization which is typical of the American legal system, crated with the purpose to overcome the uncertainties and the difficulties caused by the presence of different state legal system, and constitute an autonomy which is source of right.

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³¹ Fabio Bortolotti, *Manuale di Diritto Commerciale Internazionale, Diritto dei Contratti Internazionali,* third edition, first volume, CEDAM, 2010, p.49

Even though they were originated within two different contest, both the Unidroit Principles and the American Restatement have the same purpose that is to overcome the uncertainties and the difficulties caused by the presence of different national sets of rules that can be applied to international transactions. As the American Restatement, also the Unidroit Principles represent a combination of tradition and innovation. In the absence of a solution which can be common among the different national sets of rules, the various rules had been drafted according to the "best rule" approach, that is to privilege the solution which is the one that correspond the most to the needs of the international trade.

"Sebbene traggano origine in due differenti contesti, sia i Principi Unidroit che il Restatement americano appaiono diretti verso il medesimo obiettivo: superare le incertezze e le complessità causate dalla compresenza di differenti ordinamenti nazionali applicabili alle transazioni internazionali. Come il Restatement americano, anche i Principi Unidroit rappresentano una combinazione di tradizione e innovazione. In assenza di una soluzione comune tra gli ordinamenti nazionali, le varie regole sono state redatte infatti secondo un approccio "best rule", e cioè privilegiando la soluzione maggiormente corrispondente ai bisogni del commercio internazionale."32

The second characteristic that makes the Unidroit Principles a particular innovative tool within the contest of the harmonization of the international trade law is its value of soft law. Although drafted as abstract juridical rules, the Unidroit Principles have not been drafted in the form of international treaty or model of law to be subjected to the states to be transformed in national law. They constitute a source of soft law and thereby a series of contractual principles without a direct binding force, the application of which depends exclusively from their persuasive value.

Finally the Unidroit Principles constitute an innovative tool because of their neutral nature, in the sense that they do not reflect, or prefer, the rules of any specific national set of rules, but, where possible, they try to mirror the rules that are common to the principal sets of rules. This presuppose a more balanced content, that thereby do not tend to any particular national set of rules. By consequence, in the application of these principles to the international disputes, the judges would be able to better look for a solution which is uniform and internationally accepted within the concrete case. Furthermore, the parties, in deciding the law to be applied to the contract, would be less and less dependent from a particular national system that can result as unknown or less familiar to at least one of them.

The most significant advantage that the Unidroit Principles present in comparison with the international conventions is their flexibility and thereby their possibility to be applied for a variety of different purposes. The Unidroit Principles can be applied in six different contests: as a system of

32 Economia & Diritto, Analisi spunti e riflessioni su temi economico-giuridici, I Principi Unidroit in materia di contratti internazionali: uno strumento innovativo di regolamentazione del commercio internazionale, 2010 http://www.economiaediritto.it/en/i-principi-unidroit-inmateria-di-contratti-internazionali-uno-strumento-innovativo-di-regolamentazione-del-commercio-internazionale/

rules to be applied to contracts and expressly chosen by the parties; as lex contractus when the parties have not expressed any choice on the applicable law; as source of general principles of law or lex mercatoria; as a means to interpret the tools of uniform right; as a means to interpret the national law and as a model for the national and international legislators. Furthermore, the praxis had individuated other possible applications of the Unidroit Principles, the most important of which is constitute by the use as a guide for the redaction of international contracts. It is important to mention also the fact that in 2013 the Unidroit has elaborated a series of model clauses that have the purpose to clarify more precisely the ways in which the Principles can be applied to the contract, facilitating thereby their diffusion within the economical operators.

They can be divided into four categories according to the ways in which the parties intend to use the Principles: the clauses which express the choice of the Principles as ruling law of the contract, the clauses that incorporate the Principles as terms of the contract, the clauses that refer to the Principles as tool to interpret the CISG and the clauses that refer to the Principles as tool to interpret the national law.

"Il vantaggio più significativo che i Principi Unidroit presentano rispetto alle convenzioni internazionali è la loro flessibilità e cioè la loro possibilità di essere impiegati per una varietà di scopi differenti. Come sancito nel Preambolo e come si vedrà più nel dettaglio nei prossimi paragrafi, i Principi Unidroit possono essere impiegati in sei differenti contesti: come sistema di regole applicabili al contratto ed espressamente scelto dalle parti; come lex contractus quando le parti non hanno espresso alcuna scelta circa la legge applicabile; come fonte di principi generali di diritto o lex mercatoria; come mezzo per interpretare strumenti di diritto uniforme; come mezzo per interpretare la legge nazionale e come modello per i legislatori nazionali ed internazionali. Inoltre, la prassi ha identificato ulteriori possibilità applicative per i Principi Unidroit, la più importante delle quali è costituita dall'uso come guida per la redazione dei contratti internazionali. Va infine menzionato che nel 2013 l'Unidroit ha elaborato una serie di clausole modello che hanno lo scopo di chiarire con più precisione in che modo i Principi possono essere applicati al contratto, facilitando così la loro diffusione presso gli operatori economici. Esse si suddividono in quattro categorie a seconda dei vari usi che le parti intendono fare dei Principi: le clausole che esprimono la scelta dei Principi come legge regolatrice del contratto, le clausole che incorporano i Principi come termini del contratto, le clausole che si riferiscono ai Principi come strumento interpretativo del diritto nazionale."³³

The Unidroit Principle are constituted by a Preamble, in which the principal ways of application of the principles within the praxis are listed, and 211 articles divided into eleven chapters. The articles, the so called black-letters rules, appear as general dispositions typical of the national contractual sets of rules or of the international treaties: nevertheless, differently from the national sets of rules and

³³ Economia & Diritto, Analisi spunti e riflessioni su temi economico-giuridici, I Principi Unidroit in materia di contratti internazionali: uno strumento innovativo di regolamentazione del commercio internazionale, 2010 http://www.economiaediritto.it/en/i-principi-unidroit-in-materia-di-contratti-internazionali-uno-strumento-innovativo-di-regolamentazione-del-commercio-internazionale/

from the international treaties, each article is followed by a comment and, sometimes, by illustrations that provide exemplifications on how these rules can be applied within the praxis.

The content of the Unidroit Principles can be summarized into four fundamental ideas: the contractual freedom, the good faith principles, the opening to the contractual uses and the favor contractus. The principles of the contractual freedom is expected by art. 1.1 and includes both the freedom to conclude contracts with any subject, independently by his status or nationality, and the freedom to determine the content of the contract. The enunciation of the principle of good faith, included in art. 1.7, is fundamental because one of the principal ideas related to the redaction of the Principles is that of diffuse as much as possible just and fair conditions within the international transactions. This principle is further specified in several articles of the Principles, that cover all the aspects of the contractual relationship, from the negotiations, to the interpretation and to the execution of the contract. The principle of good faith is so recognized within the Unidroit Principles, that it can also limit the other fundamental idea of the contractual freedom. This is recognized in art. 1.7(2), which confers to the good faith duty an imperative character, that cannot be limited or excluded by the agreement between the parties.

"Il contenuto dei principi unidroit può essere sintetizzato in quattro idee fondamentali di fondo: la libertà contrattuale, il principio di buona fede, l'apertura agli usi contrattuali, ed il favor contractus. Il principio di libertà contrattuale è previsto dalll'art 1.1 e comprende sia la libertà di concludere contratti con qualsiasi soggetto, indipendentemente dal suo status e la sua nazionalità, che la libertà di determinare il contenuto del contratto, salvo l'applicazione delle regole imperative. L'enunciazione del principio di buona fede, contenuto nell'art. 1.7, è di fondamentale importanza poiché una delle idee principali connesse alla redazione dei Principi è quella di diffondere nel più ampio modo possibile condizioni giuste ed eque nelle transazioni internazionali. Questo principio è poi ulteriormente specificato in numerosi altri articoli dei Principi, che coprono tutti gli aspetti della vicenda contrattuale, dalle negoziazioni, all'interpretazione e all'esecuzione del contratto. Il principio di buona fede è così ampiamente riconosciuto nei Principi Unidroit che esso può addirittura limitare l'altra fondamentale idea di fondo, e cioè la libertà contrattuale. Ciò è riconosciuto nell'art. 1.7(2), il quale conferisce al dovere di buona fede carattere imperativo, che non può dunque essere escluso o limitato dall'accordo delle parti." 34

Another essential characteristic of the Unidroit Principles is the central role played by the uses of the commercial practices in determining the rights and the duties of the parties. This is because the Unidroit Principles aim to provide a system of rules flexible enough to permit its constant adaptation to the always changing technical and economical conditions of the international trade. According to art. 1.9 the parties are linked not only by what they have expressly agreed among themselves, but

strumento innovativo di regolamentazione del commercio internazionale, 2010 https://www.economiaediritto.it/en/i-principi-unidroit-in-materia-di-contratti-internazionali-uno-strumento-innovativo-di-regolamentazione-del-commercio-internazionale/

³⁴ Economia & Diritto, Analisi spunti e riflessioni su temi economico-giuridici, I Principi Unidroit in materia di contratti internazionali: uno

also by any other use that is largely known and observed within the particular commercial sector taken into consideration.

Several dispositions of the Principles are finally inspired by the idea of favor contractus and thereby the necessity of preserve the contract where it is possible, limiting the number of cases in which its existence and validity can be put into question. For example, art. 2.1.1 subverts the traditional procedure of formation of the contract, establishing that it is concluded with the agreement of the parties, regardless of any further element. In this way, this disposition exclude all a series of requisites, as the cause or the delivery of goods within real contracts, that are considered essential for the valid formation of the contract in several national orientations. Another important disposition is the one of art. 2.1.22 on the conflict within standard clauses, that solves the frequent problem in the commercial practice, that is the so called battle of the forms, and the situation in which, during the negotiation, both the parties exchange standard contractual clauses in contrast among themselves. This conflict is solved establishing that the contract is concluded on the basis of the standard clauses which coincide and not conflict among themselves (the so called knock-out rule).

The UNIDROIT (the International Institute for the unification of the private right) has recently published the new edition of the "Unidroit Principles of International Commercial Contracts". The beginning of this new edition of the Principles has been conferred to the Unidroit Governing Council at the Secretariat Unidroit within the 95th session (Rome, 18-20 of May 2016).

The Unidroit Principles establish general rules that are applicable to contracts of international trade, and find their application only if expressly requested by the parties. The Principles represent an important point of reference, to solve commercial disputes within the contest of international arbitrations and for numerous national legislators that have accepted them as internal norms within the contract.

The new edition of 2016 of the Unidroit Principles has introduced several amendments and extensions to the previous edition of 2010, and it concentrates on the long term contracts that are the ones to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties.

The Unidroit Principles had been adapted with the purpose to discipline not only the contracts of instantaneous execution, as the purchase agreement, but also of the contracts of sales whose performances develop within a medium or long period, as the contracts of distribution, agency franchising etc.

"24/08/2017 - PRINCIPI UNIDROIT, PUBBLICATA LA NUOVA EDIZIONE 2016

La nuova edizione del 2016 dei Principi UNIDROIT ha introdotto alcuni emendamenti e aggiunte alla precedente versione del 2010, occupandosi, in particolare, dei *long term contracts*, ovvero quei contratti "to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties."

I Principi UNIDROIT sono quindi stati adattati al fine di disciplinare non solo i contratti ad esecuzione c.d. "istantanea", come il contratto di compravendita, ma anche quelle fattispecie di contratti commerciali le cui prestazioni si sviluppano nel medio-lungo periodo, come i contratti di distribuzione, agenzia, *franchising*, etc."³⁵

To conclude it is important to focus on the dispositions of the principle of good faith within the Unidroit Principles that are in particular ratified by article 1.7 and 2.5:

"The Principles' main provisions on good faith are found in Articles 1.7 and 2.15. Article 1.7 states that "[e]ach party must act in accordance with good faith and fair dealing in international trade," and "[t]he parties may not exclude or limit this duty." Article 2.15 provides:

- 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 into or continue negotiations intending not to reach an agreement with the other party.

In addition, several other articles incorporate the concepts of good faith, fair dealing, or some variation thereof. Article 4.8 states that good faith and fair dealing should be considered when an otherwise omitted contractual term must be supplied. Article 3.5 requires a party to call a mistake of the other party to the latter's attention if it is "contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error." Moreover, in a case involving gross disparity between the parties, Article 3.10 provides that a court may, upon a request by the party entitled to avoidance, adapt the contract or term to "make it accord with reasonable commercial standards of fair dealing." Similarly, Article 7.1.6 delineates circumstances in which an exemption clause excluding a party's liability for either non performance or substantially different performance "may not be invoked if it would be grossly unfair to do so."³⁶

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³⁵ Sondra Faccio, 24/08/2017 – PRINCIPI UNIDROIT, PUBBLICATA LA NUOVA EDIZIONE 2016, Studio Legale Santosuosso Avvocati Lexcom, Law Firm, Cabinet d'Advocats, 2016 http://www.santosuosso.it/index.php/it/news/288-24-08-2017-principi-unidroit-pubblicata-la-nuova-edizione-2016

³⁶ Farnsworth, Allan, Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws, Tul.J.Int.Comp.L. 1995 < https://www.trans-lex.org/122100/_/farnsworth-allan-duties-of-good-faith-and-fair-dealing-under-the-unidroit-principles-relevant-international-conventions-and-national-laws-tuljintcompl-1995-at-56-et-seq/>

CHAPTER 2. THE INTRODUCTION AND THE DEVELOPMENT OF THE GOOD FAITH PRINCIPLE IN CHINA

2.1 The general clauses in Chinese right.

Within the general clauses that are currently included in the Chinese legal system, the contractual good faith plays a leading role: this principle, introduced in the set of rules of the People's Republic of China by art. 4 of the General Principles of the Civil Right in 1986, after a brief phase in which it was used only sporadically, because of the positive conception of right that has characterized the first years of the post-Maoist reforms, starting from the 1990s it has been very successful in Chinese jurisprudence so that it is considered as the "queen of the clauses" (帝王 条款 diwangtiaokuan³⁷).

The principle of good faith in the current legislation in China is so important that almost every existing law, within the civil or commercial range, refers to the objective good faith, while its duty of honesty and correctness nearly became a slogan frequently mentioned during Chinese leaders speech as one of the imperatives needed to accompany the edification of the state of right within the People's Republic of China.

Other aspects of the principle are less known: such as the relevance of good faith within the judicial practice, or the system of values that the mandarin term used to refer to good faith, *chengshi xinyong* (诚实信用), recalls to the mind of the Chinese judge.

Some scholars stated that the principle of good faith can be considered more as a form of behaviour rather than a legal rule to be applied, this because its vague characteristics and expressions.

In order to better understand the principle of good faith in China it is worthy to analyze the etymology of the Chinese characters that compose the expression *chengshi xinyong* (诚实信用) and the principles of the Confucian tradition that refer indirectly to this notion.

³⁷LIANG HUIXING, "Minfa", (Diritto civile), Sichuan Renmin Chubanshe, 1989, p. 323; JIANG PING, "Zhonghuarenmingongheguo Hetongfa. Jingjie (fu falü tiaowen)" (LaLegge sui contratti. Commento puntuale), Beijing, Zhongguo Zhengfa Daxue Chubanshe, 1999, p. 6

The expression *chengshi xinyong* (诚实信用), as the principle to which it refers, is rather recent in China: to find it within a law, in fact, we have to wait until 1931 when the Civil Code of the Republic came into force, at culmination of the modernization and westernization process of the right started at the end of the XIX century. So in the traditional Chinese right it does not exist a reference to the expression of *chengshi xinyong* as it is intended currently in China. It is in fact included within the neologisms created between the end of the XIX century and the beginning of the XX during the period of modernization of the Chinese right, that is the time during which all the others concepts typical of the *Western Legal Tradition* were also introduced.

Chinese were inspired by the German model, filtering from the Japanese experience. In Italian and in French the term "good faith" is used to indicate both the concept in an objective or subjective sense, while the German legislation distinguish the two notions using two different terms: the good faith intended as the legitimate belief, typical of the right of property, has been called "guter Glaube", that correspond to the literary definition of good faith, while the good faith intended as loyalty is called "Treu und Glauben", in which Treu means faith and Glauben which means as well belief faith or loyalty. Japanese, influenced by Germans, has also adopted this distinction using characters whose literally meaning correspond to the German ones: the subjective good faith is called "zen-i" (善義, literal translation of "good faith"), while to refer to the objective one is used the expression "shingi seijitsu no gensoku" (信義誠実の原則, literally "principle of maintaining the word given").

Chinese jurists adopted the same distinction using the same characters used by Japanese with only a minimal difference: Chinese jurists distinguish between "shanyi" (善意), that is the good faith intended in a subjective sense with the meaning of "good intention", and "chengshi xinyong de yuanze" (诚实信用的原则), that is the good faith intended in an objective sense where chengshi (诚实) means "be honest" and xinyong (信用) means "be worthy of trust".

So "good faith" is a new expression that has been introduced in the Chinese vocabulary using characters that up to that moment were used to refer to different concepts and principles that were distant from the western conception. Thanks to this choice, the values represented by those characters have not been lost and were used to implement the imported notion.

Chinese authors also stresses the importance of the relation between the ancient and new meaning of these characters and, in the published studies made in China on good faith, is possible to find many references to the Confucian works or also Maoist ones in which are highlighted values such as *cheng* 诚 and *xin* 信 to demonstrate the fundamental role embodied by those values for centuries within the Chinese philosophic and legal thought. The expression *chengxin* 诚信, that is currently recognized as the abbreviation of *chengshi xinyong* 诚实信用, is very ancient: Chinese jurists usually

""Cheng 诚" e "xin 信, del resto, sono termini da sempre considerati affini: già in epoca Han, nel celebre Shuowen jiezi (说文解字, I sec. d. C.), il più antico dizionario cinese, l'uno veniva impiegato per illustrare il significato dell'altro.

Il loro legame è evidente anche dal punto di vista etimologico.

Cheng 诚 è costituito dal radicale 言 (oggi semplificato in 讠) yan, "parola", e dal carattere 成 cheng, "portare a compimento", con valore fonetico; esso "rimanda a una completezza individuale esibita nell'autenticità dei discorsi" e viene tradotto con "sincerità, onestà"³⁸. Anche in xin 信 è presente il radicale di parola, 言, yan, preceduto però da quello di "uomo", 〈 (人 ren): "la parola di un uomo", da cui il significato di "fiducia, fede", e quello di "lettera, messaggio"."³⁹

Coming back to the meaning of cheng 诚, we can also mention the fact that is a nominalised verb, used within the Confucian Four Books (四书, Sishu), to indicate the human virtue of sincerity and integrity.

It is also important to understand the link that exists between the concept of *cheng* $\dot{\mathbf{w}}$ and the one of *ren* \leftarrow that means humanity because it represents an important link between the philosophical level and the legal one, because is important to notice how these ethical principles found their application also within the practice of the imperial right.

The *ren* 仁 in fact is the virtue of men of being kind and sympathetic with other men and of the government of nourish the community (*yangmin* 养民); this concept that has been consolidated in the following centuries within the norms of the Qing code that (大清律例, *Da Qing Lü Li*), in particolar in relation with some institutes that are related to the contractual range, represented also

³⁹ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 6

https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20diw20buona%20fede%20e%20la%20giurisprudenza.pdf

³⁸ WU GUANGHUA (zhubian): "Chinese- English Dictionary - Hanying da cidian", Shanghai Jiaotongdaxue chubanshe, 1995

one of the principles to which the magistrates, selected through the imperial exams system, had to respect in order to establish equity within the relation between the parties, and to establish an equilibrium within the demands of the parties in situations in which this balance has failed.

Beyond these cases, the Da Qing Lü Li 大清律例 regulated the duties of the parties of an agreement on the basis of another principle of the general clauses that has made the history of the contract and that consist in the duty of the parties of respecting the pacts, and of fulfilling the assumed tasks. So here we find again the second character of xin 信, that represents the duty of the parties of being coherent within their promises and, since Han dynasty, has been put in relation with the fulfilment of the contracts as a form of respect in the entrustment that the other party has put on the contractual promise.

The strict connection between the ethical value represented by xin 信 and contracts, is also directly expressed by the etymology of the character itself. Beyond its meaning of "faith", in modern Chinese in fact it means also "letter, message" and sometimes in classical era xin 信 has been used to indicate agreements, or contracts, doing so a summary of its ethical and documentary meaning; a famous example of this use of *xin* 信 is contained in the *Lunyu* (论语, *Dialoghi*) of Confucius.

"The philosopher Yu said, 'When agreements (信 xin) are made according to what is right (义 yi), what is spoken can be made good. When respect is shown according to what is proper, one keeps far from shame and disgrace. When the parties upon whom a man leans are proper persons to be intimate with, he can make them his guides and masters."40

It is interesting here to notice the recall to yi 义, justice, virtue that is strictly connected to xin 信, also in the juridical practice. The imperial magistrates that had to decide on "contractual" disputes, in fact, did not limit themselves to evaluate the fulfilment of the reciprocal promises in relation with the status of the parties.

To conclude the etymological analysis of the characters that compose the Chinese for objective good faith, it is important to mention the fact that xin 信, intended as the respect of the duties taken by the king towards his subjects, has a fundamental importance also within the school of thought which can be considered the most hostile to the Confucian one and that is the legal one.

This system of values in the course of the centuries was gradually modified by the new ideas that came from the western countries. This ideas matured in a contest that is completely different from the Chinese one and were destined to subvert the equilibrium on which the Confucian state was built up for centuries; it is during this process that also the general clauses entered China.

⁴⁰ James Legge, "The Chinese Classics", vol. I: "Confucian Analects, The Great Learning, and the Doctrine of the Mean", Cosimo Classics, Oxford, 2009, p. 139-40

From this brief analysis of the meaning of this principle, it is clear that there is not an unanimous definition of the term "good faith", but we can define it as the embodiment of the concept of justice in civil law, and as a legal tool which aims to reach a balance between the interests of the parties and between the interests of the parties and society. The "Civil Procedure Law of People's Republic of China" stipulates that civil litigation must follow the principle of good faith.

"诚实信用是民法的基本原则之一。它是正义理念在民法的具体化,是在遵守交易道德基础上谋求当事人之间的利益平衡,以及当事人与社会的利益平衡。《中华人民共和国<u>民事诉讼法</u>》规定,民事诉讼应当遵循<u>诚实信用原</u>则。"41

The application of the principle of good faith in the field of justice has always been one of the focuses of academic research. The academic circles generally believe that the principle of good faith means to acknowledge the creativity and initiative of judicial activities, which means to admit the discretion of the judge. Cai Zhanglin, a scholar in Taiwan, believes that the principle of good faith is not established. It is stipulated in white paper. In other words, it is a white paper to the judge. Mr. Liang Huixing also believes that the principle of good faith is both a moral rule and a legal rule, therefore has dual function of legal regulation and moral regulation. The principle of good faith gives more flexibility to law, so confer more fairness to judges within their activities, it eliminates the egoistic will of the parties and can directly balance the autonomy, rights and obligations of the parties.

"诚信原则在司法领域中的应用向来是学界研究的重点之一。学界一般认为,诚信原则意味着承认司法活动的创造性与能动性,意味着承认法官的自由裁量权。台湾学者蔡章麟认为诚信原则是未形成的法规,它是白纸规定,换言之,是给法官的白纸委任状。梁慧星先生亦认为:诚实信用原则是将道德规则与法律规则融合为一体,因而同时具有法律调节和道德调节的双重功能,使法律获得更大的弹性,法官因而享有较大的公平裁量权,能够排除当事人意志自治而直接调整当事人之间的权利义务关系。"42

2.2 The introduction of the good faith principle in China.

The exact entrance of the notion of "good faith, loyalty" in China is not clear. What is sure is that it was not included in the draft of the civil code realized during the last period of the Qing empire; it

https://baike.baidu.com/item/%E8%AF%9A%E5%AE%9E%E4%BF%A1%E7%94%A8/3493564?fr=aladdin

⁴¹ Definition from Baidu, my translation, 诚实信用

⁴² Definition from Baidu, my translation, 诚实信用, 应用

https://baike.baidu.com/item/%E8%AF%9A%E5%AE%9E%E4%BF%A1%E7%94%A8/3493564?fr=aladdin

was only in 1931, with the introduction of art. 219 of the Republican Civil Code (中华民国民法 *Zhonghua minguo minfa*), that the concept of good faith made its first appearance in the Chinese right. This article ratified that each of the parties had to perform its own obligation and its own rights according the rules of loyalty and the reciprocal respect (诚实信用, chengshi xingyong).

The Chinese code results really influenced by the German one, but this is not a surprise as the Bürgerliches Gesetzbuch is considered one of the most developed code of that time and, for this reason, for Chinese it constitutes the ideal model to follow. Besides their predecessors, in fact, the legislators of the Guomindang (the nationalist party) had not as purpose the simple westernization of Chinese right, but they aimed to a modernization of rules, choosing norms which had to be both actual and the most in tune with the Chinese "spirit" embodied by the "Three people's principles" that are nationalism (China must be a nation cohesive internally and able to relate with other countries on a parity level externally), democracy (adapting the democratic doctrines of western countries within the Chinese contest) and the welfare of the people (creating a social security system to improve also the quality of life of the masses through the redistribution of lands and capitals).

It is worthy to notice also the fact that the use of the technique and the science of the western countries is instrumental, in the sense that they are only useful because compatible and functional to the maintenance of the singularity of the Chinese culture and the Chinese values (idea that had characterized for a long time the attitude of China towards the "west") in order to solve the serious problems that afflicted the nation and to defend it from the attack of the great foreign Powers.

The principle of good faith contained in the BGB (German code) insert itself perfectly in this contest: from one side in fact it was a rule of one of the most prestigious code of that time; on the other side it was conform with the principle of social justice that was implicit in the Three principles of the people (Ξ 民主义, *San Min Zhuyi*) and it introduced in the Chinese legal system more flexibility, besides the possibility of going beyond of the will expressed by the parties to give priority to the community above the individual.

It is important to focus our attention on this last aspect to understand how the notion of good faith, since its first appearance in the Chinese right, has been intended in a collectivistic way, as a principle of cooperation, useful to balance the relations between the single parties of a contract, but also the realization of the interests of the parties and of the society, in order to make it fair.

It is known that the normative emptiness left by the abrogation of the Six codes of the Guomindang and by the dismantlement of the nationalist legal system was destined to last for a long time; as Tong Rou, one of the principal civil law specialist in China, has noticed in an article of 1989, the Chinese civil legislation, together with the economical development of China, has followed a curvy stretch of road. The steps of this way had to lead to, in 1982, the renounce of publishing a civil code which

comprehended all, and to the decision to ratify only one law that included all the fundamental principles of the civil right. Those principles are the general ones of the civil right of the People's Republic of China (中华人民共和国民法通则, Zhonghua renmin gongheguo minfa tongze) that, came into force the first January of 1987, had to introduce within the formal Chinese right the notion of good faith that became now one of the fundamental principles (基本原则, jiben yuanze), with a range that is no more limited to the right of the contracting parties, but is extended to all the civil activities.

Article 4 of the first chapter of the General Priciples of the civil right ratifies that:

"'Le attività civili devono (应当, yingdang) rispettare i principi di volontarietà (自愿 原则, ziyuan yuanze), equità (公平原则, gongping yuanze), risarcimento di eguale valore (等价有偿的原则, deng jia you chang de yuanze) e buona fede (诚实信用原则, chengshi xinyong yuanze)".⁴³

La buona fede è divenuta così uno dei principi fondamentali (基本原则, jiben yuanze) del diritto civile, i principi, per usare le parole di Tong Rou, che costituiscono il punto di partenza e la base "per la formulazione, spiegazione, realizzazione, e ricerca delle nostre norme di diritto civile", nonché "la manifestazione, all'interno dei Principi Generali del diritto, dell'essenza socialista cinese""44

The civil activities must respect the principle of volunteering, equity, compensation of equal value and good faith. So good faith became one of the fundamental principles of the civil right, that are the ones that constitute the starting point and the fundament for the formulation, explication, realization and research of the norms of the civil right, and also the manifestation, within the General Principles of right, of the Chinese socialist essence.

Good faith means that within the civil activities the subjects of the civil rights must manifest clearly their intentions, they must respect them, and must observe the promises and must not use tricks, must not tell lies (for example pretending to sell products of bad quality as good quality ones), must not damage the interests of the State, of communities, individuals and must fulfil their civil duties.

The principle of good faith requires also that, during the development of the civil activities, parties respect the uses and customs and the public goods of the society, that do not violate the limits of law, that do not perform in an erroneous way a contract, that do not abuse of their rights and that they do not go into unfair competition. At the same time the respect to the principle of good faith represents the need and the incarnation of the socialist spiritual civilization within the civil activities.

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⁴³ Clizia Cacciamani, A. Flamini, *La formazione del conratto nel Diritto Cinese*, Principi generali del diritto civile della Repubblica Popolare Cinese, cap. I, art. 4 (translation) http://ecum.unicam.it/80/1/La_formazione_del_contratto_nel_diritto_cinese_CACCIAMANI.pdf

⁴⁴ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 12 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

This is a definition that will be taken again into consideration after 1990s. It is in fact after the come into force of these General Principles that in China the jurists started to discuss about the principle of good faith, its importance, its function, its meaning, neglecting, maybe for ideological reasons, the fact that it was already present in Chinese legislation twenty years before the abrogation of the nationalist Civil Code. Going back to the legislative level, we can notice, in fact, that the norms within the civil range ratified after 1986 refer to this concept.

The principle of good faith in the first years of 1990s, because of its extreme vagueness, find only a scarce application, and until the end of 90s it was not uses frequently at a practical level.

According to one of the most famous author of that time about this argument, Cui Guangping, within the thirteen years that separate the General Principles from the promulgation of the laws on contracts of 1999, the principle of good faith could find application only in fourteen cases: in particular he was referring to the four cases decided within the 1st of January 1987 and April 1992, the seven cases decided between April 1992 and the end of 1998, and the three cases in which has been applied the principle of good faith, without mentioning the relative article.

"Secondo un autore, nei tredici anni che separano i Principi Generali del Diritto dalla promulgazione della Legge sui Contratti del 1999 tale principio doveva trovare applicazione solo in 14 casi: si tratterebbe, nello specifico, di quattro casi decisi tra il 1 gennaio 1987 e l'aprile del 1992, di sette casi decisi da quella data alla fine del 1998, e di tre casi in cui era stato applicato il principio di buona fede, ma senza citare esplicitamente l'articolo corrispondente."

Within these applications it is important to include the opinion 27/1992 of the Supreme Court of People that would be fundamental to understand the future development of the principle of good faith within the right of contracts. Through this decision the Supreme Court of People has given concreteness to the notion of "xianshi gongping" (显失公平, evident lost of equity) listed in art. 59 of the Minfa Tongze within the clauses that would consent to one party to require the annulment or the modification of a civil negotiation; thanks to this opinion, it has also confirmed the existence of the principle of the mutation of the circumstances within the Chinese right. The fact that the Supreme Court of People had later used this last principle to define the principle of good faith itself, make this case even more emblematic according to another point of view: it is the first time that the principle of good faith is used directly to fill the legal lacks. So with this opinion it has been established and confirmed the link between the principle of good faith and the one of the mutation of circumstances. This link has also been reaffirmed in the published works of the following years by

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⁴⁵ Guojia fagui shujuku – Database di leggi e regolamenti nazionali, Beijing, Guojia xinxi zhongxin chubanshe, 1999, citato in CUI GUANPING, "Hetongfa chengshixinyong yuanze bijiaoyanjiu" (Studio comparativo del principio di buona fede nella Legge sui Contratti), in Chongqing Sanxia Xueyuan xuebao, n. 1 2002, vol. 18, p.. 87.

famous Chinese authors that, often without mentioning any particular decision, consider the "mutation of circumstances" as case of application of the principle of good faith.

So we can say that the space of application of the principle of good faith is extended to all the life of the contract, and thanks to art. 92 is not only the result of the legal developments just mentioned. This principle derives in fact from the new needs of flexibility of right and of contractual justice within a climate full of economical, political and social reforms.

The new law of Contracts, destined to uniform the contractual discipline, become in those years extremely complex. It has in fact to satisfy ambitious requisites in particular within the intentions of who was stipulating it, it had to be inspired by the principles of the market economy and by the ones contained in the international treaties and the agreements. This principle has to give the appropriate attention to the autonomy of the parties and to the necessities of the socialist market economy, considering at the same time the problems linked to the transition from the planned economy to arrive at the end to fulfil the new needs of economical efficiency, making the transactions easier and safer without forgetting the public welfare.

"La nuova Legge sui Contratti– destinata, com'è noto, a uniformare la disciplina contrattuale, divenuta, in quegli anni, estremamente frammentata e complessa – doveva, infatti, soddisfare requisiti molto ambiziosi, e di difficile conciliazione: in particolare, nelle intenzioni dei suoi compilatori, essa avrebbe dovuto "essere ispirata ai principi propri dell'economia di mercato, e a quelli contenuti in trattati e accordi internazionali; porre adeguata attenzione all'autonomia delle parti e alle necessità dell'economia di mercato socialista, tenendo conto, nello stesso tempo, dei problemi legati alla transizione dall'economia pianificata; venire, infine, incontro alla nuova esigenza di efficienza economica, rendendo più facili e sicure le transazioni, senza però dimenticare il benessere pubblico".

La clausola di buona fede, contenuta in molti dei testi legislativi presi a modello nella redazione della legge, e portatrice, nello stesso tempo, di valori morali collegati alla giustizia contrattuale, aveva le caratteristiche adatte a mediare tra queste (talvolta conflittuali) istanze; non a caso, a tale principio è stato attribuito tanto spazio, all'interno della nuova normativa contrattuale."⁴⁶

The general clause of good faith, contained in several legislative texts taken as a model for the redaction of law, and that brings also ethical values related to the contractual justice, had the characteristics suitable to mediate these instances; it is not by chance that has been attributed to this principle such a wide space within the new contractual normative.

This year, 2017, in China the New General Principles have been introduced. The "General Rules of Civil Right of the People's Republic of China" can be considered as the answer to the new necessities of Chinese society and also the reflection of the international role of China.

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⁴⁶ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 16 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

Their promulgation signs the beginning of the compilation of the civil right in China. Foreshadowing a civil code, in fact, the "General Rules of Civil Right of the People's Republic of China" have been adopted by the majority of votes during the fifth session of the XII National People's Congress of 15th March 2017, and will enter into force the 1st October 2017.

They count a total of 206 articles divided in eleven chapters and they are, for what concern their structure, very similar to the "General Principles of the Civil Right of the People's Republic of China" (still in force because not expressly abolished).

The contents of the General Rules contain remarkable changes compared to the previous General Principles. For example, they contain important innovations related to the sources of right (art. 10 disposes that the uses and customs are considered within the sources of right and it expunges the old disposition of the Principles according to which also politics was considered within the sources of right). Also the disposition within the theme of protection (art. 33), agency duties (art. 170), of termination of the contract of agency (art. 174) and of terms of operation of the action (art. 188), are new.

Relatively to the terms of the operation of the action, the General rules have extended the deadline from the original two to three years.

Also the norm within the range of voluntary protection of the incapable signs an important turning point, because extends also its rage of application. The institute of the voluntary protection of the incapable attributes to the subject the right of choice of his tutor, beyond the limits disposed for the safeguard assigned by office. This will be useful for the enterprises that will manage to prevent eventual losses and damages identifying in advance powers and duties of the tutor and so nominating then who has real professional competencies, for example for a business partner who became totally or partially unable to act.

2.3 The contract in China.

China was a country based on a double planning economy until 1993, as it was URSS until 1990. The economical planning of the state was a source of the contractual obligations and a criterion of reference or measurement parameter necessary for the validity of contracts in the public sector;

stipulation, execution, modification and resolution of those contracts could happen in contradiction with the objective fixed by the economical planning.

The planned sector was so different from the free one that two different laws of contracts were ratified: the first of 1981 was about the national contracts also called internal or planned contract, and the other one, of 1985, was more liberal and was about transnational contracts or the ones relative to the foreign trade.

In 1993 the binding economical planning was eliminated, but the socialist dichotomy of contracts was cancelled only in 1999 after the adoption of the Law of Contracts (or Contract Law).

In the new unified text the definitions, the regulations, the number and the technical quality of the disposition dedicated to the contract in general confirm that the Chinese right has been influenced by the western right and by the international private right.

The unified right has exercised a strong influence to: the new law in fact produces several solutions derived from the CISG (Convention on Contracts for the International Sale of Goods) and from the Unidroit principles, for example in the distinction between proposal and invitation to propose (art. 14-15 of CISG), in the distinction between the suspension and the retire of a proposal (art. 17-18 of CISG). At the same time art. 11 of the Law of Chinese Contracts provides that the written form can also be a text sent through electronic means of communication (telegrams, fax, email). This prevision derives from the E-Commerce Model Law of 1996 of the Uncitral (United Nation Commission on International Trade Law).

In china, until the introduction of the Civil Code in 1986, there were not a clear definition of contract. However, the contract was conceived as an agreement to constitute, modify and extinguish civil relations between the parties.

Art. 2 of the new law instead defines contract as an agreement to constitute, modify or extinguish civil relations of an obligatory nature between physical persons, juridical persons or other organizations, as subjects of equal status.

Comparing this definition with the one of the Civil Code we can immediately see some differences. At first the New Law of Contracts, specifying the physical persons as equal within a contract, is different from the previous economic law on contracts where Chinese citizens were excluded from the execution of negotiating relations. Secondly, the New Law of Contracts emphasizes the fact that all the contracting parties are civil subjects of equal degree regardless the status. Thirdly, the New Law of Contracts permits also to other organizations to stipulate agreements, differently from the Civil Code of 1986 where this problem was not solved.

Therefore the definition of contract in China is generally interpreted including the following legal characteristics: the contract is a legal civil act, made by physical persons, juridical persons or other

organizations of equal legal status; the contract has the purpose to create, modify or extinguish obligatory civil relations; the contract is an agreement that expresses the will of two or more parties. About this last point, with the expression of "the will of the parties" is intended the achievement of the manifestation of the parties' will. Essential factors to understand if this encounter of the parties' will had occurred are at first the fact that the expression of the will of the parties must be mutual, so every party has to express to the other his intentions; secondly, a consensus between the parties must be reached.

"Pertanto la definizione di contratto è generalmente interpretata in Cina in modo tale da includere le seguenti caratteristiche legali:

- 1) il contratto è un "atto civile legale", posto in essere da persone fisiche, persone giuridiche e altre organizzazioni di uguale status giuridico;
- 2) il contratto ha lo scopo di creare, modificare o estinguere rapporti civili di tipo obbligatorio;
- 3) il contratto è un accordo che esprime la volontà di due o più parti.

persons, juridical persons and other organizations.

In merito a quest'ultimo punto con l'espressione "volontà delle parti" si intende essenziale il raggiungimento dell'incontro delle manifestazioni di volontà delle parti. Fattori essenziali per comprendere se c'è stato incontro tra le volontà delle parti è in primo luogo che l'espressione della volontà deve avvenire mutualmente; ogni parte deve esprimere all'altra la sua intenzione. In secondo luogo deve essere raggiunto un consenso tra le parti."⁴⁷

Another interesting element of distinction between Chinese right and western civil right is that of the "equality of status" within the contracting parties. While in civil law and in common law these concepts are considered as part of the modern civilization of enlightenment derivation. It is an innovative concept of the Chinese legal system and it is worthy to mention that China had, for decades, a planned economy and just recently has become a market economy. As already mentioned, within the planned economy all the transaction were conducted respecting the government plans.

Today within the market, all the parties are equal, even though one of them is an agency or a government agency and the latter would be considered by lawyers the same as a private subject.

About subjectivity, the law of contracts divides the contracting parties in three categories: physical

The physical persons can be both citizens and foreigners. The term "other organization" is not defined by law, but, according to the interpretation of the People's Supreme Court, the term include those organizations that are constituted according to law with determined properties and organizational structures, that have legal capacity and in particular are included social organizations as subsidiaries of legal entities and associations. According to the Chinese Civil Code, the juridical

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persons are associations with legal capacity and able to assume civil obligations. According to the

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⁴⁷ Clizia Cacciamani, La Formazione del Contratto nel Diritto Cinese, Dottorato di ricerca in Diritto Civile nella Legalità Costituzionale, pg. 37-38 http://ecum.unicam.it/80/1/La formazione del contratto nel diritto cinese CACCIAMANI.pdf

Chinese right and the People's Supreme Court the "other organization" can stipulate contracts in his name with other subjects, but who creates that organizations, will be directly responsible for the patrimony if the organization would not be able to respond with its own properties to the obligations assumed.

Chinese law does not rule familiar relationships as marriage, adoption, tutelage. In the first chapter of Chinese law of contracts, named "General Dispositions", after the definitions and the delimitations within the range of the relations just mentioned above, there are some articles that establishes in an explicit way other general dispositions: they are the principle of contractual freedom (art.4), of equity (art. 5), of good faith (art. 6), of respect of the ethical and juridical set of rules, of the social and the economic order and the public interest (art. 7).

"Nella legge cinese sui contratti, nel primo capitolo, dedicato a "Disposizioni generali", dopo la definizione e le delimitazioni nell'ambito dei rapporti sopra considerati, vi sono alcuni articoli che fissano in modo esplicito altre disposizioni generali: esse sono il principio di libertà contrattuale (art.4), di equità (art.5), di buona fede (art.6), di rispetto dell'ordinamento etico-giuridico, dell'ordine economico sociale e del pubblico interesse (art.7)" 48.

The enunciation of those disposition in an introductive position is a originality which is relevant both for the method and for the content.

As expected from art. 13 of the law of contracts, when the contract is concluded, the proposal and the acceptation are essential, because consist in the mutual consensus of the parties. It is interesting to notice that even though the law of contracts is not the first of the modern China, but is the first time that those concepts, proposal and acceptation, are considered within the legislation. Nevertheless, both concepts were not born in China, but are included in the law of contracts with some Chinese characteristics.

First of all the proposal and the acceptation are based on the premise that the contract is a consensual agreement. In order to refine the contractual proposal, there are two elements that must be taken into consideration: a declaration of intent and the intention of entering a contract with other subjects. The content must be concrete in order to obtain the proposal and who is proposing has to declare that, after the acceptation by the recipient, the proposal is binding. To make the proposal, the will of the tender can be expressed in a written form. According to the prevailing doctrine the contents of the proposal must be clear enough to let who has to accept it to understand not only the real will of who is proposing, but also what are the essential elements of the content of the contract.

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⁴⁸ SCHIPANI, I principi di Unidroit e le asimmetrie del commercio internazionale", trad. in cinese di DING (testo italiano in Studi in onore di Pietro Rescigno, 1, Milano, 1998, p. 753).

So the proposal is a declaration of intent, but not all declarations of intent constitute a proposal. To become a proposal, the declaration of intent must be done in a way so that it can be understood by the other person. If the declaration does not express clearly the intention of concluding a contract or if it has in itself only indications of advertising or if it is a simple commercial information, this declaration could not be considered as a proposal, but in some cases it can be defined as an invitation to propose. Art. 15 of the Chinese law of contracts ratifies that the invitation to propose must be a manifestation of intent that indicates the desire to receive offers by others.

According to Chinese law a proposal once that has become effective could not be annulled and the person who propose is bound to it until the addressee will not accept it. The addressee could not transfer or cede the power to accept to third parties without the consensus of the proponent. The proposal is not effective when it is effectively retired, revoked or banned and so when it is rejected by the acceptor. The non acceptance occur when the acceptor does not accept the terms and the conditions of the proposal. According to the doctrine also the notification of the non acceptance is required and also the reject must be done expressly. The necessity of the notification of the non acceptance is justified in particular whereas the parties had already stipulated contracts among them. A proposal would be also considered not effective if the acceptor has changed the content of the proposal. The contract is concluded only when the proposal has been accepted.

Chinese legislators, for the first time included, in their law of contracts, the principle of the binding power of the contract and the parties must perform all the obligations assumed in stipulating the contract, but the parties can also modify the contract. The modification can result from a deal between the parties or from an order of the judge.

2.3.1 Good faith within Contract Law and Chinese right.

The encounter between China and the Romanesque categories of private right is quite recent, no more than a century if we consider as starting point the process of codification of the last period of Qing dynasty (1911).

This encounter has been characterized, most of all in the post-Maoist era, by the recourse of law as principle source of right fa 法, fomenting a dialectic that was also present within the history of Chinese right, and that used to prefer the model of rites for the relations between individuals.

The opening of China from a planned economy to the market economy, has been followed by the production of right through laws that seems to indicate to China the way towards the codification step by step. What has been called the Chinese way toward the Rule of Law, is not free from the important choices of content of the civilian tradition funded on the roman right. It is important to highlight the political choice to resort to the legislative production of right also within the civil relations and the adhesion to a series of dogmatic contents that transmit precise choices of value within the civilian tradition of the Romanesque system.

Within the range of contracts, the law of 1999 describes a contract that is extraneous to the traditional Chinese right and is, instead, typical of the civilian tradition funded on the roman right.

The experience of the economical contract, started with the law of 1981, and that has been concluded with the law of 1999, highlighted the vitality of the contract scheme also beyond the principle of contractual freedom.

With the subsequent laws, the one on the "International Economical Contracts" of 1985, the one on the "General Principles of Civil Right" of 1986 and the one on "Contracts" of 1991, both within the international and internal relations, the contract took a shape that derived from the codification of the private right within the civilian tradition of roman right.

In this way the Chinese legal system inserts itself within a debate in which prevail on one side a model of contract as an agreement, on the other side it highlights the existence of different types of contracts that leads to a debate on the elements of cause.

Within this contest, Chinese right represents a new current of the system which has its own peculiarity and differentiations that must be examined and understood.

Art. 2 of Chinese law on contracts of 15 march of 1999 ratifies that according to that rule the word contract is intended as an agreement to constitute, modify or extinguish obligatory civil relations between physical persons, juridical persons or other organizations as equal subjects.

"Ai fini di questa legge, per contratto 合同 (hetong) si intende un accordo 协议 (xieyi) per costituire modificare o estinguere rapporti civili di tipo obbligatorio tra persone fisiche, persone giuridiche od altre organizzazioni, in qualità di soggetti paritari."49

The Chinese definition of contracts evokes at a structural level the French definition of contract of art. 1101 included within other Italian civil codes of 1865 and 1942.

The Chinese law of 1999 modifies the generic description of the effects of the contract present in the General Principles of the civil right of 1986 that in art. 85 referred to the "civil relations" minshi

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⁴⁹ S. SCHIPANI - G. TERRACINA, Leggi tradotte della Repubblica popolare cinese. Legge sui contratti, trad. di L. FORMICHELLA - E. TOTI, Torino, Giappichelli, 2002, art. 2 (p. 2-3).

guanxi (民事关系), with the more specific construction of "relations of right and of obligation" minshi quanli yiwu (民事权利义务) that referred to the German and the Italian civil code in terms of "legal patrimonial relation", and that do not give value to its distinctive element from the common law system as a contract as a source of obligation rendered in Chinese in the form of debt.

The choice to translate the notion of contract in *hetong* 合同 is the result of a terminological and conceptual process started at the beginning of 1900 in relation to the notion of contract of the European civil codes. In the Chinese civil code of 1929, in fact, the Chinese jurists of the commission did a different choice, translating the word contract with the two characters of *qiyue* 契约 that, typical of the most ancient tradition, was preferred to express the western notion of contract.

It was since 1950 that the expression of *hetong* 合同 began to be used to express the idea of contract within the measures of the executive power within the range of the relation between administrations, public enterprises and cooperatives.

It has been stated that the substitution of the term *qiyue* with *hetong* could have been done for an ideological reason, as it expresses the idea of sharing and equality (*he* 合 in fact stands for "to accord", "to unify", while *tong* 同 means "equal", "common") and is so retained more in tune with the principle of the socialist economical ideology.

"È dal 1950 che hetong inizia ad essere usato per esprimere l'idea di contratto all'interno di provvedimenti del potere esecutivo in materia di rapporti tra amministrazioni, imprese pubbliche e cooperative. È stato sostenuto che, al riguardo, potrebbe sottostare al ricorso sempre più frequente a hetong, rispetto a qiyue, una ragione di tipo ideologico, in quanto il primo segno «esprime l'idea di comunione ed uguaglianza (he sta per 'accordare', 'unire', mentre tong significa 'uguale', 'comune') ed è dunque ritenuto maggiormente in sintonia con i principi dell'ideologia economica socialista»"50

Also in the legislation of the economical contract of 1980s prevails the contruction of 经济合同 (jingji hetong) under the influence of the sovietic model. Now the terminology seems to have settled in favour of the expression *hetong*, even though sometimes, mostly in works of translations of foreign codes and Roman sources, we can see a certain oscillation.

A further remark must be made: in this long Chinese process of fixation of right through several norms, the general category of contract has never substituted, or cancelled the regulation of the single contractual typology. In this way a system of rules and content typical of the civilian tradition of contracts has been added to the system of contractual relations in China.

This is particularly interesting in China, because the European observer can catch a significant differences within the general parties that had accompanied the several contractual norms. For example the elements which normally should be taken into consideration within the agreement

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⁵⁰ Marina Timoteo, *Il contratto in Cina e Giappone nello specchio dei Diritti Occidentali*, CEDAM, Padova, 2004 cit., p. 255.

between the parties through specific clauses, do not coincide with the minimum that generally is requested in the private right of our tradition.

In addition we can find also the issues related to the combination of rules and proper principles of Chinese traditional right as the one of "equitable reason" (公平合理) and of "human measure" (合情), and rules and principles that appeared in the Chinese right through the encounter with the civilian tradition of the Roman system, as the principle of good faith *chengshi xinyong* (诚实信用), expected in art. 4 on the General Principles of right of 1986 and in art. 6,42-3, 60, 125 of the new Law of Contracts of 1999 during the phases of formation, interpretation and execution of the contract.

Art. 6 in particular invites the party to act in a climate of honesty and good faith in exercising their rights and performing their obligations. Art. 42 stresses the point that the parties of a contract must be aware of the fact that they are responsible for the damages of the other party if it is proved that they have started a negotiation which does not respect the standards of society. Art. 60 states that the parties are obliged to respect the principle of good faith and to perform a series of obligation according to what they have decided in the stipulation of the contract. Also art. 92 ratifies the fact that the parties, after having concluded the agreement, they must perform the obligation of the contract but also some duties that come from morality and ethical values. Within art. 125 good faith is used as a parameter to interpret disputed clauses of contracts.

"Law, starting by the Article 6 of CL3(china contract law), which invites the contracting parties explicitly to act in climate of honesty and good faith in exercising their rights and performing their obligations. Moreover, the Article 42 CL clarify and stress on the point that the party shall be responsible for the damage and deemed liable if its proved that the party started an agreement by a negotiation which doesn't respect society standards and ethics yet wantonly act in bad faith. For more emphasizing the principle of the good faith, the Article 60 CL5 oblige that the parties has to respect the principle of good faith and perform various obligations in accordance with the nature and the object of the agreement within the business ethics and practices. Also Article 92 CL set forth that after concluding rights and obligations under the contract, the parties shall observe the principle of honesty and good faith and perform different agreed duty according to business rules and customs, the principle of "good faith" could be in somewhat a latent motif of a breach. Article 108 CL6 indicates that where one party to a contract expresses explicitly or indicates through its acts that it will not perform the contract. The other party may demand it to bear the liability for the breach of contract before the performance period finish.

However, "good faith" prohibits one from delaying the performance without considerable reason or from stopping it in an early stage, to the contrary to what was agreed and written in the contract. The Article 125 CL7adopts the good faith as a primordial parameter when interpreting disputed clauses of the contract."51

According to those articles it is clear that good faith is directly connected with the freedom of the contract, but there are some limitations to this freedom. In China good faith can be seen as a tool to

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⁵¹ Nadia Zayani, The Doctrine of Good Faith in China: A Tool to Correct the Contractual Behavior or A Serious Restriction to the Freedom of the Contract and Individual Interests, *Dama International Journal of Researchers (DIJR), ISSN: 2343-6743, ISI Impact Factor: 0.878 Vol 1, Issue 10, October 2016, Page 13 - 19, Available @ www.damaacademia.com*

correct the contractual behaviour and sometimes to limit the freedom of the contract and the individual interests of the parties whereby the use of the principle is considered as an offence to the public order.

The equilibrium between obligations and benefits within the binding agreement which is the contract itself, is not granted, within the traditional Chinese right, by good faith. The frequent appeal in the traditional right to the models of equity in order to better manage the relationships within contracts, collocates the current debate on good faith in the Chinese right in a perspective partially different from the European one, almost opposite.

In Europe, it is necessary to interpret and integrate the general abstracts norms to transmit in contract, through the judicial moment, new social and juridical application. On the contrary in China it has been reaffirmed the importance of the Roman distinction between *iudicia stricti iuris* and *iudicia bonae fidei* as interpretative key to limit to the minimum the discretion of judges in deciding within the disputes arisen from contracts, and the application of the relative clauses on the basis of criteria of equity and sensibleness.

The interest to the concept of good faith in China has changed after the enter into force of the Contract Law. With its emanation began also the concern on the possible use that the Chinese courts could do of the principle, without considering that since more than ten years the "chengshi xinyong" was already one of the fundamental principles of Chinese civil right, and that was included also in the majority of the civil laws and also within the contractual ones. What is certain is that none of the laws of the People's Republic gave too much importance to the principle. The Contract Law refers to the principle of good faith in 5 articles, in other two is mentioned using the term that indicates good faith in a subjective way (善意, shanyi), and in other three is used the term of bad faith (恶意, e'yi).

To better understand the norms concerning the objective good faith, it is necessary to consider firstly the structure of the Hetong fa, whose norms, according to art. 1, are finalized to safeguard the legitimate rights and the interests of the parties of the contract, the economical and social order and to promote the construction of the socialist modernization, disciplining the contracts of the civil right that are, according to art. 2, articles to construct, modify or extinguish the civil obligatory relations between physical persons, juridical ones and other organizations as equal subject.

It is a very long law composed by 428 articles divided in two parts: the first one, dedicated to the "General Principles" (总则, zongze), contains the norms dedicated to the contract in general, organized in eight chapter (general dispositions, formation of the contract, effects of the contract, execution of the contract, modification and transfer of the contract, extinction of the rights and obligations derived from the contract, responsibilities caused by non-fulfilment, integrative dispositions); the second, entitled "Specific Dispositions" (分则, fenze), disciplines instead fifteen

typical contracts (trade, supply and use of electricity, water, gas, heating, donation, money mortgage, lease, financial lease, tender, construction, transportation, technology, storage, storage in warehouses, commission, mediation).

"Si tratta, com'è noto, di una legge straordinariamente lunga, se paragonata alle altre in vigore nella RPC. Essa è infatti composta da 428 articoli, divisi in due parti: la prima, dedicata ai "Principi generali" (总则, zongze), contiene le norme dedicate al contratto in generale, organizzate in 8 capitoli (disposizioni generali, formazione del contratto, effetti del contratto, esecuzione del contratto, modifica e cessione del contratto, estinzione dei diritti e delle obbligazioni derivanti dal contratto, responsabilità per inadempimento, disposizioni integrative); la seconda, intitolata "Disposizioni specifiche" (分则, fenze), disciplina invece quindici contratti tipici (compravendita, fornitura ed uso di elettricità, acqua, gas, riscaldamento, donazione, mutuo di denaro, locazione, locazione finanziaria, appalto, costruzione, trasporto, tecnologia, deposito, deposito nei magazzini, commissione, mediazione)."52

The fundamental principles, on which contracts must refer to, are listed in the first part in art. from 3 to 8: the principle of parity (平等, pingdeng, art. 3), free will (自愿, ziyuan, art. 4), equity (公平, gongping, art. 5), and of course good faith (诚实信用, chengshi xinyong, art. 6).

The references to good faith do not stop to the generic prevision contained in chapter one, in fact, during the redaction of the Contract Law, emerged two schools of thought of the general clauses. According to the first one, the new law had to follow the model of the Minfa Tongze, defining the fundamental principles in one or more articles; according to the second, on the contrary, the principles were expressed directly through law, which gave them more concreteness.

For what concern the principle of good faith it seems that it followed the second one, because its structure referred to one of the most important normative tests to which the Chinese legislators inspired themselves, Principles of international contracts of trade published by the Unidroit, and which represented a twofold advantage: the one of conforming the Chinese contractual right to the uses of international trade, giving space at the same time to a clause considered fundamental to grant justice and equity within the contractual relations.

The articles dedicated to good faith within the Contract Law recall the dispositions contained in the Principles, and the legislator had inserted in almost every chapter dedicated to the "General Principles" references to honesty and correctness. In particular in Chapter one, "General Dispositions" in art.6; in Chapter two, "Formation of contract" in art. 42, 398; in Chapter four, "Extinction of rights and obligations derived from contract", in art. 60; in Chapter eight, "Integrative Dispositions", in art. 125.

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⁵² Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 17 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

The principle of good faith, if we consider the titles of the chapters mentioned above, finds its application in every moment of the contractual activity, from the formation to the extinction, passing through execution and interpretation.

These dispositions, in the period of time of the entrance into force o the CL, do not represent an innovation only for the reference to the principle of good faith: they disciplined situations that, until then, were completely unknown to the Chinese right. So the new Law of Contracts is considered a great progress for the Chinese contractual right.

The acceptance of the model was not total: for example the hardship clause is not even mentioned in the definitive test of the Hetong fa. This demonstrates how the several recalls to the "chengshi xinyong", included in the Contract Law, were not exclusively linked to the necessity to adapt the Chinese contractual discipline to the most recent products of the uniform right. They permitted also to make effective the equality of the parties, through limitations of the contractual free will inspired to justice and equity.

From the emanation of the Hetong fa, good faith is considered an useful means to adapt and solve the contract in case of unpredictable events, but also it is considered as the turning point of the new contractual system which was able to grant a standard of morality and to adapt to the changing needs of this experience of transiction.

The notion of good faith has become the "queen of the clauses".53

2.4 The new General Principles in China.

After having analyzed the introduction of the General Principles in China in 1986, and after having examined the introduction of the new Civil Code and the new Law of Contracts in China, it is important now to focus on the new General Principles introduced and discussed recently.

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⁵³ LIANG HUIXING, "Minfa", (Diritto civile), Sichuan Renmin Chubanshe, 1989, p. 323

In 2017 a study concerning the five principles of Chinese Civil Code and their main characteristics was conducted in China.

The general principles constitute the basis of Chinese Civil Code since its first appearance in China, they reflect the ethical values of the Civil Code, its purposes and guiding principles, they govern and guide several systems and standards of civil law. The General Principles are also object of several studies because they are very important to study and understand the Chinese civil law. Therefore Xin Xiangxu 新祥旭 conducted this study on the General Principles highlighting their essential charachteristics.

"民法的基本原则是效力贯穿民法始终,体现民法的基本价值,集中反映民事立法的目的和方针,对各项民法制度和民法规范起统率和指导作用的基本原则。民法基本原则也是法硕考试的重点,掌握民法的基本原则对我们民法的学习是非常重要的,因此新祥旭考研辅导班为大家总结了法硕民法基本原则复习的要点"54

The first principle is the one of equality. The contents of this principle include the legal equality in status, the legal application of equality, the consult on the basis of equality, the legal safeguard of equality.

The so called principle of equality, also called as the principle of legal equality of status, is included in the third article of the Chinese rules of civil law that ratifies that the parties within the legal activities are equal. The principle of equality reflects and concentrate the characteristics and the essence of legal relations, and its main characteristics derive from the differences between the civil legal relations and the others legal relations.

The concept of equality is the premise to the production and development of the concept of legal equity as a standard that embodies the civil legislation and the civil administration of justice, secondly it embodies the legal equality of the main body of the civil rights competence, it is also the expression of the behavioural criterion of the fundamental legal activities. This is the nucleus and the spirit of the principle of equity and it is also the essential meeting point of the differences between the civil legal relations and the other typologies of relations.

The regulation of the principle of equity within Chinese current legal system stresses not only the principal abstract moral quality of equity, but also stresses on the weaknesses of the equal treatment.

"平等原则包含的内容有法律地位平等,法律适用平等,平等协商,平等受法律保护。1、所谓平等原则,也称为法律地位平等原则我国《民法通则》第3条明文规定:当事人在民事活动中的地位平等。平等原则集中反映了民事法律关系的本质特征,是民事法律关系区别于其他法律关系的主要标志。2、平等观念是民法得以产生和发展的思想前提平等原则首先体现为一项民事立法和民事司法的准则,其次体现为民事主体民事权利能力的平等,还体现为一项

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⁵⁴新祥旭, 2017 法律硕士考研: 民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

民事主体进行民事活动的行为准则,即要求民事主体之间应平等相待, 这是民法上平等原则的核心和灵魂,也是民事法律关系区别于其他类型法律关系的根本所在。3、我国现行民事立法中的规定的平等原则,既强调民事主体抽象人格的平等(见《民法通则》第10条),又注重弱式意义上的平等对待(如消费者权益保护法,劳动法)。"55

The second is the so called voluntary principle.

This principle consists in the fact that a party is free to express his own real will, and, on the basis of his own desires, to establish, modify, annul obligations and relations of civil right.

It consists also in the fact that any organization or legal person cannot illegally interfere in the manifestation of the free will of the other party/parties, and cannot illegally impede the other party/parties to achieve their own civil rights.

The principle of private law autonomy refers to the basic legal criteria to determine that civil subjects are free to conduct civil activities based on their will. Art. 4 of the General Principles of Civil Law stipulates that civil activities should follow the principle of voluntariness. The principle of private law autonomy is the embodiment of civil society autonomy in the field of private law.

The principle of autonomy of private law emphasizes that the legal relationship between individuals should depend on the individual's free will, thus providing the civil subject with a freedom protected by law.

Of course the principle of private law autonomy is not absolute, civil law recognition and protection of freedom is not unrestricted freedom, the sufficient and justified way to limit the freedom of civil subjects is the national interest and the social and public interests.

"1、当事人充分自由地表达自己的真实意志,按照自己的意愿依法设立、变更、终止民事权利义务关系。2、禁止任何组织或个人非法干涉民事主体依法表达其自由意志或非法阻碍其实现民事权利。(1)私法自治原则,又称意思自治原则,是指法律确认民事主体得自由地基于其意志去进行民事活动的基本准则。我国《民法通则》第 4 条规定,民事活动应当遵循自愿原则。私法自治原则是市民社会自治在私法领域的体现。(2)私法自治原则强调私人相互间的法律关系应取决于个人的自由意思,从而给民事主体提供了一种受法律保护的自由。当然,私法自治原则不是绝对的,民法所确认和保障的自由也不是不受限制的自由,得以限制民事主体自由的足够充分且正当的理由就是国家利益和社会公共利益。"56

The third principle is the one of equal pay.

The meaning of this principle is that within the exchange of property, the exchange of equal value shall be paid for the acquisition of the property rights. According to the principle of equal compensation, the exchange and benefit of the two parties in the market economy are equal and compensable. If the not balanced exchange of benefits between the parties is the result of a

⁵⁵新祥旭, 2017 法律硕士考研:民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

⁵⁶新祥旭, 2017 法律硕士考研: 民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

voluntary initiative, it is not considered as a violation of the principle. (Such as voluntary contributions between civil subjects free of charge or inheritance of property according to law, to fulfil the obligations between family members).

"等价有偿原则含义:在财产流转中进行等价交换,取得财产权利应当支付的对价。1、等价有偿原则针对市场经济关系中,双方交换利益的等值性、有偿性,即无付出就无所得。2、如果当事人之间利益关系的不均衡系自主自愿的产物则不认为违反了该原则。(如民事主体之间自愿无偿赠与财产或者依法继承财产、履行家庭成员间的扶养义务)。"57

The fourth principle is the principle of good faith. This principle consist in telling always the truth to the other party and in not violating or cheating the principle of good faith. This means to maintain the word given and to fulfil all the civil duties. If a damage occurs all the parties have to try to find a remedy, all the civil subjects within the relation must be loyal, keep their promises, must be careful and safeguard the interests of the other party and meet their general expectation. One party has also to provide to the other all the necessary information in order to seek personal interests and social public interests. Because modern society is increasingly becoming a commercial society, to maintain an efficient and secure market environment, it is necessary to establish sufficient trust among different subjects. Article fourth of the general principles of civil law stipulates that civil activities shall follow the principle of good faith. The principle of good faith as a basic principle of civil law, known as the "king clause" in the law, can be effectively applied to all areas of civil law, plays a guiding role within the civil parties, establishes that the parties must exercise their rights and obligations in good faith, if the parties violate the principle of good faith in exercising their rights, this is considered as an abuse of rights.

"1、将真实情况告知对方,禁止隐瞒或欺骗诚实信用。2、恪守信用,认真履行民事义务,发生损害时双方当事人都应当采取补救措施,避免或减少给对方造成的损失。诚实信用原则,将最低限度的道德要求上升为法律要求,要求处于法律上特殊联系的民事主体应忠诚、守信,做到谨慎维护对方的利益、满足对方的正当期待、给对方提供必要的信息等,以谋求个人利益与社会公共利益的和谐。因为现代社会日益成为一个商业社会,维持有效率又安全的市场环境必须要靠不同主体之间建立充分的信赖。《民法通则》第 4 条规定,民事活动应当遵循诚实信用原则。将诚实信用原则规定为民法的一项基本原则,在法律上号称"帝王条款",具有适用于全部民法领域的效力,对当事人的民事活动起着指导作用,确立了当事人以善意方式行使权利、履行义务的行为规则,如果当事人行使权利违背诚实信用原则的要求,即构成权利的滥用。"58

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⁵⁷新祥旭, 2017 法律硕士考研: 民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

⁵⁸新祥旭, 2017 法律硕士考研: 民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

The fifth principle is the one of fairness. To carry out civil activities the parties, while exercising their civil rights and performing their obligations, must follow the principle of fairness taking into consideration the interests of others and of social justice. So another important point related to the principle of fairness is the judicial fairness and justice. When there is no clear provision in law, civil disputes shall be dealt with impartially and reasonably.

The principle of fairness contains two meanings: the first is that legislators and judges should maintain the balance of interests between the civil subjects in the process of civil legislation and judicature (this is the core of the principle of fairness); the second is that civil subjects should engage in civil activities according to the fair concept recognized by society to maintain the balance of interests between the parties.

The principle of fairness has a very important meaning because it embodies the moral concepts of progress and justice within Chinese legal system, to make up for the insufficiency of the legal provisions and guarantee the realization of the principle of autonomy of private law.

The legislation of other countries and regions has mostly stipulated the principle of fairness. China's general principles of civil law also clearly recognize the principle of fairness, article four, in fact, states that civil activities should follow the principle of fairness.

"1、本着公平观念进行民事活动,正当行使民事权利和履行民事义务公平原则。2、兼顾他人利益和社会公平利益。3、司法公平合理。法无明文规定时应按公正、合理处理民事纠纷。公平原则包含两层含义:一是立法者和裁判者在民事立法和司法的过程中应维持民事主体之间的利益均衡(公平原则之核心);二是民事主体应依据社会公认的公平观念从事民事活动,以维持当事人之间的利益均衡。公平原则是进步和正义的道德观在法律上的体现,对于弥补法律规定的不足和保证私法自治原则的实现,具有重要意义。其他国家和地区的立法对于公平原则大多设有明文规定,我国《民法通则》也明确认可公平原则,该法第4条规定,民事活动应当遵循公平的原则。"59

Xing Xiangxu's study analyzes the five New General Principles in China of 2017, but the evolution of the principle of good faith is not clear, that is because is difficult to find precise information on this principle and on the debate over it of the recent years in China. To better understand its evolution over the years we can analyze the main points of the principle of good faith according to an article of March 25th of 2015 of Findlaw.cn (找法网 zhaofa wang).

This article is entitled "The main points of the principle of Good Faith of Civil Law" (民法知识点诚实信用原则).

The first point states that the principle of good faith means that a civil subject engaged in civil activities must be honest in exercising his rights and performing his obligations; the exercise of rights

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⁵⁹新祥旭, 2017 法律硕士考研: 民法五大原则复习要点, Xin Xiangxu, law study on the five General Principles of Chinese Civil Law, 2017, my translation https://m.sohu.com/n/462160066/

of one party must not infringe upon the interests of others and society; the parties must fulfil their obligations and duties, keep their promises and provide legal provisions, and finally think to their own interests. The basic principle is that the interests of the parties and of the society must be balanced.

"诚实信用原则是指从事民事活动的民事主体在行使权利和履行义务时必须意图诚实、善意,行使权利不侵害他人 与社会的利益,履行义务信守承诺和法律规定,最终达到当事人之间的利益、当事人与社会之间的利益得到平衡的 基本原则。"60

The second point states that the principle of good faith is often referred to as the "king clause". Article fourth of the General Principles of Civil Law stipulates that civil activities shall follow the principle of good faith. The principle of good faith reflects the ethics of the market in civil law and is applicable to all civil law fields.

"诚实信用原则常被奉为"帝王条款"。《民法通则》第 4 条规定,民事活动应当遵循诚实信用原则。诚实信用原 则是市场伦理道德准则在民法上的反映,适用于全部民法领域。"61

The third point of this article focuses the attention on the fact that the principle of good faith is mainly embodied in contract law and it is present in every stage of life of the contract and this includes the step of formation, performance, and three aspects that occur after the performance of the contract:

- A. Before the stipulation of the contract, according to art. 42 and 43 of Contract Law, the parties must adhere to the principle of good faith. It is important that the parties respect the interests of others and it is important that the parties inform each other of any changing of the performance of the that could affect and damage the other party. If this happens the responsible party must pay for the damages.
- B. In the performance of the contract, the parties concerned shall abide by the principle of good faith in accordance with the provisions of the sixtieth article of the contract law.
- C. After the performance of the contract is completed, the parties shall abide by the principle of good faith in accordance with the provisions of article ninety-second of the contract law. In the event of termination of a lease relationship, the owner shall permit the lessee to post the notice of migration at the appropriate place in front of the house for a period of time, as well as the obligation of the owner to inform others when he inquires. After the termination of

main points of the principle of Good Faith of Civil Law, Findlaw.cn http://china.findlaw.cn/info/minshang/minfa/mfzs/csxy/1209766.html

⁶⁰ 诚实信用原则, 民法通则知识, 民法知识点诚实信用原则, 找法网, The Principle of Good faith, General Knowledge of Civil Law, The main points of the principle of Good Faith of Civil Law, Findlaw.cn http://china.findlaw.cn/info/minshang/minfa/mfzs/csxy/1209766.html ⁶¹诚实信用原则, 民法通则知识, 民法知识点诚实信用原则, 找法网, The Principle of Good faith, General Knowledge of Civil Law, The

the employment contract, the employer shall be required to have the obligation to issue a service certificate, and the employee shall have the obligation to keep confidential the business secrets he meets during his or her post. All of these reflect the principle of good faith.

"当然诚实信用原则主要体现在《合同法》上,《合同法》上的诚实信用原则,体现在合同的全过程,包括合同成 立前、合同履行中、合同履行后三个方面:

- a. 合同成立前,根据《合同法》第 42 条、第 43 条的规定,当事人应当遵循诚实信用原则。如 北京的甲向上海的乙发出要约,欲出售房屋一套,乙通知甲将于 10 日后前往北京看房。2 日 后,甲将该房屋卖给了丙,但没有通知乙房屋已经出售的事实,导致乙如期前往北京看房, 造成乙一定的损失。此时双方虽然没有订立合同,但由于甲没有按照诚实信用原则履行告知 义务,应当承担缔约过失责任。
- b. 合同履行中,当事人应当按照《合同法》第 60 条的规定遵循诚实信用原则。例如,不得深 夜叩门还钱或者在歹徒抢劫时还钱。再如,当事人虽然未明确约定债务履行方式,仍不得用 脚夹钱递于他人鼻下还钱或者雨天掷信件于地上送信。
- c. 合同履行完毕后,当事人应当按照《合同法》第 92 条的规定遵循诚信原则。如租赁关系终止后,房主应容许承租人在一定期间内在门前适当地方张贴迁移启事,以及他人问询时房主有告知的义务。雇佣合同终止后,雇主应受雇人的请求有开具服务证明书的义务,而受雇人在离职后对于工作期间所接触到的商业秘密有保密的义务。所有这些都体现了诚实信用原则。"62

According to all these article it is clear that the principle of good faith in China, even though it is constantly evolving, is always present and cover an important role within Civil Law and in particular in Contract Law so much that it is considered as the king of the general clauses.

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⁶²诚实信用原则, 民法通则知识, 民法知识点诚实信用原则, 找法网, The Principle of Good faith, General Knowledge of Civil Law, The main points of the principle of Good Faith of Civil Law, Findlaw.cn http://china.findlaw.cn/info/minshang/minfa/mfzs/csxy/1209766.html

CHAPTER 3. ANALYZING THE PRINCIPLE OF GOOD FAITH THROUGH THE CONSIDERATION OF DIFFERENT CASE STUDIE

3.1 Judicial applications of the principle of good faith: *culpa in contraendo*.

The legal systems that welcome the principle of good faith in the pre-contractual phase usually expect its application when the breaking of the negotiations occurs at the presence of determined circumstances, that could have create, within the counterpart, a legitimate expectation related to the conclusion of the contract.

Chinese jurisdiction, to verify if a particular situation falls within the range expected by art. 42 of Contract Law, does not move away from this procedure, as it is possible to understand analyzing the result of the dispute between a certain company of electronic devices and a certain Liu, caused precisely by the sudden breakup of an employment negotiation⁶³.

The company, having the intention to open a pharmacy, signed a letter of intent with Liu for the employment; in this letter of intent the parties specify that Liu will conduct, within the above-mentioned pharmacy, the activity of quality check, while other details, as the date of the beginning of the activity and the remuneration, are referred to the employment contract, to be stipulated later. Once that the letter of intent has been signed, the electrical devices company identifies the location where to open the pharmacy and gets the permits, while Liu is committed to achieve, as agreed, the qualification required to exercise the pharmacist work. The parties, despite the many attempts, and the mediation by the competent authorities, could not find an agreement on the point not yet clarified, in particular on what concern the duration of the employment and the remuneration.

Liu, considering the electrical devices company in bad faith, interrupts any relation with it, and the company on the other hand is so obliged to find another pharmacist and delays the opening of the activity. The company of electrical devices sues Liu asking for the refund of the expenses sustained (for his formation, for the exam of qualification and for the medical checks required to obtain the

⁶³从本案谈违反诚信原则的司法判断 (Cong ben'an tang weifan chengxin yuanze de sifa panduan), fonte : Zhongguo Fayuan Wang (www.chinacourt.org/ajdq/), 2007

title of pharmacist), and the compensation for the damage due to the losses suffered because of the delay of the opening of the pharmacy.

The Intermediate Tribunal of Nantong (Jiangsu), rejected the plaintiff's claims. The court, in fact, considers that the letter of intent signed by the plaintiff and the defendant cannot be considered as an employment contract and it cannot have produced the legal effects because, within this letter, some elements which are essential to the creation of a relation of subordinated job, as exactly the duration of the employment and the remuneration, were not specified.

The defendant, after the signature of this letter of intent, has only exercised his contracting freedom which is granted to all subjects within civil activities, formulating reasonable requests towards the plaintiff and interrupting the relation with him. His behaviour therefore does not violate the principle of good faith and does not represent the pre-contractual responsibility.

In Zhongguo Fayuan Wang is not reported the complete sentence, as in the majority of cases within the contractual range, but is reported only a critical comment, drafted by a judge who is member of the same danwei (单位, working unit) of the one who issued the sentence. Thanks to the comment summarized above, it is possible to have an idea of the passages through which this decision has been reached.

In Italy, in fact, the breakup of the negotiations (principle case of jurisprudential application of art. 1337 of the Civil Code) is sanctioned at the presence of two conditions: the first is the "reasonable" expectation of conclusion of the contract by the plaintiff, and the second consist in the impossibility of the defendant to justify "reasonably" his behaviour. It seems possible that the Chinese judge has questioned the existence of both of these requirements, inserting an element of originality: to act as a parameter, in assessing the reasonableness of the claims of the parties, it is not only balancing the interests of the plaintiff and the defendant, but also the relapse that the outcomes of the judgment may have on the community.

Chinese doctrine, as we have already noticed, defines the principle of good faith as the duty to maintain the balance between the interests of the parties and between the interests of the parties and the society. It is exactly in the light of this definition, included also in the text of the sentence, that the judges proceed to the analysis of Liu's behaviour, reaching the following conclusions: Liu, refusing to conclude the contract, has simply exercised two of the rights recognized by law, the freedom of choosing an occupation and the one of having a remuneration for this occupation; the damage suffered by the company of electrical devices is part of the normal business risk; to force Liu to sign just because the actor has already fulfilled it would not only be a violation of the rights of the defendant, but "would also damage the general interests of society". On this basis, the court rejects the actor's demands.

"Come abbiamo già notato, la dottrina cinese definisce il principio di buona fede come dovere di mantenere un "equilibrio tra gli interessi delle parti, e tra gli interessi delle parti e quello della società". E' proprio alla luce di questa definizione – non a caso riportata nel testo della sentenza - che i giudici procedono all'analisi del comportamento di Liu, arrivando alle seguenti conclusioni: Liu, rifiutandosi di concludere il contratto, ha semplicemente esercitato due diritti riconosciuti dalla legge, la libertà di scegliersi un'occupazione e quella di avere una remunerazione per il proprio lavoro; il danno subito dalla società di dispositivi elettrici fa parte del normale rischio di impresa; costringere Liu a firmare solo perché l'attore ha già adempiuto non costituirebbe solo una violazione dei diritti del convenuto, ma "danneggerebbe anche gli interessi generali della società"."64

Another duty which is typically related to the good faith during negotiations is that of information. According to the second point of art. 42 of the Contract Law, one party cannot deliberately hide important facts related to the formation of the contract and cannot provide false information about it. It is a relatively frequent hypothesis of application of the principle of good faith in China, in particular concerning contracts with consumers, and to it are equalized also cases in which one party, knowing a cause of invalidity of the contract, have not noticed to the other party. Generally, in case of false or omitted information from sellers towards ignorant or unqualified buyers, the sanction is the invalidity of the contract, in addition to the return of goods to the seller and of the price paid to the buyer. Sometimes, however, Chinese judges go further, and they do not recognize to the victim only the compensation to the damage calculated on the basis of the "negative" interests (a solution common to the jurisprudence of several Countries including Italy), but also the payment of the "positive" ones, that are the benefits that the victim could have obtained from the execution of the contract, if it had been valid.

About this, it is interesting to focus our attention on another case, the case decided by the People's Court of the district of Xiling of the city of Yichang in the Hubei, with sentence number 497/2004. The 23rd of November of 2001 Wang Kenian stipulated, on behalf of the husband, Qu Haiqing, among the branch of Yichang of the "Life Insurance Company of Tai Kang", a life insurance, the beneficiary of which was the son Qu Yuhua. On the same day, she paid the policy prize (RMB 1480,20), that is issued by the company the 29th of the same month. The 4th October of 2002 the husband died, and the 9th of October Wang Keniang required the insurance for the payment of the insured sum, RMB 30,000.

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⁶⁴ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p.22 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

⁶⁵此人身保险合同是否有效(Ci renshenbaoxian hetong shifou youxiao), fonte: Zhongguo Fayuan Wang <(www.chinacourt.org/ajdq/)> , 2007

The 20th of November the Insurance answered, informing the beneficiaries of the policy of the fact that the insurance contract could not be retained valid, as the policy had not been subscribed from the insured and, therefore, nothing was due to them.

Wang Kenian and Qu Yuhua sue the Insurance Company, arguing that the question had not been highlighted by the insurer during the negotiations, and that the Company of Insurance had in any case received the payment of the policy; they asked so for the compensation for the damages due to the *culpa in contrahendo*.

During the process of first instance, held in front of the People's Court of the district of Xiling of the city of Yichang (Hubei), the facts above mentioned were proved, along with the intent of the Insurance Company to refund only the amount of the insurance premium. The Court of first intstnace verified also that the contract reports in a very clear way the duty, for the insurer and insured, of signing directly the policy, under penalty of invalidity. The court considered therefore that the Insurance Company had fulfilled the duty of information and rejected the, with sentence number 273 of 2003, the request of the plaintiff parties, which appealed on appeal.

The Intermediate People's Court of Yichang evaluated the facts differently: the court considered, in fact, that the Insurance Company was, since the moment of the stipulation of the life insurance contract, perfectly conscious of the invalidity of the contract; the insurer, in fact, had filled the policy on behalf of Wang Kenian, and he could not have been unaware of the absence of the insured. On these basis the Court accepted the appeal and returned the case to the first instance court. Hence the first instance court conferred to the Insurance Company the responsibility of the invalidity of the contract; the company in fact, while having assisted, through its agent, to the signature of the contract, had not fulfilled properly the duty of information, without clarifying what the consequences of the absence of the insured's subscription might be.

According to art.61, co. 1, of the General Principles of right, and of art. 42, point 2, of the Law of Contracts, the Company of the life insurance of Tai Kang is condemned to perform the contract, by paying to the parties the compensation equal to the sum insured for the death case, RMB 30,000.

This is a rather significant sanction, at least according to the Western perspective; also in China, anyway, it must have had an exemplar value since the judge author of the comment clarifies that, recognizing the direct and indirect damages, the court of the return had decided on the basis of the "common sense of social equity" and had slowed the spread of this practice of the insurance companies, evidently guite frequent.

The violation of the duty of information according to good faith, has not always led to such a net income; the criterion of rationality (合理, heli, vague term that is not included within the legal

general clauses, but that is part of the Chinese legal tradition) is useful to temper the too exaggerated requests of the party which is victim of the omission.

The Guangzhou Ribao (the daily newspaper of Guangzhou) reports, for example, the case of Miss Zhou⁶⁶ who, having the intention to buy a property in order to open a new business activity in it, required a loan to the branch of Huangpu of a certain bank. In the December 1998 she stipulated with the bank a contract of mortgage for 4.540.000 yuan, for the duration of ten years, deciding to return the money invested and the interests through monthly rates of equal value. In 2003, from an article of a newspaper, miss Zhou is aware of another way to repay the loan that is the one of the "progressive reduction of payment" (递减还款法, dijian huankuan fa). This new modality of payment, would permit her to save almost ¥10,000 of interests. Considering that, at the moment of the conclusion of the contract of mortgage, the bank omitted to illustrate to miss Zhou this form of payment because in bad faith, miss Zhou sue the bank asking the bank to recalculate the her debt, starting from the stipulation of the mortgage, according to the method of the progressive reduction; furthermore she asked for the restitution of the interests that she had paid up to that moment, August 2003, ignoring the existence of this different type of restitution of the debt, and that, according to her estimate, amounted around RMB 7,000.

The first instance court rejected the request of miss Zhou, considering that she had not sufficient basis of fact or right. Hence Miss Zhou called the appeal. The court of appeal assumed on the contrary that the bank, on the basis of the supplementary obligations of good faith and rational information, being in a position of superiority towards the customer, should have, during the phase of negotiation, informed her in details about all the possibilities. The request of compensation of miss Zhou is however "bu heli" (不合理), not reasonable, because it considers only the highest interests of the method of the "rates of equal value" and not of the fact that, at the beginning, the paid sum on the basis of this method was lower than the one that should have been paid according to the method of the "progressive reduction".

The solution to the case, anyway, is not yet definitive, or at least it was not definitive at the moment of the report: Miss Zhou in fact, manifested the intention to ask to the proxy of people of Guangzhou to reopen the case in revision, through the procedure of the *zai shen* 再审, literally judge again.

Before examining cases related to the execution of the contract, it is interesting to analyse briefly a last episode of presumed pre-contractual bad faith, in which the author of the comment, published on Zhongguo Fayuanbao, 中国法院报 magazine of the Chinese courts, clarified the differences between the duties imposed by the moral to the party, and the one rendered obligatory by law.

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⁶⁶银 行 隐 瞒 按 揭 还 款 方 式 成 被 告 法 院 判 银 行 有 过 失 (Yinhan yinman' anzhao huankuan fangshi cheng bei gao – Fayuan pan yinhang you guoshi), fonte: Zhongguo Fayuan Wang (www.chinacourt.org/html/ajk), 2008

A certain Ping Yong, using the edition 2.0 of the program of typing Microsoft, discovered the incorrect phonetics of several characters and, deepening the investigation, he realized that those mistakes were present also in the majority of the editions of the software.

Starting from 2001 he informed the Chinese branch of Microsoft of the problem, clarifying his intention to discuss the matter with the society, and sending them several examples.

During the first weeks of November the contact with the Chinese branch of Microsoft intensified, in deciding whether Ping Yong should be rewarded by society, and at what level, but negotiations were not successful; in December Ping Yong sent again to Microsoft a fax containing, as an example, his corrections on 10 characters and, again, the warning to use this material. Starting from that month, Microsoft appointed a specialized company on the revision of characters of the 2.0 version of the software, and the work of correction included, among the others, also the ten characters of the fax of Ping Yong.

In January of 2002, Microsoft informed Ping Yong of its intention to not compensate him for his work since he was not required. Ping Yong, assuming that the discover and the correction of the mistakes of the software of pinyin typing of Microsoft could have been considered as a business secret, sue Microsoft, according to art. 43 of the Law of Contracts, for the violation of the business secret in *culpa contrahendo*, asking for ¥10,000 of compensation. The judge of first instance rejected the request of the plaintiff: the correction and the pronunciation of the ten characters do not constitute a business secret protected by the law; Microsoft did not therefore commit acts of unfair competition or violated the principle of good faith.

Ping Yong resorted to appeal, but during the judgement the parties come to a conciliation, and Microsoft pays to Ping Yong the sum of ¥9,888 (practically the same sum required by the plaintiff) as a reward.

The comment reiterate that, from a legal point of view, Microsoft has nothing to pay to Ping Yong, who limited himself to only criticize and suggest the correct pronunciation of determined characters. Of course, Ping Yong has made a commendable comparison work to find and correct mistakes, and if Microsoft considers to have the duty to compensate him somehow, law cannot intervene; this, however, does not mean that the pretended recognition of rights of intellectual properties is grounded.

"Ping Yong, ritenendo che la scoperta e la correzione degli errori del software di digitazione pinyin di Microsoft possa essere considerata segreto commerciale, cita Microsoft, ai sensi dell'articolo 43 della Legge sui Contratti, per violazione del segreto commerciale e culpa in contrahendo, chiedendo 10.000 yuan di risarcimento. Il giudice di primo grado respinge la richiesta dell'attore: la correzione della pronuncia dei 10 caratteri non costituisce segreto commerciale protetto dalla legge; Microsoft non ha pertanto compiuto atti di concorrenza sleale, né violato il principio di buona fede. Ping Yong ricorre in

appello, ma durante il giudizio le parti giungono a conciliazione, e Microsoft versa a Ping Yong la somma di 9.888 yuan (in pratica, la stessa cifra richiesta dall'attore) a titolo di ricompensa. Il commento ribadisce che, dal punto di vista legale, Microsoft non deve nulla a Ping Yong, il quale si è limitato a criticare e suggerire la giusta pronuncia di determinati caratteri. Di certo, Ping Yong ha svolto un encomiabile lavoro di comparazione per trovare e correggere gli errori, e se Microsoft ritiene di doverlo in qualche modo ricompensare, la legge non può intervenire; questo, però, non significa che il preteso riconoscimento di diritti di proprietà intellettuale sia fondato."⁶⁷

3.1.1 Judicial applications of the principle of good faith: execution and interpretation of the contract.

Among the several meanings that the expression of good faith can assume, the one of loyalty, in the sense of respect for the word given, is one of the most common; for Chinese this implication is obvious by the characters chosen to translate the concept itself, one of them, *xin* (信), indicates the duty to maintain the agreements. Maybe this is the reason for which, frequently, Chinese judges recall to the rule of good faith in the execution of the contract to manage situation in which one of the parties has not fulfilled the contractual dties.

"Tra i numerosi significati che l'espressione "buona fede" può assumere, quello di "lealtà", nel senso di rispetto per la parola data, è certo uno dei più comuni; per i cinesi, come abbiamo visto, questa implicazione è resa ovvia dagli stessi caratteri scelti per tradurre tale concetto, uno dei quali, xin (信), indica da sempre il dovere di tener fede ai patti. Forse è questo il motivo per cui, molto spesso, i giudici cinesi richiamano la regola di buona fede nell'esecuzione del contratto per governare situazioni nelle quali una parte abbia mancato di adempiere agli obblighi contrattuali."68

Typical, to this purpose, is the decision of the judge about the dispute between Xin Wenguo and Su Guangjin.⁶⁹ Xin and Su are friend since a long time. the 20th of May of 2004, Su was arrested by order of the District Court of Ningcheng (Inner Mongolia) for not having returned a loan of RMB 6,000. Not knowing who to turn to, he asked to his family members to seek the help of Xin Wenguo. Xin undertakes to collect the required sum and he delivers this sum to the court, that releases Su.

⁶⁷ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 25 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

⁶⁸ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 26 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

⁶⁹危急时刻得帮助获得自由不认账 (Weiji shike de bangzhu huode ziyou bu renzhong) , fonte: Zhongguo Fayuan Wang (http://www.chinacourt.org/html/ajk), 2008

Once released, Su writes a "qiantiao" 欠条 promising to return all the money within a month. After that he disappeared.

The court, having ascertained of the effective existence of the debt and the missing of the payment, established that Su's behaviour was contrary to the principle of good faith, violating the dispositions of art. 60, co. 1, of the Law of Contracts, and damaging the property right of the plaintiff; for this reason, the court condemned Su to refund of ¥6,000.

The solution offered from the first comma of art. 60, recalled in the sentence mentioned above, is not innovative; on the contrary, the second comma of the same article, that attributes to the principle of good faith the role of criterion to identify what are concretely the reciprocal duties among the parties (sanctioning the entry, within the Chinese contractual right, of the so called "supplementary clauses" 附随义务, *fusui yiwu*), seems that it had opened new perspectives for the jurisprudence of the People's Republic of China.

"La soluzione offerta dal primo comma dell'articolo 60, richiamato nella sentenza sopra sintetizzata, non è certo innovativa; al contrario, il secondo comma dello stesso articolo, che attribuisce, come abbiamo visto, al principio di buona fede il ruolo di criterio per individuare quali siano, in concreto, i doveri reciproci tra le parti - sancendo l'ingresso, nel diritto contrattuale cinese , delle cosiddette "obbligazioni supplementari" (附随义务,fusui yiwu), - sembra aver aperto nuove prospettive per la giurisprudenza della Repubblica Popolare."

The application of this disposition is today very frequent, and it permit to sanctioning, for example, the behaviour of parties that, presumptuously, limit themselves to perform only what is strictly expected from the letter of the contract.

The following two cases represent very well this type of situation.

A certain Shen⁷¹ bought an apartment, and he appointed its restoration to a well-known company on this field, with which he stipulated a contract "baogongbaoliao"包工包料, literally which comprehend the work and the material. When half of the work has been done, Shen ordered a centralized conditioning system, composed by five appliances that, according to the general practice, were installed by the producing society; but, as the producing society and the one of restoration did not coordinate their work, the condensate drain hose of the air conditioner is installed under the floor, and is not integrated in the exhaust system of the apartment.

The summer of 2006 was particularly hot and the air-conditioning worked no stop; the drain under the floor cannot drain the large amount of condensate water that has been formed, the water

<mark>%20buona%20fede%20e%20la%20giurisprudenza.pdf</mark> ⁷¹新房地板喷水装修公司违反附随义务赔偿(Xinfang diban penshui zhuangxiu gongsi weifan fusui yiwu peichang), fonte: Zhongguo Fayuan Wang (http://www.chinacourt.org/html/ajk), 2008

⁷⁰ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 26 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

flooded the apartment several times before it was possible to repair the failure. The maintenance company, affirming that on the contract the conditioning installations were not mentioned, refused to refund the damage, and for this reason Shen sue the maintenance company.

The court of the district of Qingpu of Shanghai, established that the defendant, according to the principle of good faith, should have not only execute the performance which was the object of the agreement, but also the performances related to it; in particular, the defendant should have coordinated his work with the company designed for the installation of the conditioning system, to connect the condensate discharge tubes to the exhaust of the bath.

The court considered the restoration company responsible for the damage at 50%, and therefore it was condemned to pay \$10,000\$. The author of the case, after having summarized facts and sentence, felt the necessity to clarify, in one note, the meaning of the term "supplementary obligations" (附随义务, fusui yiwu), giving to this term a meaning which recalls almost the whole content of the second comma of art. 60. The necessity to act in good faith implies that, for one party, the duty to not reveal to third party, or to use to one's own advantage, the business secret of the counterpart known during the execution of the contract.

In the recent years in China, the disputes between enterprises and former employees, accused to have violated the business secret, have become more and more common; the following case⁷², published recently together with other nine leading cases within the matter of the violation of the intellectual property rights of the Department of Laws and rules of the Office on the Intellectual Property of the Guangdong province, refers exactly to one of those situations.

The 14th of April of 2000 a certain Lu was employed from the Huashen Dashi company as sales clerk. On that occasion he signed a privacy agreement on the basis of which he committed, for the period of time he will work for the Huashen company, to not operate for other enterprises, institutes, associations etc. that produce articles or furnish services which are similar to the ones offered by the Huashen, and to not carry out these activities on his own; the 26th of December of 2003 Lu resigned. But, in the June of the same year he opened a company, the Saifei, that from July (so when Lu was still employed in the plaintiff company) started to have professional relations with another company, the Hong Fujin industry, providing to that company the services that, up to that moment, had been provided from the Huashen.

For this reason the Huashen company sue Lu and the Saifei, asking that they interrupt the violation of the business secret, that they compensate for the losses and to make public apologies.

⁷²员工"跳槽"侵犯商业秘密被列入广东十大知识产权案件(Yuangong "tiaocao" qinfan shangyemimi bei yeru Guangdong Shida zhishi changyuan anjian), fonte: Zhongguo Fayuan Wang (http://www.chinacourt.org/html/ajk), 2008

The court of first instance welcomed entirely the request of the plaintiff and sanctioned Lu and the Hong Fujin company that must interrupt the violation and refund separately the damages. The appeal court later confirmed the sentence of the court of first instance.

According to Liu Zaidong, the director of the Department of Laws and Rules of the Office on the Intellectual Properties, who cared for the choice of the published cases, this case touched the problems related to the balance between the interest of the enterprise and the individual freedom to choose an occupation. Lu, creating the company of Saifen while he was still working for the Huashen, had, according to art. 10 of the "Law on the unfair competition", violated the business secret; within the comment to this case he also highlights that "every person, in developing his own tasks, must respect the principle of good faith, to consider the company's rights and the individual ones, and to exercise the right to choose one occupation within the limits permitted by law and without harming others".

"Secondo Liu Zaidong, direttore del dipartimento leggi e regolamenti dell'Ufficio sulla Proprietà Intellettuale, che ha curato la scelta dei casi pubblicati, questo caso toccherebbe i problemi legati al bilanciamento tra l'interesse dell'impresa, e la libertà individuale di scegliere un'occupazione. Lu, creando la società Saifen mentre ancora lavorava presso la Huashen, aveva, in base all'articolo 10 della "Legge sulla concorrenza sleale", violato il segreto commerciale; nel commento a questo caso, egli evidenzia inoltre come "[...]ogni persona, nello svolgimento delle proprie mansioni, deve osservare il principio di buona fede, considerare i diritti dell'azienda e quelli individuali ed esercitare il diritto di scegliere un'occupazione entro i limiti consentiti dalla legge, e senza recare danno al prossimo"."⁷³

We can understand that, as the violation of the business secret occurred when the defendant was still working for the Huashen company, even without the recall to the "Law against the unfair competition", and independently from the existence of the privacy agreement, the behaviour of Lu could have been sanctioned according to art. 60, comma 2, of the Hetong fa; however, this agreement, at least as far as it results from the information in our possession, has not been mentioned in the sentence.

⁷³ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 27-28 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

3.1.2 Judicial applications of the principle of good faith: the post-contractual responsibility and the burden of proof.

According to the art. 92 of the Law of Contracts, the principle of good faith binds the parties even after the termination of the contract, and it imposes to the parties the duties of notification, assistance, privacy etc., in a way which is conform to the business uses. The reading of cases has shown little propensity from the Chinese judges to apply this norm: in the website examined, in fact, has been reported only a single case on the post-contractual responsibility in which it is recalled the formula of "chengshi xinyong". It is also contained within a document⁷⁴, drawn up by a member of the politic Department of the People's Supreme Court with the purpose to let the judges to understand what is intended with the expression "post-contractual obligations" (后台同义务, houhetong yiwu). The author also explains why this clarification is necessary: "because the General Principles of right do not mention this institute, and the doctrine, up to now, has never been too much interested on it. The comprehension of the meaning of the term "post-contractual obligations", even though only in theory, and of what could be its practical application is not univocal from magistrates".

"In base all'articolo 92 della Legge sui Contratti il principio di buona fede vincola le parti anche successivamente alla cessazione del rapporto contrattuale, imponendo loro, "obblighi di avviso, assistenza, riservatezza et cetera, conformemente agli usi commerciali". La lettura dei casi ha mostrato una scarsa propensione, da parte dei giudici cinesi, ad applicare tale norma: nel sito esaminato, infatti, è riportato un unico caso di responsabilità post-contrattuale in cui venga richiamata la formula di "chengshi xinyong". Non solo: esso è contenuto all'interno di un documento, redatto da un membro dal Dipartimento politico della Corte Suprema del Popolo proprio al fine di far comprendere ai giudici cosa si intenda, esattamente, con l'espressione "obbligazioni post-contrattuali" (后台司义务,houhetong yiwu). Lo stesso autore spiega perché tale chiarimento si sia reso necessario: "poiché i Principi generali del diritto non fanno menzione di questo istituto, e la dottrina, fino ad oggi, non se ne è molto interessata, la comprensione di cosa significhi, in teoria, il termine "obbligazioni post-contrattuali", e di quale possa essere la sua applicazione pratica non è univoca, da parte dei magistrati"."75

To overcome this situation the author analyzed the following case as an example of post-contractual responsibility.

⁷⁴由一起典型案例论后合同义务理论(You yiqi dianxing angli lun houhetong yiwu lilun), fonte: Zhongguo Fayuan Wang (<u>www.chinacourt.org</u>), 2007

⁷⁵ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 28 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

In the January of 2000 a certain Liu assumes the position of manager for the south-east Asiatic sector in the import-export company of clothing Xinya, of Lugang; the duration expected by the contract was of three years, during which he has to manage the marketing channels of the south-east Asiatic market, the list of customers and other important information.

After three years, Liu establishes in the same city a children's clothing factory, the Chenxin, that uses the same marketing channels and the customers' portfolio of the Xinya, in addition to other reserved information known by Liu during his work among the Xinya. In May 2003, the Xinya sues Liu. Liu rejects the request of refund because he sustains that he is no any longer tied to any contract with the Xinya. It is clearly a case of school but it can give us a clear idea of the orientation function of the jurisprudence performed by the People's Supreme Court.

The analysis of the case described above, in fact, does not only cover theoretical aspects as, for example, the notion and the characteristics of the "post-contractual obligations", or its content, but it provides to the judge also practical indications related to the elements that he must consider concretely to evaluate the existence of the post-contractual responsibility (a responsibility that, according to the doctrine is still contractual), and to establish the identity of the refund.

"L'analisi del caso sopra descritto, infatti, non tocca solo aspetti teorici, quali, ad esempio, la nozione e le caratteristiche di "obbligazione post-contrattuale", o il suo contenuto, ma fornisce al giudice anche indicazioni pratiche riguardo agli elementi che, in concreto, egli deve prendere in considerazione per valutare l'esistenza della responsabilità post-contrattuale (una responsabilità che, secondo la dottrina, è ancora di tipo contrattuale), e per stabilire l'entità del risarcimento."

In this case, Liu has certainly violated the duties of confidentiality, that persist even after the extinction of the contract, and for this reason the Xinya company can rightly appeal to the art. 92 of the Law of Contracts and ask for the refund of damages.

The vague content of good faith let this principle to perform several different functions according to the situations in which it is applied and to the legal lacks that it has to fill. It is exactly with the purpose to interpret the legislator's thought, on matters about which he has never expressed his opinion, that the Chinese judges often use the principle of good faith; in this sense, the use of the principle of good faith can be considered emblematic to determine who has the burden of proof within disputes in which both the parties did not manage to prove their reasons (the burden of proof is a general legal principle according to which those who want to prove the existence of a fact are obliged to provide evidence for the existence of this fact). It is a procedure that is positively accepted

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⁷⁶ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 29 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

by the doctrine: Zhang Junyan, of the Renmin Daxue (People's Uéniversity), in an article published in 2001⁷⁷ explained that, in appointing the burden of proof, "if there are some explicit legal norms, the judge must follow the law; if there are not explicit legal norms, but some rules of experience suitable for the case do exist, these rules of experience are applied; if there are neither the first nor the second rules, the burden of proof must be distributed on the basis of the principles of equity and good faith, to avoid that the silence of law becomes injustice".

"Si tratta di una prassi guardata con favore dalla dottrina: Zhang Junyan, della Renmin Daxue (Università del popolo), in un articolo pubblicato nel 2001 spiegava che, nell'assegnare l'onere della prova, "se esistono norme legislative esplicite, il giudice deve seguire la legge; se non esistono norme legislative esplicite, ma esistono regole di esperienza adatte al caso, si applicano le regole di esperienza; se non esistono né le une né le altre, l'onere della prova deve essere distribuito sulla base dei principi di equità e buona fede, per evitare che il silenzio della legge si traduca in ingiustizia". ⁷⁸

The possibility, for the judge to decide in some cases who has the burden of proof on the basis of the principle of good faith, is now explicitly provided by art. 7 of the "Set of Rules on proofs within the civil process" (关于 民事诉讼证据的若干规定, Guanyu minfa susong zhengjude ruogan guiding), ratified by the People' Supreme Court the 9th of November of 2003.

According to this article: "Where no specific legislative provisions exist, and on the basis of this Regulation and other case-law interpretations it is impossible to determine who is the burden of proof, the People's court can, according to the principles of equity and of good faith, decide who is the burden of proof."

"La possibilità, per il giudice, di decidere, in determinati casi, a chi spetti l'onere della prova sulla base del principio di buona fede, viene ora esplicitamente prevista anche dall'articolo 7 del "Regolamento [lett.: alcune norme] sulle prove nel processo civile" (关于 民事诉讼证据的若干规定,Guanyu minfa susong zhengjude ruogan guiding) emanato dalla Corte Suprema del Popolo il 9 novembre 2003. In base a tale articolo: "Qualora non esistano norme legislative specifiche, e sulla base del presente regolamento e di altre interpretazioni giurisprudenziali non si riesca a stabilire a chi spetti l'onere della prova, il tribunale del popolo può, sulla base dei principi di equità e buona fede, tenuto conto della capacità probatoria delle parti, et cetera decidere a chi spetti l'onere della prova"."

⁷⁸ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 29 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

⁷⁷ ZHANG JUNYAN, "Chengshi xinyong yuanze yu juzheng zeren" (Principio di buona fede e onere della prova), in Dianzikeji Daxue Xuebao (Shekeban), March 2001, third volume, n. 1 p. 84-86.

⁷⁹ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 29, CORTE SUPREMA DEL POPOLO: Regolamento [lett.: alcune norme] sulle prove nel processo civile", articolo 7, traduzione. Il testo originale completo è il seguente: "在法律没有具体规定,依本规定及其他司法 解释无法确定举证责任承担时,人民法院可以根据公平原则和诚实信用原则,综合当事人举证能力等因素确定举证 责任的承担".

The People's court of Pengzhou (Sichuan), in deciding the dispute⁸⁰ between the Henda company (of Pengzhou in the Sichuan province) and the Pengzhou branch of the Industry of salt of Sichuan, has applied exactly this disposition.

The Henda company, producer of brine food, stipulated with the branch of Pengzhou of the Industry of salt of Sichuan an administration contract, for the furniture of salt to be used in the conservation process.

In November of 2001, the plaintiff bought from the defendant 224,6 tons of common salt; of these, 135 tons were in reality iodized salt, kept in stock since a long time, that the defendant, arguing that the iodine had already evaporated, sold at the same price. The plaintiff company used that lot to produce brine vegetables, but the vegetables deteriorated, and the company suffered huge damages. Therefore the Henda company sued the Industry of salt of Sichuan, asking a refund of RMB 1,492,565,40; the defendant defended himself arguing that there were no connection with his furniture and the damage suffered by the counterpart.

During the process, the parties did not manage to prove that this correlation, of the use of the iodized salt and the deterioration of the vegetables, existed, and for this reason it is necessary to decide who is the burden of proof.

The People's Court of Pengzhou, in the absence of specific norms, applied art. 7 of the "Set of Rules on the proofs within the civil process" of the Supreme Court and, according to the principle of good faith and equity, established that the burden of proof was borne by the plaintiff enterprise. The Henda company did not manage to demonstrate the facts on which her requests were founded; therefore the court, according to art. 2 of the "Set of Rules on the proofs within the civil process", rejected her requests and the company was condemned to pay the procedural costs.

In reality, it is not clear the reason why the judge, within this circumstance, had felt the necessity to somehow reinforce the prevision of art. 2 of the same set of rules with a reference to the good faith and to the principle of equity. To this purpose, it is significant the statement of the judge, that is the author of the comment of the case and that was also member of the court that issued the judgement, according to which the recall to those principles, within situations of that type, would be necessary because of the several lacks within the Chinese right, due to the absence of a civil code.

The importance of the principle of good faith in the distribution of the burden of proof, and variety of solutions to which its use can lead to within this field, is demonstrated by the following case⁸¹, about which were issued three sentences (of first instance, appeal and zaishen), with different outcomes

⁸¹一波三折究竟何人承担商品品质的举证责任 (Yibosanzhe jiujing heren chengdan shangpin pinzhi de juzheng zeren), fonte: Zhongguo Fayuan Wang (http://www.chinacourt.org/ajdg/), 2007

⁸⁰穷尽证明手段后案件事实仍然真伪不明时举证责任由谁承担 (Qiongjin zhengming shouduan hou anjian shishi rengran zhenwei bu mingshi juzheng zeren you shei chengdan), fonte: Zhongguo Fayuan Wang (http.//www.chinacourt.org/ajdq/), 2007

due to the different way of intending the situation by the judging courts. This is a case within the range of the consumers' rights, considered, by the judge who is the author of the comment, as "a practical lesson on how the burden of proof should be distributed within the disputed related to the commercial products.

"L'importanza del ruolo del principio di buona fede nella distribuzione dell'onere della prova - e la varietà delle soluzioni a cui può portare il suo utilizzo in questo campo - è dimostrata dal caso seguente, su cui sono state pronunciate tre sentenze (primo grado, appello e zaishen), con esiti differenti, dovuti al diverso modo di intendere la questione da parte delle corti incaricate del giudizio. Si tratta di un caso in materia di diritti dei consumatori, considerato, dal giudice autore del commento, "una lezione pratica su come debba essere distribuito l'onere della prova nelle controversie relative alla qualità di prodotti commerciali"."82

Zhang Zhiqiang the first of January of 2004 bought a fridge from the Suning company, and he paid it ¥1600. The fridge did not work properly and the technicians of the Suning company went two times to Zhang Zhiqiang residence to repair it, without success. The 24th July 2004 the producing enterprise then decided to replace the device.

One operator of the company transported and delivered the new device, but the second fridge was left in the apartment of Zhang, that at the time was not at home, without all the original packaging and without the "three guarantees" (repair, replacement and refund for defective products) and the instruction booklets, that were not given to his family members.

When Zhang came back home, realized that on the surface of the fridge there were traces of dirt and mould, so he deduced that it was a used equipment. He complained with the producing company, trying to find an agreement, but without any result.

The 16th of September of 2004, Zhang sued the Suning company for the damages, asking for ¥3320 of refund (¥1600 paid for the purchase, ¥1600 as refund and ¥120 of reimbursement of expenses).

The Court of first instance, of the district of Quanshan of Xuzhou in the Jiangsu province, has to face the difficulty to demonstrate whether the device is new or not. Considering the probative capacity of Zhang inferior to the one of the Suning company (that is a specialized enterprise in producing electrical devices and therefore provided with all the necessary knowledge to prove that the second fridge was new), the court of first instances assigned the burden of proof to the Suning company, according to the principles of good faith and equity within the relations wit consumers.

The requests of the plaintiff are entirely accepted, modifying only slightly the sum due for the reimbursement of expenses; the Suning company, unsatisfied by the judgement, recurred on appeal. Also the Intermediate Court of Xuzhou considered fundamental, to decide the outcome of the

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⁸² Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 30 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

dispute, the distribution of the burden of proof; but, since the situation taken into consideration did not fall within the eight cases of inversion of the burden of proof, expected by art. 2 of the "Set of Rules on proofs within the civil process" of the Peoples Supreme Court, the court assigned this responsibility to the appellate, that was the plaintiff in the judgement of first instance. The sentence of appeal confirmed then the judgement of the court of Quanshan in the fact which provided for the return of the goods to the seller and of the price paid to the buyer, in addition with the refund for the expenses sustained by the buyer, but denied to Zhang Zhiqiang the compensation for the damage.

Zhang Zhiqiang asked for the reopening of the trial (zaishen), considering that the court of appeal had committed a mistake in assigning the burden of proof; according to the plaintiff, in fact, the burden of proof, according to the principle of good faith of art. 7 of the "Set of Rules on proofs within the civil process", should have been assigned to the producing company, and not to the consumer.

The intermediate Court of Xuzhou, appealed for the zaishen, established that the court of appeal have not distributed properly the burden of proof, annulling therefore the sentence emitted by the court of appeal, and confirmed the decision of the court of first instance.

It is clear, once again, that good faith has been used to rebalance the relations between the parties and to avoid that one of them could take advantage from his own position of advantage; the use of this clause is perfectly in accordance with the temptation of "solidarity" typical of the socialist market and, at the same time, with the Chinese legal tradition, inspired by the principles of humanity and justice.

The author of the comment sustains, maybe excessively, that the solution of this case "is not only conform to the common sense of justice, but it is also the result of a mature process technique, that reflects the perfect agreement between right and society". For us, instead, this complicated legal situation mentioned above, illustrates that, at least in this field, the certainty of Chinese right has yet to be met.

"Notiamo che qui, ancora una volta, la buona fede è stata utilizzata per riequilibrare i rapporti tra le parti, ed evitare che una di esse potesse approfittare della propria posizione di vantaggio; un uso di tale clausola in perfetto accordo con le tentazioni di "solidarietà" tipiche del mercato socialista e, allo stesso tempo, con la tradizione giuridica cinese, ispirata, come abbiamo sopra ricordato, ai principi di umanità e giustizia.

Lo stesso autore del commento sostiene, con un'enfasi forse eccessiva, che la soluzione di questo caso "non solo è conforme al comune senso di giustizia, ma è anche frutto di una matura tecnica processuale, e riflette il perfetto accordo

tra diritto e società". A noi, la complicata vicenda giudiziaria sopra brevemente illustrata pare piuttosto mostrare come la certezza del diritto, almeno in questo campo, sia ancora lontana dall'essere raggiunta."83

3.2 Judicial application of the principle of good faith. Good faith as a moral criterion.

The Chinese doctrine is unanimous in defining good faith as "the expression of a moral criterion within the activities of the market economy". As such, "it requires that people, within the economical activities, behave loyally (信 用, xinyong), respect the scrupulously the word given (言, xin), are sincere (诚实, chengshi) and pursue their own interest without damaging the interests of others, or the one of society".

It is exactly to sanction "incorrect" behaviours, that the general prevision of the duty to adapt, within the civil activities, to that principle (contained within art. 4 of the General Principles of civil right), is frequently applied by Chinese judges.

Sometimes, the recall to this principle, is necessary only to accentuate or to reinforce, somehow, sentences already decided on the basis of norms that rule in a more specific way the situation considered; more frequently, the reference to "honesty and correctness" is necessary to fill the legal lacks, and to sanction behaviours that seem "unjust" also according to the criterion of rationality (合理, heli).

"La dottrina cinese è unanime nel definire la buona fede come "l' espressione di un criterio morale nelle attività dell'economia di mercato". In quanto tale, "essa richiede che le persone, nelle attività economiche, si comportino con lealtà (信用, xinyong), rispettino in modo scrupoloso la parola data (言, xin), siano sincere (诚实, chengshi) e perseguano il proprio interesse senza danneggiare l'interesse altrui, o quello della società".

E' proprio per sanzionare comportamenti "scorretti", nel senso più ampio del termine, che la previsione generale dell'obbligo di conformarsi, nelle azioni civili, a tale principio - contenuto, com'è noto, nell'articolo 4 dei Principi Generali del diritto civile – viene frequentemente utilizzata dai giudici cinesi.

Talvolta, il richiamo ad essa serve solo per "colorire", o rafforzare, in qualche modo, sentenze decise sulla base di norme che regolano in modo più specifico la situazione in oggetto; più spesso, il riferimento a "onestà e correttezza" serve per

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⁸³ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 32 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

colmare lacune legislative, e sanzionare comportamenti che paiano "ingiusti" anche alla luce del criterio di ragionevolezza (合理, heli)."84

Within the two following cases, the judge seems to have applied the rule of good faith exactly in that sense and with reference to other behaviours that represent easier "misconducts".

A certain Li and a certain Liu registered their marriage in May 1995, and from this marriage a daughter was born.85

In October 2004, the wife told the husband her intention to undertake an activity within the insurance range and, supporting the fact that an unmarried woman would have had more chance of success within that field, proposed to Li to register a false divorce, continuing, in reality, to live as husband and wife. At first the husband opposed himself to the request of his wife, then, he thought back and decided to accept.

Li and Liu, then, started the practices to register the divorce, and subscribed a separation agreement. According to that agreement, the daughter was entrusted to her mother, while Li had to deposit every month ¥ 500 as maintenance check and, to leave his wife the property of the common house. Few days later the registration, the wife expelled her husband from their home and therefore he sued her asking to the court the annulment of the agreement of the division of properties.

The People's Court of Ma'an Shan in the Anhui province welcomed Li's request, according to art. 4 of the General Principles of Civil Law, according to which, within the civil activities, the principle of good faith must be respected; on those basis, the court established that, as the agreement of separation of properties was extorted by deceit, and as it did not reflect Li's will, he could, within an established deadline, revoke it.

It would be interesting to read the motivation of this sentence, of which the Zhongguo fayuan wang gives only a brief notification; but, from the elements given, it seems that, in this case, the concepts of bad faith and dole overlap, while no indication appears to be made of the (at least originally) falsehood of the divorce registration, presumably unlawful.

The same analogy between the violation of the principle of good faith and the intention to harm, can be seen in this other case⁸⁶, that concern a request for damages for a medical error.

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⁸⁴ LIANG HUIXING, "Chengshi xinyong yuanze yu loudong buchong" (Il principio di buona fede e l'integrazione delle lacune", in Faxue Yanjiu, n. 2 1994, pag. 22, citato da HE WANGXIANG "Dui woguo chengshi xinyong yuanze yanjiu xianzhuangde pingui" (La situazione attuale degli studi sul principio di buona fede in Cina), in http://www.law-lib.com/lw/lw_view.asp?no=3382 from: *Le clausole generali nel diritto cinese*. *La nozione di buona fede e la giurisprudenza*, 2008,

⁸⁵ "假离婚"丈夫被扫出门 真维权撤销财产分割 ("Jia lihun"zhangfu bei saochu me zhen weiquan chexiao caichan fenge), fonte: Zhongguo Fayuan Wang, (<u>http://www.chinacourt.org/html/aik</u>), 2008

⁸⁶ 治腰椎误切输尿管 医院诱骗患者二次手术 (Zhi yaozhui wu qie shuniaoguan yiyuan youpian huanzhe erci shousu), fonte: Zhongguo Fayuan Wang (http://www.chinacourt.org/html/ajk), 2008

The 17th of December of 2000 Dong Yanwu, a forty years old labourer of the fertilizing Factory of Rizhao in the Shandong province, was hospitalised at a certain hospital of Junan district, with symptoms of back pain, night sweats and light fever; he was therefore diagnosed with a vertebral tuberculosis and, on December 21st he underwent surgery for the removal of tuberculosis. During the operation, due to an error, the surgeon cuts the right urethra, and none of the presents noticed it.

After the operation the symptoms did not regress, despite the administration of antibiotics and antiinflammatory drugs; the doctors, on January 13th, decided therefore to make an x-ray and they discovered the urethra injury.

Without respecting the information duties, the doctors made his wife to sign the consensus for two operations, to which he was subjected in the following days. Dong Yangwu was dismissed on January 29th, but his conditions did not improve, he could not restart to work and he had to continue to take medicines.

In December of 2003, while he was hospitalised in Rizhao hospital for due to swelling and abdominal pain, he discovered that his problems were due to "intestinal adherences". As he could not understand the reason of that, he went back to the Junan hospital, and, through the medical staff that had attended the surgery, he came to know about the medical error, and about the abdominal infection of which he had suffered, that was due to the urinary accumulation in the abdomen caused by the injury of the urethra.

After having tried to find an agreement, in September of 2005 Dong Yanwu turned to the court of Junan, accusing the hospital not only of not having nursed him properly (cutting the urethra and causing to him an abdominal infection), but also of not having informed him about the medical mistake, hiding him the truth, jeering at a sick person, avoiding their responsibilities and creating further damages to his health. For all these reasons, he asked for a refund of ¥ 34.399,24. The court recognized that the health problems of Dong Yangwu were caused by the medical mistakes of the defendant, noting also that if the hospital had realized immediately that mistake, and had taken proper measures, it would have never cause such huge damages to the plaintiff.

Furthermore, the hospital, once having discovered that the urethra of Dong Yangwu had been cut during the surgery did not, maliciously (guyi, 故意, intentionally), inform the patient, violating the principle of good faith. Even though, once that the mistake was discovered, the hospital proceeded with the repair of the urethra, it was only because of the actions and omissions committed by the doctors that the patient had suffered such serious problems; therefore the hospital must undertake the whole responsibility for the economical loss caused to the plaintiff.

It is not clear if the responsibility considered by the court was contractual or extra-contractual: the beginning of the document in fact talks about the dispute related to a contract of medical services,

but within the sentence no mention is made of the existence of a contractual relationship between the parties, nor is mentioned any disposition of the Law of Contract.

"Notiamo, per completezza, che non è chiaro se la responsabilità di cui parla la corte sia contrattuale o extracontrattuale: nelle prime righe del documento sopra sintetizzato, infatti, si parla di "controversia relativa a un contratto di servizi medici" (医疗服务合同纠纷,yiliao fuwu hetong jiufen), ma nei passi della sentenza riportati non si fa alcun accenno all'esistenza di un rapporto contrattuale tra le parti, né viene citata alcuna disposizione della Legge sui Contratti."87

3.3 Good faith within the range of trademarks and property rights.

The following case is between the Fulian Sheng limited liability company against the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes limited liability company.

"北京福联升鞋业有限公司与国家工商行政管理总局商标评审委员会、北京内联升鞋业有限公司商标异议复审行政纠纷案"⁸⁸

It is a case of administrative dispute over review of opposition against trademark registration, the judgement of which goes back to the 18th of November of 2015.

As competitors of the same geographical area, the applicant of the disputed trademark should have a good understanding of the popularity and significance of the quoted trademarks. Therefore, the applicant of a trademark to which an opposition has been registered shall, at the time of registering and using relevant trademark on similar commodities, observe the principle of good faith, and reasonably avoid to arouse confusion among the relevant public.

Although the trademark to which an opposition has been registered has formed a certain market size after being used for a certain period of time and within a certain scope, the use of the opposed trademark mostly occurs after the date of application of the disputed trademark, which has not yet been approved.

⁸⁸Beijing Fuliansheng Shoes Co., Ltd. v. the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes Co., Ltd.,

http://en.pkulaw.cn/display.aspx?id=2176&lib=case&SearchKeyword=&SearchCKeyword=%b3%cf%ca%b5%d0%c5%d3%c3, 2015

⁸⁷ Simona Novaretti, *Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza*, 2010, p. 34 https://iris.unito.it/retrieve/handle/2318/128879/32051/Le%20Clausole%20generali%20nel%20diritto%20cinese.%20La%20nozione%20di%20buona%20fede%20e%20la%20giurisprudenza.pdf

The applicant of the trademark to which an opposition has been filed should, before that the opposed trademark is used on large-scale, be aware that there are such legal risks that the opposed trademark could not approved for registration if it is similar to the cited trademark and the cited trademark has gained rather high popularity and significance. If the applicant of the trademark to which the opposition had been registered does not perform carefully, avoiding the obligations, and still applies to register on large-scale the use of the disputed trademark, he should therefore bear all the responsibilities and all the adverse consequences.

"被异议商标申请人作为同地域的同业竞争者,理应对引证商标的知名度和显著性有相当程度的认识。因此,被异 议商标申请人在同类商品上注册、使用有关商标时,应当遵守诚实信用原则,注意合理避让而不是恶意攀附引证商 标的知名度和良好商誉,从而造成相关公众混淆误认。

虽然被异议商标经过一定时间和范围的使用在客观上形成了一定的市场规模,但是,有关被异议商标的使用行为大多是在被异议商标申请日之后,尚未核准注册的情况下发生的。被异议商标申请人在其大规模使用被异议商标之前,理应认识到由于被异议商标与引证商标近似,并且引证商标具有较高的知名度和显著性,故存在被异议商标不被核准注册,乃至因使用被异议商标导致侵犯引证商标注册商标权的法律风险。被异议商标申请人未能尽到合理的注意和避让义务,仍然申请注册并大规模使用被异议商标,由此带来的不利后果理应自行承担。"89

Supreme People's Court, administrative ruling, knowing and doing words n. 116 of 2005.

Retrial applicant (second instance was the appellee, the first plaintiff): Beijing Fulian or Shoes Co., Ltd.

Legal representative: Wang Jingxin, general manager of the company.

Attorney: lawyer of Beijing Weiheng Law Firm.

Attorney: Zhang Fan, Beijing Wei Heng Law Firm.

Applicant (first instance defendant, second instance appellant): Trademark Review and Adjudication

Board of the State Administration for Industry and Commerce.

Legal representative: He Xunban, director of the committee.

Principal agent: Sun Sha, the committee examiner.

Applicant (third instance, second instance appellant): Beijing Neilian Sheng Shoes Co., Ltd.

Legal representative: Cheng Gang, chairman of the board of directors of the company.

Authorized agent: Shangquan Quan, Beijing Gao Wen Law Firm.

"最高人民法院

行政裁定书

(2015)知行字第 116 号

再审申请人(二审被上诉人、一审原告): 北京福联升鞋业有限公司。

法定代表人: 王敬欣, 该公司总经理。

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http://en.pkulaw.cn/display.aspx?id=2176&lib=case&SearchKeyword=&SearchCKeyword=%b3%cf%ca%b5%d0%c5%d3%c3 , 2015

⁸⁹ Beijing Fuliansheng Shoes Co., Ltd. v. the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes Co., Ltd.,

委托代理人: 吴新华, 北京市炜衡律师事务所律师。

委托代理人: 张帆, 北京市炜衡律师事务所律师。

被申请人(一审被告、二审上诉人): 国家工商总局商标评审委员会。

法定代表人:何训班,该委员会主任。

委托代理人: 孙莎, 该委员会审查员。

被申请人(一审第三人、二审上诉人):北京内联升鞋业有限公司。

法定代表人:程来祥,该公司董事长。

委托代理人:商家泉,北京高文律师事务所律师。"90

The applicant for the re-examination of the applicant Beijing Fulian or Shoes Co., Ltd. due to the applicant's State Administration for Industry and Commerce Trademark Review and Adjudication Board, Beijing Lianlian Shoes Co., Ltd. trademark opposition review of administrative disputes case, refused to accept the Beijing Municipal Higher People's Court in 2014 December 8 to make (2014) Gao Xing (Zhi) final word No. 3252 administrative judgment, and appealed to the Court for retrial. The court formed a collegial panel of judges to examine the case that is now under review.

"再审申请人北京福联升鞋业有限公司 (以下简称福联升公司)因与被申请人国家工商行政管理总局商标评审委员会 (以下简称商标评审委员会)、北京内联升鞋业有限公司(以下简称内联升公司)商标异议复审行政纠纷一案,不服北京 市高级人民法院于 2014 年 12 月 8 日作出的(2014)高行(知)终字第 3252 号行政判决,向本院申请再审。本院依法组成合议庭对本案进行审查。现已审查终结。"91

Fu Liansheng company applied for retrial: the court of the second instance verdict believed that there were some mistakes within the facts and within the application of law. At first the second instance verdict found that the trademark of objection and the cited trademark constitute an approximate trademark, and that the facts were wrong. There are obvious differences in the appearance of the trademark and the trademark of the objection, and the objection is the combination of the trademark, the Chinese phonetic "FULIANSHENG" and the Chinese character "Fu Lian Sheng". The second instance verdict only compares the text of the two marks, and then drew only the one-sided leading to an erroneous conclusion. Secondly, the first of the characters of the trademark often recall the meaning of "important action, activity". If the first character of the initial letter are different, it is not usually considered a trademark.

In the case considered, the characters of the disputed trademark of "Fulian Sheng" are clearly different from the characters of the cited trademark of "Neilian Sheng", recalling also to two

⁹⁰ Beijing Fuliansheng Shoes Co., Ltd. v. the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes Co., Ltd.,

 $[\]underline{http://en.pkulaw.cn/display.aspx?id=2176\&lib=case\&SearchKeyword=\&SearchCKeyword=\%b3\%cf\%ca\%b5\%d0\%c5\%d3\%c3~,~2015~,~201$

⁹¹ Beijing Fuliansheng Shoes Co., Ltd. v. the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes Co., Ltd.,

http://en.pkulaw.cn/display.aspx?id=2176&lib=case&SearchKeyword=&SearchCKeyword=%b3%cf%ca%b5%d0%c5%d3%c3, 2015

obviously different meanings, and therefore, according to the review practice, the two trademarks should not be identified as approximate trademarks.

The characters of "lian sheng" obviously were not originated by the Beijing Neilian Sheng company, because was introduced during the Qing dynasty of Qianlong. Furthermore a lot of different goods of different typologies do have this characters of "lian sheng" as their trademark.

The second instance verdict did not comment on the evidence submitted to the retrial applicant for the use of the objection trademark at the stage of the review and use, leading to a false conclusion.

The applicant of the retrial established his activity in September 13th of 2006 and it was mainly engaged in selling shoes, bags and clothes and the trademark of "Fulian Sheng", at that time, meant "fortune rises with joy". Since then the company started to promote the old Beijing shoes culture hiring the well-known actress Niu Li as the brand image and spokesperson, and spent a lot of money for advertising, with the purpose to create an independent property right with a well-known brand.

Up to now the applicant of the retrial has more than 1000 stores in more than 30 provinces, because the product is well sold on a national scale and is widely recognized by consumers.

In the judgment of the second instance verdict, there is no comment of whether the objection trademark and the cited one are similar or not, and there are no evidence of the propaganda of the disputed trademark and therefore this led to a wrong conclusion. The disputed trademark has been widely propagated and used by the applicant for a long time, and has been widely recognized by the vast number of consumers. Since there are significant differences between the applicant's and the respondent's trademark logo, signboard, store decoration, product category, market positioning, sales area, etc., and as the objection trademark and the quotation mark both exist in the market, this has never created confusion within the relevant public.

The use of the disputed trademark for a long time, has established a higher market reputation and led the formation of relevant public groups. According to the Supreme People's Court "on the trial of trademark authorization to determine the administrative rights of a number of issues", in order to allow the registration of the market, it is necessary to accurately grasp the trademark law on the protection of the interests of the previous commercial signs and to maintain the market order in line with the legislative spirit, to fully respect the relevant public that has been the objective of the relevant business logo, to maintain the stability of the market.

"福联升公司申请再审称: (一)二审判决认定事实、适用法律错误。1. 二审判决认定被异议商标与引证商标构成近似商标,认定事实错误。被异议商标与引证商标在构成要素、整体外观上有明显区别,被异议商标为图文组合商标,由图形、汉语拼音"FULIANSHENG"及汉字"福联升"组合而成。其中,图形居于上部,视觉效果突出,显著性很强,汉字"福联升"居于下部,为美术字体。引证商标则为纯文字商标,"内联升"文字为书法字体,"联"、"升"二字还是繁体字。二审判决仅将两商标的文字部分进行比较,进而得出片面、错误的结论。2. 在文字商标中,首个文字往往

在呼叫、视觉、含义上起主要作用。如果首字或首字母不同,通常不认为是近似商标。本案中,被异议商标文字为 "福联升",引证商标文字为"内联升",呼叫、含义明显不同,根据审查惯例,两商标不应被认定为近似商标。3. 二 审判决称"'联升'并非固定的词语组合,而是内联升公司所独创",与事实不符。首先,"联升"文字并非北京内联升公 司所独创,清朝乾隆年间就有一位名叫"联升"的人,其生卒年月远早于"内联升"的诞生时间。其次,在很多商品或 服务类别上,很多行业里,均有使用"联升"文字作为商标、字号进行登记注册的情形。4. 二审判决未对再审申请人 在评审及诉讼阶段提交的有关使用、宣传被异议商标的证据进行评述,导致得出错误结论。再审申请人成立于 2006 年 9 月 13 日,主要经营鞋帽、衣服和箱包等产品。再审申请人在成立之时就开始使用"福联升"作为字号、商标,取 寓意为"福气联发升腾"。此后,又请专人设计公司VI视觉识别系统,聘请著名演员牛莉担任品牌形象代言人,并投 入大量广告宣传费用,致力于推广老北京布鞋文化,创立拥有自主知识产权的知名品牌。截至目前,再审申请人已 在全国三十多个省份开设了一千多家加盟店,产品畅销全国,广受消费者认可。二审判决在判断被异议商标与引证 商标是否近似时,未对被异议商标的使用、宣传证据进行任何评述,进而得出片面、错误结论。(二)被异议商标经 过再审申请人长期广泛的宣传和使用,已经具有了较高的知名度,并得到了广大消费者的普遍认可。由于再审申请 人与被申请人在商标标识、门脸招牌、店面装潢、产品种类、市场定位、销售区域等方面均存在明显差异,被异议 商标与引证商标共存于市场,从未导致相关公众的混淆误认。被异议商标使用时间较长,已建立起较高市场声誉和 形成相关公众群体,根据最高人民法院《关于审理商标授权确权行政案件若干问题的意见》的规定,应当准确把握 商标法有关保护在先商业标志权益与维护市场秩序相协调的立法精神,充分尊重相关公众已在客观上将相关商业标 志区别开来的市场实际,注重维护已经形成和稳定的市场秩序,被异议商标理应获准注册。如果不予注册,将给再 审申请人及其加盟商造成重大损失,从而产生不良社会影响,不利于社会稳定。"92

Even though it is not so clearly highlighted in this last sentence, it is possible to understand that the request of the Fulian Sheng had not been welcomed as the two trademarks were not identical, even though similar, and as both are widely recognized in the marked they have never created confusion in consumers' mind.

For what concern the principle of good faith, in this case it is clear that in registering a new trademark it is important to respect the principle of good faith, as it is considered bad faith to register a trademark that has the same name or logo or that is applied to the same kind of goods or target market. But this is clearly not the situation of the last case studied, in which the principle of good faith has not been violated.

⁹² Beijing Fuliansheng Shoes Co., Ltd. v. the Trademark Review and Adjudication Board of the State Administration for Industry & Commerce and Beijing Neiliansheng Shoes Co., Ltd.,

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CONCLUSIONS:

The futility of the efforts to define the principle of good faith as a general clause finds its confirmation in the indefiniteness of the principle within its application in the judicial praxis. The need of determining the contents of the good faith principle, the necessity of a certain elasticity of the principle, the resistances in its applications, are the signs, often contradictories, of a process not yet completed and, at the same time, represent the reasons of the cultural tensions which are still present on the theme of good faith.

This evaluations, however, do not allow us to renounce in trying to define the general clause of good faith, because these efforts represent the necessary prerequisite of a wider and more efficient operation of the principle within the system of private relations.

The correct way should be to try to explain a multitude of parameters of judgement, sufficiently specific in relation with the diversity of the sectors of application of good faith and with the variety of conflicts of interest, but sufficiently elaborated so that they would be able to be applied to a plurality of situations and to be controlled during their applications.

A similar task, whose fulfilment is linked to the further process of affirmation of the principle of good faith within the current legal system, must, by its nature, be reserved to the practice of law within the daily contact with the reality of the judicial relations and to its ability in realising a balance between norms and cases.

For what concern the principle of good faith within the People's Republic of China, it is impossible to clearly define the role played by the principle within Chinese courts. The cases studied allow us to evaluate the real importance of some commonplaces, widespread in the western literature, in relation with the vague norms of Chinese legislation. In fact, some external observers, can look with suspicion the use, by Chinese judges, of the general clauses, because of the risk that the extension of their field of application could lead to arbitrary decisions, and create uncertainty within the law.

If we consider the case studied, these worries can be downsized, and we can say that good faith has not brought to, in the Peoples' Republic of China, original solutions.

After having analyzed the cases (taken from Zhongguo Fayuan Wang 中国法院网), we can say that the general clause of good faith is used marginally, inviting the judges to make their decision according to the principle of good faith only when there are no legal norms that can regulate the situation specifically.

What is relevant is the tendency of using the principle of good faith in judgements of value, in which this concept, that derives clearly from the west, is put beside to criteria that come from the Chinese legal tradition, as the rationality (合理, heli), or the equity (公平, gongping), which are considered also within the collective interest.

Beyond the declamations of Chinese jurists and legislators, according to which the good faith should be used to "moralize" civil relations, which consist in balancing the interests between the parties, and between the parties and the society, it seems that this principle is frequently used to realize a certain "justice", leading to solutions that sometimes recall those obtained by the imperial magistrates, based on the Confucian principles, but, as we have seen, is the Chinese doctrine itself that etymologically recalls the Confucian tradition.

In conclusion it is important to affirm that the legal success of the principle of good faith in China, and its welcome within the new Contract Law, had been certainly influenced by the Western models, and its use in China can be seen as conform to the one of several countries that belong to the Western Legal Tradition and sometimes the changing rules of Roman and German tradition seem to meet solutions which belong to Chinese one. Whether it is simply used to confirm what has been established within the contract (good faith intended as "xin" 信, keep faith in agreements), or whether it is used, on the basis of "loyalty and correctness" (诚实信用 chengshi xinyong), to modify a contract to protect the weaker party, that can recall the confucian principle of "ren" (仁, "umanità"), the important is that the final solution will be fair (公平, gongping), and reasonable (合理, heli).