Revista Chilena de Derecho Privado, Nº 18, pp. 149-177 [julio 2012]

GOOD FAITH IN CIVIL LAW SYSTEMS. A LEGAL-ECONOMIC ANALYSIS*

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Introduction

Good faith is a key concept in civil law systems. The *Proyecto sobre Principios latinoamericanos de Derecho de los Contratos*[1] may serve to illustrate this. In a questionnaire circulated amongst participating countries, the very first of 50 questions asks about the role of good faith in their legal systems. The Chilean response[2] emphasises the broad reach of the concept, referring to the 2008 decision of the Chilean Supreme Court in Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur S.A, in which the court affirms that

> "...el principio de buena fe que debe estar presente en todo contrato. En efecto, como lo ha comprendido la doctrina y la jurisprudencia en nuestro medio jurídico, la buena fe contractual que exige el artículo 1546 del Código Civil, ha de estar presente en todas las etapas de desenvolvimiento del contrato, esto es, desde las negociaciones preliminares, pasando por la celebración y

* El documento fue presentado originalmente en el marco de una invitación realizada por la Fundación Fernando Fueyo Laneri, que tuvo lugar en la Facultad de Derecho de la Universidad Diego Portales, en Santiago de Chile, el día 18 de abril del 2011. Mis agradecimientos al profesor Iñigo de la Maza Gazmuri y a las personas que contribuyeron al debate: A Gerrit De Geest, Gerald Spindler y Alain Parentpor sus comentarios y ayuda. Algunas de las ideas expresadas en este documento, se encuentran desarrolladas con anterioridad en Ejan Mackaay *et al.*, *L'économie de la bonne foi contractuelle*, Montréal, Mélanges Jean Pineau, Benoît Moore (ed.), Editions Thémis 2003; Ejan Mackaay, "The Civil Law of Contract", in *Encyclopedia of Law and Economics-Contract Law and Economics*, Montréal, Gerrit De Geest (ed.), Cheltenham, Edward Elgar, Éditions Thémis, 2010.

[1] "Proyecto sobre los Principios latinoamericanos de derecho de los contratos".pdf., en www.fundacionfueyo.udp.cl/catedra_derecho_continental.php.

[2] Claudia Bahamondes, Iñigo de la Maza, Carlos Pizarro, Álvaro Vidal, "Proyecto Principios Latinoamericanos de derecho de los contratos. Informe Chile".pdf, en www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_chile. pdf, visitado el 3 de marzo de 2011.

ejecución del mismo, hasta las relaciones posteriores al término del contrato inclusive"[3].

The Columbian response, while pointing to a similarly broad role in contract law (objective good faith) of that country as well as in the areas of company law, securities, financial transactions, competition law, consumer protection law and others, usefully recalls that the concept is also used in a subjective sense, where it serves to decide such matters as whether the possessor in good faith can acquire property of movables through prescription. In each of the participating countries, the Civil Code contains a specific provision stipulating good faith in contract[4].

Both the Chilean and the Columbian report speak of the general *principle* of good faith. The Columbian report expressly adds that the greater part of legal scholarship and the case law in that country are in agreement to attribute to good faith the character of a legal principle, meaning that it is capable of creating, modifying or extinguishing specific legal relationships[5].

In spite of the Code provisions explicitly prescribing good faith, it is difficult to get a handle on what precisely the concept means. In none of the Civil Codes is the concept well defined. So we have a puzzle here, which legal scholarship has not satisfactorily solved. Can we do better by "thinking out of the box" and resorting to the economic analysis of law to advance our understanding? This paper proposes to pursue this lead, first looking at good faith in its subjective sense, then, in a second part, in its objective or contractual sense.

I. Good faith as justifiable ignorance

In its first, subjective sense, good faith is used in situations where persons

[3] Corte Suprema, Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur S.A, 2008, rol N° 1287, 2008. Legal Publishing N° 39372, quoted in Proyecto principios latinoamericanos de derecho de los contratos - Cuestionario Chile, octubre 2010, Pregunta 1, nt 6.pdf, en www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_chile.pdf, visitado el 3 de marzo de 2011 "...the principle of good faith that must prevail during the entire contract. Indeed as legal scholarship and case law in our legal environment have understood it, good faith as required by art. 1546 of the Civil Code must be present in all phases of the unfolding of the contract, that is from the preliminary negotiations through the entering into and performance of the contract through to the relationship following the termination of the contract".

[4] Argentina: art. 1198 del *Código Civil*; Chile: art. 1546 del *Código Civil*; Colombia: art. 1603 del *Código Civil*; Uruguay: art. 1291 del *Código Civil*; Venezuela: 1160. El informe de cada uno de los paises puede descargarse de: "Proyecto sobre los Principios latinoamericanos de derecho de los contratos".pdf, en www.fundacionfueyo.udp.cl/catedra_derecho_continental.php, visitado el 3 de marzo de 2011.

[5] "Proyecto principios latinoamericanos de derecho de los contratos, Cuestionario Colombia", 2010, N° 1-a-4, p. 3. pdf, en www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_colombia.pdf, visitado el 3 de marzo de 2011.

are protected from the unfavourable consequences of a legal situation, and in particular a title defect, of which they were justifiably ignorant. As the Columbian response to the project on Latin-American principles of contract law recalls[6], good faith in this sense appears in a number of contexts within the civil code. To name just a few: the good faith possessor of a movable can acquire ownership by prescription (*usucapio*); a good faith possessor of an object who has to return it to its legitimate owner is entitled to revenues (fruits) produced by the object as well as to reimbursement of necessary and useful expenditures made for it; a good faith purchaser of movables that turn out to have been stolen is protected if they were acquired from a merchant in similar ware or in an open market; payment made in good faith to the apparent creditor is valid, even where someone else subsequently turns out to be the real creditor; a person who has been dealing in good faith with another acting as the agent (*mandatary*) of a third according to appearances the latter has created or not dispelled may exercise contractual rights directly against that third person as principal or mandator.

The Chilean Code, in article 706, proposes a definition of this form of good faith:

> "La buena fe es la conciencia de haberse adquirido el dominio de la cosa por medios legítimos, exentos de fraude y de todo otro vicio.
>
> Así en los títulos translaticios de dominio la buena fe supone la persuasión de haberse recibido la cosa de quien tenía la facultad de enajenarla, y de no haber habido fraude ni otro vicio en el acto o contrato.
>
> Un justo error en materia de hecho no se opone a la buena fe.
>
> Pero el error en materia de derecho constituye una presunción de mala fe, que no admite prueba en contrario"[7].

Compare this to a comparable effort in article 932 of the Quebec Civil Code:

> "A possessor is in good faith if, when his possession begins,

[6] "Proyecto principios latinoamericanos de derecho de los contratos, Cuestionario Colombia", 2010, N° 1-a, pp 1-2. pdf, en www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_colombia.pdf, visitado el 3 de marzo de 2011.

[7] *Codigo Civil de Chile* en línea, en www.servicioweb.cl/juridico/Codigo%20Civil%20de%20Chile%20Libro%20Segundo.htm, visitado el 21 de enero de 2011; Translation: Good faith is the awareness of having acquired ownership of the thing by legitimate means, exempt from fraud or any other vice. Thus as regards titles that can transfer ownership good faith presupposes the conviction that one has acquired the object from a person who had the faculty to transfer it and that no fraud or other vice has occurred as part of the act of transfer or the contract. A mere error of fact does not stand in the way of good faith But an error of law constitutes an irrefutable presumption of bad faith.

> he is justified in believing he holds the real right he is exercising. His good faith ceases from the time his lack of title or the defects of his possession or title are notified to him by a civil proceeding"[8].

These definitions, though usefully focusing attention on specific aspects of the transaction in which a mishap has occurred, still beg the question of when one is justified to hold the beliefs referred to. To an economist, this translates into the question of how much precaution one should take to avoid holding a mistaken belief. Those who have taken adequate precautions are justified to hold the belief in question; those who have taken fewer are not so justified.

Formulated in this way, the mistaken belief looks like the cause of an accident and the precaution taken to avoid it seems subject to the cost of accident calculus developed originally by Guido Calabresi[9] and elaborated subsequently in the law and economics literature on torts or civil liability[10]. A normally prudent person (*a bonus paterfamilias*) would take precautions up to the point where their (marginal) cost is just equal to the (marginal) reduction in accident costs they achieve –no less, but no more either. The law sanctions persons taking less than that amount of precaution by making them pay the damage so caused. This should give them the incentive to take precautions up to the level of the damages they would face in their absence.

How would this play out in the case of the acquirers of stolen goods? A diligent acquirer faced with the prospect of having to return the good purchased to the true owner without compensation may be expected to engage in precautions so long as their cost is lower than the value of the good to be returned (without compensation) discounted by the probability that the true owner will trace it to the acquirer. Taking less precaution than this test suggests may be considered negligent. A court, asked to decide whether the acquirer should return the good and if so, should be entitled to compensation, might award compensation where the acquirer had been diligent in this sense, and deny it otherwise.

The problem for the court, and for any outsider for that matter, is that the relevant values are subjective and difficult to assess. What is the value to the purchaser of the good to be returned? What, the cost of precautions? As a rule of thumb, one would expect precautions to be more extensive as the good acquired is more valuable, but this will not get us very far. To make the decision

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[8] *Código Civil de Quebec* en línea, en www.canlii.org/en/qc/laws/stat/sq-1991-c-64/latest/sq-1991-c-64.html, visitado el 28 de diciembre de 2010.

[9] Guido Calabresi, *The cost of accident. A legal and economic analysis*, New Haven, Yale University Press, 1970.

[10] Saul Levmore (ed.), *Foundations of Tort Law,* New York, Oxford University Press, 1994; Michael Faure (ed.), *Tort Law and Economics*, Cheltenham, Edward Elgar 2009.

problem tractable, the Codes of many countries provide a simplifying rule holding that acquirers who have to return a good to the true owner are entitled to the price they paid for it if they took the precaution of dealing with a merchant in similar ware or at an open market[11]. This criterion looks relatively easy to apply. Moreover, it contributes to the effort of restraining the market for stolen goods, by having the acquirer reveal the merchant dealt with, which facilitates policing efforts.

The mechanism employed in this and in similar cases is the same: persons who have taken adequate precautions and in this sense have acted in good faith get their preferred option. Depending on the context, this may: mean keeping a good that has been sold to them as third persons, but is now subject to a duty of restitution by the seller[12], a contract entered into with an agent may be validly enforced against the principal[13]; a contract undermined by a secret, contrary agreement (*contre-lettre*) may be enforced as valid by good faith persons who were not apprised of the latter; payment made to a person one believed in good faith to be one's creditor, but who subsequently turns out not to be that, is valid[14]. Those who failed to take adequate precautions will have to be satisfied to see other parties get their preferred option.

This latter observation points to a consideration present in many of these problems: both parties can take precautions to prevent the occurrence of a mishap. How then to give adequate incentives to each of them? This problem has been identified early on as the *compensation paradox*[15]. In a recent contribution, Alan Schwartz and Robert Scott refer to it as the *double marginalisation problem*[16]. There does not appear to be a solution to it that is optimal with regard to all parties in all circumstances. Code provisions seem to exhibit a desire to create for all parties involved some incentives for precaution. This may be illustrated by the provision on the apparent mandate in the Civil Code of Quebec:

> 2163.
>
> "A person who has allowed it to be believed that a person was his mandatary is liable, as if he were his mandatary, to the third person who has contracted in good faith with the

[11] Para ver las virtudes de reglas sencilla en un mundo complejo, véase Richard A. EPSTEIN, *Simple rules for a complex world*. Cambridge, Harvard University Press, 1995.

[12] Art. 1707, *Código Civil* de Quebec, en www.canlii.org/en/qc/laws/stat/sq-1991-c-64/latest/sq-1991-c-64.html, visitado el 28 de diciembre de 2010.

[13] *Op. cit.,* arts 1323, 1362, 2163.

[14] *Op. cit.*, art. 1452.

[15] Robert D. COOTER & Thomas ULEN, *Law and economics*, Glenview, Illinois, Scott, Foresman and Cy, 1988; Robert D. COOTER & Thomas ULEN, *Law and Economics International Edition*, 5th ed., New York, Pearson Addison Wesley, 2008.

[16] Alan SCHWARTZ & Robert E. SCOOT, "Rethinking the Laws of Good Faith Purchase", in *Columbia Law Review*, vol. III, New York, 2011, pp. 16-18. (forthcoming) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1775032).

latter, unless, in circumstances in which the error was foreseeable, he has taken appropriate measures to prevent it".

In the light of the cost of accident logic, as the probability of a mishap increases, so does the amount of precaution that would be justified. Without using the term, art. 2163 spells out this good faith burden of precaution for the principal (*mandator*), whilst using the term good faith explicitly to designate the precautions imposed on the third person.

All in all, good faith as regards mistakes stemming from ignorance of a legal situation, in particular a title defect, could be seen as taking adequate precautions to guard against such mistakes. The extent of the precautions expands as the cost and likelihood of such mistakes increases. Persons having taken adequate precautions should be granted their preferred option in law. Those who have taken less will have to be satisfied with others getting theirs.

II. Good faith as not taking advantage

The second, objective sense in which the term good faith is used pertains to contractual dealings and, by extension, to relationships within a business enterprise. It refers here to not taking advantage of a contract or business partner in situations that might lend themselves to it.

A Good faith in law texts

Good faith in this sense is a key concept in all civil law systems[17]. It played a major role in late Roman law and in pre-codification French law[18]. Within the modern civil law family, most civil codes have one or more general good faith provisions[19]. Besides the

[17] Saul Litvinoff, "Good faith", in *Tulane Law Review*, vol. 71, New Orleans, pp. 1.654-1.675; Simon Whittaker and Reinhard Zimmerman, "Good Faith", in Reinhard Zimmermann and Simon Whittaker (eds.), *European Contract Law: Surveying the Legal Landscape*, Cambridge, Cambridge University Press, 2000 , pp. 7-62; Martijn W. Hesselink, "The Concept of Good Faith", in Arthur S. Hartkamp, Martijn W. Hesselink *et al.* (eds.), *Towards a European Civil Code-Fourth Revised and Expanded Edition*, 4th ed, Amsterdam, University of Amsterdam-Centre for the Study of European Contract Law, Alphen aan de Rijn, Kluwer Law International, 2010, pp. 619-649.

[18] Élise M., Charpentier, "Le rôle de la bonne foi dans l'élaboration de la théorie du contrat", dans *Revue de droit de l'Université de Sherbrooke*, vol. 26, Quebec, 1996, pp. 300-320; António M. Cordeiro, "La bonne foi à la fin du vingtième siècle", dans *Revue de droit de l'Université de Sherbrooke*, vol. 26, Quebec, 1996, pp. 223-245; Litvinoff (n. 17); Didier Lluelles et Benoît Moore, *Droit des obligations*, Montréal, Éditions Thémis, 2006, Nos 1972 f, 1064 f.; Paul Ourliac et Jean de Malafosse, *Histoire du droit privé*, 2nd ed., Paris, Presses Universitaires de France, 1969, tome 1: Les obligations, p. 83,

[19] Didier Hessenlink & Benoît Moore, *The concep of good faith*, Montéral, Éditions Thémis 2006, p. 619. Menciona: art. 1134, sección 3 del *Código Civl* francés; § 242 del *BGB*; art. 2 del *Código Civil* suizo; art. 1175 y 1375 del *Código Civil* italiano; art. 288 del *Código Civil* griego; art. 762, sección 2 del *Código Civil* portugués, artt. 6:2 and 6:248 Dutch *Civil Code*. Para un mejor estudio, véase Simon Whittaker & Zimmerman (n. 17).

already mentioned systems of Latin American countries, the most prominent example is perhaps art. 242 of the German Civil Code, which

> "has been interpreted expansively and plays a central role in the civil law of that country" (*Treu und Glauben*)[20].

The Dutch recodification towards the end of the twentieth century recognised as a fundamental principle of civil law the objective notion of good faith as loyalty in contractual dealings, for which the distinctive term 'reasonableness and equity' (*redelijkheid en billijkheid*) was introduced[21].

The Quebec Civil Code of 1994 gives good faith a larger place than it had in the old Code of 1866. In all, 86 articles in the new code use the term good faith. Amongst these, the following stand out:

6. Every person is bound to exercise his civil rights in good faith.
7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

1375. The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

At the international level, good faith has found its way into the Vienna *International Sales Convention* of 1980 (art. 7) (providing that '(1) In the interpretation of this Convention, regard is to be had to (...) the observance of good faith in international trade')[22], the Unidroit principles (art. 1.7) (providing that 'each party must act in accordance with good faith and fair dealing in international trade' and that 'the parties may not exclude or limit this duty')[23]; the *Principles of European Contract Law* formulated over a decade ago (Article 1:201: Good Faith and Fair Dealing (1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty)[24] as well as the more recent *Draft Common Frame of Reference* for European Private Law[25] (I. –1:103: Good faith and fair dealing– (1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness

[20] Art. 242 del *BGB*, en www.gesetze-im-internet.de/englisch_bgb; Franz WIEACKER, *Zur rechtstheoretische Präzisierung des § 242 BGB*, Tübingen, J.C.B. Mohr (Siebeck), 1956.

[21] *Ibid.*, arts 3:12, 6:2, 6:258 similarly 1990.

[22] United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980. pdf, en www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf.

[23] Unidroit principles of international commercial contracts 2010, pdf, en www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf.

[24] Ole LANDO and Hugh BEALE, *Principles of European Contract Law-Parts I and II, The Hague, Kluwer Law International*, 1999, in http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/PECL%20engelsk/engelsk_partI_og_II.htm.

[25] DCFR, 2009, p. 178.

and consideration for the interests of the other party to the transaction or relationship in question. (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment)[26].

Common law countries generally remain reluctant towards good faith[27]. Amongst them, the English common lawyers appear to be the most resolutely opposed to it, judging that whatever useful role the concept might play is better performed by more specific doctrines[28]. But dissident voices are increasingly heard[29]. Remarkably, a comparative study on how cases involving a good faith problem are in fact resolved in 14 different European law systems shows no systematic difference between common law and civil law countries[30].

The United States are in an intermediate position. Until the 1960s, received scholarship was generally reluctant towards good faith[31]. That position changed during the 1960s[32]. A seminal article by Summers in 1968 was influential in this change[33]. By the 1980s the concept good faith had formally entered into American law through Section 1-203 of the *Uniform Commercial Code*[34] and Section 205 of the *Restatement (Second) of Contract*[35], and thence into the law of

[26] DCFR, 2009, p. 178.

[27] Para una visión más general, véase J. Edward Bayley, *A doctrine of good faith in New Zealand contractual relationships*, informe de tesis presentado para adquirir el grado de magíster en Derecho, Universidad de Canterbury, 2009, en http://ir.canterbury.ac.nz/bitstream/10092/2862/1/Thesis_fulltext.pdf.

[28] Un defensor de esta posición es Michael Bridge; véase Michael Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?", in *Canadian Business Law Journal/ Revue canadienne du droit des affaires*, vol. 9, Toronto, 1984, pp 385-425; "Lawyer Looks at American Contract Law", in Frank H. Buckley (ed.), *The American Illness: Essays on the Rule of Law*, New Haven, Yale University Press, 2011.

[29] Por ejemplo, Jane Stapleton, *Good Faith in private law*, Oxford, Oxford University Press, 2010, pp. 1-36.

[30] Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law-The Civilian Tradition Today,* Oxford, Oxford University Press, 2001. Para un resumen véase Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law*, Cambridge, Cambridge University Press, 2000.

[31] Robert S. Summers "The General Duties of Good Faith - its Recogniton and Conceptualization", in *Cornell Law Review*, vol. 67, New York, 1982, pp. 810-835.

[32] Véase, por ejemplo, Allan S. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code", in *University of Chicago Law Review*, vol. 30, Chicago, 1963, pp. 666-679.

[33] Robert S. Summers, "'Good Faith' in General Contract Law and the Sales Provision of the Uniform Commercial Code", in *Virginia Law Review,* vol. 54, Virginia, 1968, pp. 195-267.

[34] "Section 1.203 of the Uniform Commercial Code", in www.law.cornell.edu/ucc/ucc.table.html.

[35] "Section 205 of the restatement (second) contract", in www.lexinter.net/LOTWVers4/restatement_(second)_of_contracts.htm.

various States[36]. By 1997 Farnsworth could observe that

> "the Americans have, or so it might seem, too many meanings of good faith"[37].

B Legal scholarship on good faith

This brief overview suggests that good faith is found in most legal systems and in many different areas of law. Yet the meaning of the concept is far from agreed on. Even the very nature of the concept is in dispute. Hesselink, in an extensive survey of the field, states that it is variously considered as 'a norm, a (very important) principle, a rule, a maxim, a duty, a rule or standard for conduct, a source of unwritten law, a general clause', adding that 'to an English lawyer (...) this may seem rather confusing'[38]. Peden sees it as a "principle of construction"[39] and as an "implied obligation" in more recent work[40]. Rolland labels it a "behavioural norm"[41].

A wealth of recent legal scholarship attempts to clarify the contents of the concept[42]. In pre-revolutionary

[36] Consultar la descripción general en Simone Sepe, Simone SEPE, "Good Faith and Contract Interpretation: A Law and Economics Perspective", in *Arizona Legal Studies Discussion Paper,* Nº 10-28, Siena Memos and Papers in Law & Economics - SIMPLE Paper Nº 42/06, Tucson, The University of Arizona Press, 2010, en http://papers.ssrn.com/sol3/papers.cfm?-abstract_id=1086323.6.

[37] Allan E. FARNSWORTH, "Good Faith in Contract Performance", in Jack BEATSON and Daniel FRIEDMANN (eds.), *Good Faith and Fault in Contract Law*, Oxford, Oxford University Press, 1997, p. 161.

[38] HESSENLINK (n. 17), p. 622.

[39] Elisabeth PEDEN, "The meaning of contractual good faith", in *Australian Bar Review*, vol. 22, Queensland, 2002, p. 246.

[40] Elisabeth PEDEN, "Implicit Good Faith - or Do We Still Need an Implied Term of Good Faith?", in *Journal of Contract Law,* vol. 25, Sydney, 2009, p. 61.

[41] Louise ROLLAND, "La bonne foi dans le Code civil du Québec: Du général au particulier", dans *Revue de droit de l'Université de Sherbrooke,* vol. 26, Sherbrooke, 1996, p. 384.

[42] Puede encontrarse una mayor y más extensa bibliografía en ZIMMERMANN and WHITTAKER (n. 30), pp. 156-170. Quienes representan la más significante contribución a la literatura.

Para contribuciones más recientes, véanse: LITVINOFF (n. 17); Briggitte LEFEBVRE, *La bonne foi dans la formation du contrat*, Cowansville, Editions Yvon Blais, 1998; PierreWIDMER, *Abus de droit et bonne foi*, Fribourg, Éditions de l'Université de Fribourg, 1998; François R. VAN DE MENSBRUGGHE, *Migrations juridiques de la bonne foi,* Bruxelles, Cahiers du Centre de Recherches en Histoire du Droit et des Institutions, 1999, vol. 76; Beatrice JALUZOT, *La bonne foi dans les contrats-Étude comparative de droit français, allemand et japonais*, Paris, Dalloz, 2001; Sabine JAMET-LE GAC, *De l'utilité de la bonne foi. Une analyse économique de la bonne foi dans et pour l'exécution des contrats*, Mémoire de DEA; droit des contrats, Lille 2, Université du Droit et de la Santé, Faculté des Sciences juridiques, politiques et sociales, 1998; Marie Annik GRÉGOIRE, *Le rôle de la bonne foi dans la formation et l'élaboration du contrat*, Cowansville, Québec, Éditions Yvon Blais, 2003; Marie Annik GRÉGOIRE, *Liberté, responsabilité et utilité: la bonne foi comme instrument de justice*, Cowansville, Québec, Éditions Yvon Blais, 2010; Hector L. MACQUEEN, "Good faith in the Scots law of contract: an undisclosed principle?", in A.D.M. FORTE (ed.), *Good Faith in Contract*

French law, good faith was considered to require 'that consent be valid, that parties abstain from trickery, violence, any dishonesty or fraud; but also that it be plausible and reasonable; and finally that the contract not be contrary to divine law, to good morals, nor to the 'common weal' (*profit commun*)'[43].

In modern times, good faith seems to have taken on a narrower meaning in contract law ('objective good faith'). To capture this meaning, legal scholarship resorts to terms like

> "fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of solidarity, community standards of fairness' and 'honesty in fact"[44],

> "an objective standard based on decency, fairness or reasonableness of the community, commercial or otherwise"[45],

"having regard to the interests of the other party"[46] and their French equivalents: *'loyauté'*[47], *'honnêteté'*, *'intégrité'*[48], *'fidélité'*, *'droiture'*, *'véracité'*[49], *'comportement loyal'*, *'souci de coopération'*, *'absence de mauvaise volonté'*, *'absence d'intention malveillante'*[50]; the absence of good faith signals 'unconscionable' behaviour[51], which in French is characterised as '*blâmable*', *'choquant'*, '*déraisonnable*'[52]. In some recent Quebec theses, good faith is described as present everywhere[53], "a foundation of contract, necessary to attain contractual justice"[54], yet

> "not standing in the way of a party's taking advantage of a healthy competitive situation, but tending to avoid abuse"[55].

Do these formulas clarify the concept? Perhaps not all that much: they

and Property Law, Oxford, Hart Publishing, 1999, pp. 5-37; Paul J. Powers, "Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods", in *Journal of Law and Commerce*, vol. 18, Pittsburgh, 1999, pp. 333-353; Jane Cohen and Larry Weinberg, "Good Faith and Fair Dealing: A Primer on the Differences between the United States and Canada", in *Franchise Law Journal*, vol. 22, Otawa, 2002; Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law*, Oxford, Clarendon Press, 2002; J.F. O'Connor, *Good Faith in English Law*, Aldershot, Hants, Dartmouth, 1990.

[43] Ourliac et De Malafosse (n. 18), p. 83, Nº 67.

[44] Troy Keily, "Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)", in *Vindobona Journal of International Commercial Law & Arbitration,* vol. 3, 1999, pp. 17-18.

[45] Farnsworth (n. 32), p. 671.

[46] Peden (n. 41), p. 245.

[47] Charpentier (n. 18), pp. 300-320.

[48] Jean Pineau, Danielle Burman and Serge Gaudet, *Théorie des obligations*, 4th ed., Montréal, Éditions Thémis, 2001, p. 35.

[49] Rolland (n. 41), pp. 378-399.

[50] Gérard Cornu (ed.), *Vocabulaire juridique*, Paris, Presses Universitaires de France, 2000.

[51] Keily (n. 44), p. 17.

[52] Pineau (n. 48), p. 44.

[53] Lefebvre (n. 42), p. 257.

[54] Grégoire (n. 42), p. 92.

[55] Grégoire (n. 42), p. 254.

appear mostly to translate one general term into other general terms. This would seem to be reflected in the view of good faith as a "shoreless ocean"[56] and justify Jaluzot's exasperated conclusion that

> "good faith, having no objectively determinable content, may be used to justify any rule of contract law or even of other fields"[57].

As her comparative study examines German law as well as French and Japanese law, her observation covers the German Civil Code, in which the general good faith provision of the famous art. 242 suffuses all of the law of contract. It would also apply to the newer Netherlands Civil Code, which goes even farther along this path with the concept of "*redelijkheid en billijkheid*"[58].

Other scholarship sees good faith as a general mould in which more specific doctrines can be cast, then to assume an independent existence within the positive law of different nations[59]. A prominent example of this development is the concept of *culpa in contrahendo* in German law[60]. Reinhard Zimmermann lists as

> "doctrines which in some legal systems do the job for which in others a good faith provision is available [:] *culpa in contrahendo, obligations d'information, laesio enormis*, the abuse of rights, personal bar, interpretation of the parties' intentions (whether standard or 'supplementary'), unconscionability, doctrines of change of circumstances or erroneous presuppositions, force majeure, and mutual mistake"[61].

Common law systems, in his view, have a comparable range of doctrines:

> "implied terms, estoppel (including proprietary estoppel), part performance of a contract in equity, the de *minimis* rule, qualifications of a legal right by reference to the notion of reasonableness, relief against forfeiture in equity, the maxim according to which no man can take advantage of his own wrong, breach of confidence, fundamental mistake, repudiation, and, occasionally, even good faith in the exercise of a contractual power"[62].

Perhaps the most dramatic conclusion drawn from this unsettling debate is expressed by Hesselink in his already mentioned survey:

[56] Simone DAVID-CONSTANT (ed.), *La bonne foi*, Liège, Éditions du Jeune Barreau de Liège, 1990.

[57] JAZULOT (n. 42).

[58] ZIMMERMAN (n. 30), p. 172.

[59] CORDEIRO (n. 18).

[60] *Op. cit.*, p. 231; ZIMMERMANN (n. 30), pp. 89-92.

[61] ZIMMERMANN (n. 30), p. 172.

[62] *Op. cit.*, pp. 172-173.

> "Good faith is not the highest norm of contract law or even of private law, but no norm at all, and is merely the mouthpiece through which new rules speak, or the cradle where new rules are born. What the judge really does when he applies good faith is to create new rules"[63].

Why would such a masquerade be necessary? Hesselink's answer to that question is that

> "judges in continental European systems have felt uncomfortable with their role as creators of law [since] the judge's task is to apply the law"[64].

He is of the view that

> "if the role of the judge as a creator of rules is fully recognised, there is no need for a general good faith clause in a code or restatement of European private law"[65].

Where there is doubt about the proper role of the courts, good faith may have a place as a formula empowering the courts to create new rules. In this role, nothing can be said, in Hesselink's view, about the content of good faith without knowing the system in which it will be operating. Ideally, he adds, it should be empty[66].

Need we be that pessimistic? Let us look at what law and economics scholarship, bringing a functional approach to the contents of legal concepts, has to offer.

C. Law-and-economic scholarship on good faith

One of the earliest contributions to this approach was the already mentioned piece Summers published in 1968[67]. Summers posits that good faith is best understood not as a positive concept, but rather, negatively, through what it excludes, that is a heterogeneous set of bad faith behaviours[68]. In the article Summers presents an extensive survey of the way the courts in fact apply good faith in American law and lists five forms of bad faith behaviour in the Negotiation and Formation of Contract[69], six in Performance[70], four in Raising and Resolving Contract Disputes[71] and four in Taking Remedial Action[72]. Summers' excluder approach is criticised by Burton, who believes that a positive understanding of good faith is possible and helpful. He proposes to define opportunism as "discretion [...] used to recapture opportunities foregone

[63] Hesselink (n. 17)), pp. 619-649
[64] *Ibid.*
[65] *Op. cit.*, pp. 647-648.
[66] Hesselink (n. 17)), p. 649.
[67] Summers (n. 33), pp. 195-267.
[68] *Op. cit.*, pp. 196 -201
[69] *Op. cit.*, pp. 220-232.
[70] *Op. cit.*, pp. 232-243.
[71] *Op. cit.*, pp. 243-248.
[72] *Op. cit.*, pp. 248-252.

upon contracting"[73]. Robert Summers and Steven Burton have discussed their differences in the literature[74].

Summers' approach seems close to the characterisation of good faith in a recent civil law treatise by Pineau *et al.*:

> 'one should not profit from the inexperience or vulnerability of other persons to impose on them draconian terms, to squeeze out advantages which do not correspond to what one gives them'[75].

This formula adds to the debate an implicit pointer to the concept of opportunism used in economic discourse. On this view, bad faith should be equated to opportunism and good faith, to abstaining from opportunistic conduct in circumstances that lend themselves to such conduct. This connection was first made by Muris, in 1981[76]. Let us look at it in more detail.

1. Opportunism

Muris describes opportunism as follows:

> "A major problem occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms, leading to a transfer of wealth from the other party to the performer-a phenomenon that has come to be known as opportunistic behavior"[77].

For Muris, an unagreed wealth transfer is of the essence of opportunism[78]. He adds:

> "Because of the wealth transfer, parties have an incentive to avoid becoming victims of opportunism, yet whatever strategy of self-protection they choose, deterrence will be costly"[79].

Many legal doctrines appear to be cost-effective means of deterring opportunism, in comparison to self-protection by the potential victims. Good faith could be seen as one such doctrine.

In the law and economics literature, a number of particular forms of opportunism have been recognised and analysed:

[73] Steven J. BURTON, "Breach of Contract and the Common Law Duty to Perform in Good Faith", in *Harvard Law Review,* vol. 94, Cambrigde, 1980, pp. 369-403.

[74] SUMMERS (n. 31), pp. 810-835; Steven J. BURTON, "More on Good Faith Performance of a Contract: A Reply to Professor Summers", in *Iowa Law Review*, vol. 69, New York, 1984, pp. 497-512

[75] PINEAU (n. 48), p. 44: "que l'on ne profite pas de l'inexpérience ou de la vulnérabilité d'autrui pour lui imposer des conditions draconiennes, pour lui soutirer des avantages qui ne correspondent pas à ce qu'on lui donne"; Jean-François ROMAIN, *La théorie critique du principe général de bonne foi en droit privé*, Bruxelles, Emile Bruylant, 2000.

[76] Timothy J. MURIS, "Opportunistic Behavior and the Law of Contracts", in *Minnesota Law Review,* vol. 65, Minnesota, 1981, p. 566.

[77] MURIS (n. 76), p. 521.

[78] *Op. cit.*, p. 522.

[79] *Ibid.*

- *free riding* – where a result can be brought about only by the contribution of all or most, but it is not feasible to supervise everyone, the free rider abstains from contributing, yet shares in the spoils[80];
- *shirking* in a labour relationship, where the employee, who cannot be fully supervised, gives the employer a lesser performance than promised[81];
- *agency problems* – where one must pursue one's plans by relying on other persons' good offices without being able to fully supervise them, the other persons may pursue their own interests at one's expense[82];
- *moral hazard* – originally in insurance contracts, but subsequently with wider application – is also a supervision problem; it occurs where the insured, once the insurance contract is underwritten, behaves less carefully than promised or demonstrated when the premium was set[83];
- *hold-out* – where a collective project will go forward only with everyone's consent, hold-outs suspend their consent in the hope of securing more than their proportional share of the spoils. The opportunism stems here not from an information (supervision) problem, but from the monopoly power conferred by the veto[84];
- *hold-up* situations, i.e. those in which one party is able to force the hand of others to get more than its promised or fair share of the joint gains of

[80] Anthony De Jasay, Anthony, *Social Contract, Free Ride-A Study of the Public Goods Problem*, Oxford, Clarendon Press, 1989; Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law*, Chicago, University of Chicago Press, 2007, p. 109; Robert Sugden, *The Economics of Rights, Co-operation & Welfare*, Oxford, Basil Blackwell, 1986, pp. 122-144.

[81] Christoph Buechtemann F. and Ulrich Walwei, "Employment Security Through Dismissal Protection: Market Versus Policy Failures", in Jürgen G. Backhaus (ed.), *The Elgar Companion to Law and Economics*, Aldershot, UK, Edward Elgar Publishers, 1999, p. 172.

[82] Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure", in *Journal of Financial Economics,* vol. 3, Cambrigde, 1976; William Bishop, "Agency Cost and Administrative Law", in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law*, London, MacMillan, 1998, vol. 1; Farnsworth (n. 80), pp. 87-99.

[83] Yehuda Kotowitz, "Moral hazard", in John Eatwell, Murray Milgate and Peter Newman (eds.), *The New Palgrave-Allocation, Information and Markets*, London, MacMillan Press, 1987, pp. 207-213.

[84] Lloyd R. Cohen, "Holdouts and Free Riders," in *Journal of Legal Studies*, vol. 20, Chicago, 1991, pp. 351-362; Richard A. Epstein, "Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase", in *Journal of Law and Economics*, vol. 36, Chicago, 1993, pp. 553-586; Patricia M. Danzon, "Comment on Epstein, 'Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase' ", in *Journal of Law and Economics*, vol. 36, Chicago, 1993, pp. 567-594; Ejan Mackaay and Stéphane Rousseau, *Analyse économique du droit*, 2nd ed., Paris/Montréal, Dalloz-Sirey/Éditions Thémis, 2008.

the contract or other relationship[85].

Much as these specific forms of opportunism have been studied, a proper definition of opportunism in general is hard to find[86]. Neoclassical economic theory paid scant attention to the notions of transaction costs and opportunism, preferring to study markets as if transactions took place in principle without friction[87]. Cohen submits that standard law and economics similarly attempted to minimise the incidence of opportunism[88]. In contrast, for so-called "institutionalist" economists, these notions play a central role. Williamson, who has repeatedly insisted on the importance of the concept for economic thought, defines it as 'self-interest seeking with guile'[89]. He opposes opportunism to trust and associates it with selective or partial disclosure of information, with uncertainty, with bounded rationality and "asset specificity" on the part of the victim of opportunism and with 'self-disbelieved promises' about the opportunist's own future conduct.

In a major contribution to this literature in 1992, George Cohen presents opportunism as a very general phenomenon affecting all phases of contracting and hence as a phenomenon with which one may expect contract law to be concerned in many different ways[90]. He defines it as

> 'any contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality'[91].

[85] Benjamin KLEIN, "Why Holdups Occur: The Self-Enforcing Range of Contractual Relationships", in *Economic Inquiry*, vol. 34, Oxford, 1996, pp. 444-463; Benjamin KLEIN, "Hold-up Problem", in Peter NEWMAN (ed.), *The New Palgrave Dictionary of Economics and the Law*, London, MacMillan, 1998, vol. 2; Steven SHAVELL, "Contractual Holdup and Legal Intervention", in *Journal of Legal Studies,* vol. 36, Chicago, 2007, pp. 325-354; Michael J. TREBILCOCK, *The Limits of Freedom of Contract*, Cambridge, Mass., Harvard University Press, 1995 p. 96.

[86] COHEN and WEINBERG (n. 42), p. 953: "Economists agree more on examples of opportunistic behavior than on definitions of it, though the term has achieved general acceptance".

[87] Oliver E. WILLIAMSON, *The Mechanisms of Governance*, Oxford, Oxford University Press, 1996, p. 49 escribe: "Economists are thus late comers to the opportunism scence".

[88] Lloyd M. COHEN, "How Fault Shapes Contract Law", in Omri BEN-SHAHAR and Ariel PORAT (eds.), *Fault in American Contract Law*, Cambrdige, Cambridge University Press, 2010.

Para ilustrar esto, véase la edición más reciente del libro de Richard Posner. Richard POSNER, *Economic Analysis of Law*, 8th ed., New York, Wolters Kluwer Law & Business, 2011. Quien, en la p. 123, reconoce la lucha contra el oportunismo como un objetivo importante del Derecho Contractual. En el índice no hace mención al oportunismo.

[89] Oliver E. WILLIAMSON, *Markets and Hierarchies: Analysis and Antitrust Implications*, New York, Free Press, 1975, p. 25; Oliver E. WILLIAMSON, *The Economic Institutions of Capitalism-Firms, Markets, Relational Contracting,* New York, The Free Press, 1985, p. 47.

[90] Esto se extendería al Derecho de Sociedades. Véase Reinier KRAAKMAN, John ARMOUR *et al.* (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd ed., Oxford, Oxford University Press, 2009.

[91] Lloyd M. COHEN, "The Negligence-Opportunism Tradeoff in Contract Law", in *Hofstra Law Review*, vol. 20, New York,

He contrasts it with another impediment to the proper creation and performance of contracts, to wit negligence, and is of the opinion that where both opportunism and negligence are present in a contractual dispute, combating opportunism should take priority. This is so because opportunism left unchecked would lead all potential contractors to raise their guard, taking more extensive protective measures against "being had" by opportunistic behaviour. The ultimate precaution is to forego a contemplated contract altogether. If many potential contractors adopt this ultimate precaution it will shrink the market. Precautionary measures short of abstaining from contracting are simply wasteful (welfare reducing; a social cost)[92]. Or as Dixit puts it, opportunism refers to a class of actions that may look tempting to individuals but will harm the group as a whole[93].

Negligence on the part of one party may also lead the other party or parties to undertake more extensive precautions. Whilst this may not be the cheapest option, it is nonetheless not entirely wasteful in as much as precautions by one party are often substitutes for those by the others. Cohen adds:

> "even if negligent behavior is punished, people do not "trust" others to be careful to the same degree that people trust others to be honorable, because people realize that even if others are generally careful, some negligence is inevitable"[94].

Opportunism is more damaging to general welfare than is negligence.

These developments may be summed up by the formula that a party to a potential or existing relationship acts opportunistically where it seeks, by stealth or by force, to change to its advantage and to the detriment of the other party or parties the division of the relationship's joint gains that each party could normally look forward to at the time when the relationship was set up. It tries, in other words, to get 'more than its (fair) share', an undue advantage, as determined by "parties' agreement, contractual norms, or conventional morality", to use Cohen's formula[95]. Opportunism may involve getting a person to enter into an agreement it would not willingly have consented to had it been fully informed, or spuriously entering into negotiations when one has no intention of entering into a contract, or again breaking off negotiations arbitrarily at the end of a lengthy process when

1992, p. 957; reitera la idea nuevamente en Cohen (n. 84) p. 139, pero con la adición de que puede ser alternativamente "an attempt redistribution of already allocated contractual pie, that is, a mere wealth trasfer".

[92] Posner (n. 88), p 9.

[93] Avinash K. Dixit, *Lawlessness and Economics-Alternative Modes of Governance*, Princeton, Princeton University Press, 2004, p. 1.

[94] Cohen (n. 91), p. 977.

[95] UNIDROIT *Principles of International Commercial Contracts,* 1994, art. 3.10. Se refiere al término 'excessive advantage' (ventaja excesiva).

parties appear to be on the verge of an agreement (*ex-ante* opportunism); it may also involve later exploiting unforeseen circumstances the contract does not explicitly provide for in order to change the division of gains implicitly agreed upon when the contract was entered into (*ex-post* opportunism). In a prisoner's dilemma game, this would correspond to defection where the other party or parties choose cooperation.

In acting opportunistically one party significantly exploits an asymmetry in the relationship amongst the parties to the detriment of the other party or parties. Asymmetry itself, however, does not necessarily signal opportunism: you rely on professionals of various stripe for services they specialise in; life would be difficult without it. The problem arises where one contracting party exploits the asymmetry significantly to change in its favour the division of quasi-rents resulting from the contract.

Opportunism must have been part of human experience forever, as Buckley notes, since human nature has changed little over time[96]. It may take an infinity of forms. Cohen observes pessimistically that "there is no limit to opportunism"[97]. Its variants are coextensive with people's inventiveness in seeking opportunities for making profit and not sharing it. Each new development in communication technology –the latest being the internet– brings its lot of new openings for opportunism. Opportunism can often be masked as legitimate conduct and may be difficult to detect and to distinguish from mere negligence[98]. Yet this distinction is important since, as we saw, opportunism, left unchecked, may be far more damaging to the community than is negligence.

Responses to opportunism must develop apace. Combating opportunism is a pervasive and fundamental objective of contract law as well as of corporate law[99]. Contract law is the foremost domain where the rules are set by contracting parties themselves and where law plays a supplemental role, providing the framework. Guarding oneself against opportunism is first a responsibility of the contracting parties. The legal system can, however, make itself useful where its presence allows parties to "lower their guard", i.e. reduce their self-protection and loss-absorption costs and where this can be accomplished at a cost of the rule itself and its enforcement that is lower than the savings so

[96] Frank H. BUCKLEY, *Just Exchange-A Theory of Contract*, London, Routledge, 2005.

[97] El termino fue utilizado por primera vez por Charles Goetz, véase Charles GOETZ, Charles J. and Robert SCOTT, "Enforcing Promises: An Examination of the Basis of Contract", in *Yale Law Journal*, vol. 89, New Haven, 1989, p. 1.273. Fue citado por George Cohen, véase COHEN n. 93, p. 999.

[98] MURIS (n. 76), p. 526: [opportunism] "is subtle in two ways: first, the behavior is inherently difficult to detect; second, although the activity is detectable, it is easily masked as legitimate conduct, and thus its opportunistic nature is discoverable only at a high cost".

[99] POSNER (n. 88), p. 123; KRAAKMAN (n. 90).

generated[100]. One may expect such gains where public authorities have access to greater scale economies in framing and enforcing rules than are open to private actors. One broad principle reflected in many legal rules is to attribute a burden to the party who can best or most cheaply influence the occurrence or cost of a mishap. Calabresi has proposed the term 'cheapest cost avoider' for this principle[101]. A good deal of civil contract law appears explicable as applications of the 'cheapest cost avoider' principle[102]. Where opportunism is at stake, the opportunist is almost invariably the cheapest cost avoider.

2. Good faith as anti-opportunism

"Safeguarding transactions from the hazards of opportunism," to use Williamson's term, should be a prime objective of contract law[103]. Because opportunism may take an infinity of forms and new ones may be invented all the time and may be difficult to detect, law needs an open-ended arsenal of responses to it. Over the centuries, legal systems have developed a variety of specific concepts to deal with particular forms of opportunism, each with its specific tests and presumptions of fact[104].

To focus ideas, let us look at the concept of *dolus* (fraud). The pre-revolutionary French legal scholar Pothier, writing in 1764, defined it as "any trick used to deceive a person"[105]. This formula includes the presumption that the victims of the deception no longer get the expected benefit out of the contract, which justifies the right granted to them to ask for the contract to be annulled within a specified period (ten years in Pothier's time) from the discovery of the fraud. In the context of our earlier discussion, *dolus* is a paramount form of opportunism by stealth.

[100] En otro lugar, he llamado a esto el Test de Wittman, "Wittman test". Véase referencia en Donald A. Wittman, *Economic Foundations of Law and Organization*, Cambridge, Cambridge University Press, 2006, p. 194. Véase también Mackaay (n. *)p. 427; Mackaay (n. 84), p. 373.

[101] Calabresi (n. 9) p 139; Guido Calabresi, Guido and Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", in *Harvard Law Review*, vol. 85, Cambrigde, 1972, p. 1.118.

[102] Guerrit De Geest, Bart de Moor and Ben Depoorter, "Misunderstandings between Contracting Parties: Towards an Optimally Simple Legal Doctrine", in *Maastricht Journal of European and Comparative Law*, vol. 9, Hamburg, 2002. www.unimaas.nl/default.asp?template=werkveld.htm&id=HO4L47CN622C36ETJ070&taal=nl.

[103] Williamson (n. 87), p. 48.

[104] Cordeiro (n. 20), pp. 236-240.

[105] Robert Joseph Pothier, *Traité des obligations selon les règles tant du for de la conscience que du for extérieur-Partie 1*, Paris, Debure l'ainé, 1764. Disponible en http://books.google.com/books/download/Traité_des_obligations_selon_les_regles.pdf?id=KyRt8NVVUc4C&hl=en&capid=AFLRE71n1vpRq5DHVrXFCsZgmTlYf6MfDl-cbD0wmlyapG1i2_It6ZpaNgXxQapxEE0JV4nIOYa_OKHu1b57uXeMVTelMepLtQ&continue=http://books.google.com/books/download/Trait%25C3%25A9_des_obligations_selon_les_regles.pdf%3Fid%3DKyRt8NVVUc4C%26output%3Dpdf%26hl%3Den. Pineau (n. 48), p. 175, N° 85: "On appelle dol, tout artifice dont on se sert pour tromper quelqu'un".

Pothier already noted that minor exaggerations should not allow a contract to be set aside.[106] The contrary rule would lead, in his view, to too many trials and it would interfere with commerce. That is still the position current legal systems adopt with regard to what is termed *bonus dolus*[107]. In economic terms, it is cheaper in these cases to let parties look after their own interests than to seek protection through a public rule and associated enforcement mechanisms, with their attendant limitation of freedom of contract.

Fast-forward to 1994: consider how the concept of dolus (fraud) is defined in the new Quebec Civil Code:

> 1401. Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that error, the party would not have contracted, or would have contracted on different terms.
>
> Fraud may result from silence or concealment.

The idea of opportunism is expressed in the closing formula of the first paragraph according to which the victim would not have contracted or only on different terms. No rational actors would willingly accept to be deprived of part of their expected gains from the contract.

Notice how the formula has been enriched since Pothier's days: not only are the contracting party's own fraudulent acts considered, but also those by others of which it has knowledge; moreover, not only active behaviour but also silence or concealment may qualify as fraud. Fraudulent acts no longer need be all-or-nothing matters, but even situations where the victim would have contracted in spite of the (minor) fraud but on different terms may qualify as *dolus* (*dol incident*)[108].

These extensions are not obvious implications of the terms used by Pothier. They do make sense if the point of the concept of *dolus* is to curtail opportunism by manipulating information. Accepting opportunism as the driving theoretical focus behind dolus will direct attention to new factual patterns that might be relevant and lead one to tease out the specific facts and acts that the parties have performed or abstained from as they relate to these patterns[109]. In the used-car trade, for instance, tinkering with the mileage counter of a vehicle for sale is presumed to be fraudulent. As new cases are presented to them, the courts –and the codifiers consolidating their efforts– make policy by extending the existing formula to cover closely related forms of opportunism. "Gaps" are filled "at the margin" of existing concepts, which

[106] PINEAU (n. 48), p. 44.

[107] Véase, por ejemplo, LLUELLES (n. 18), p. 282.

[108] LLULLES (n. 18), p 305.

[109] Sobre las virtudes de la teoría que guía esta investigación. véase WITTMAN (n. 100), citado por COHEN (n. 93), p. 1.014.

act as "anchors," as it were, so as to keep legal uncertainty within acceptable bounds, and yet contribute to the broad legal objective of curtailing opportunism.

Civil law systems contain a number of such "anchors". We encountered several in the earlier mentioned list by Zimmermann[110]. Consider also legal warranties against latent defects or against eviction in sale or obligations to inform and to cooperate and to avoid conflicts of interest that are part of the contract of mandate and of relationships in which one person administers the assets of another. The common law duty to mitigate damage imposed on the person suffering a loss due to the acts of another can be seen as responding to a moral hazard problem. The Dutch[111], German[112], Italian[113] and Quebec[114] Civil Codes have formal provisions codifying this obligation[115]. By way of further example, consider how the new Netherlands Civil Code deals with either party to a contract interfering with the fulfilment of a condition stipulated in it:

> Art. 6:23-1. If reasonableness and equity so require, the condition is deemed fulfilled in the event that the party who has an interest in the non-fulfilment of the condition prevents its fulfilment.
>
> 2. If reasonableness and equity so require, the condition is deemed not to be fulfilled in the event that the party who has an interest in the fulfilment of the condition brings about its fulfilment[116].

In either case, the opportunistic party is prevented from getting its preferred option, whilst the victim gets his or hers.

Yet occasions may arise where opportunistic behaviour does not appear comfortably to lend itself to being sanctioned within the boundaries, even elastic, of the "anchors" available within the positive law. For such occasions, we may yet want an open-ended concept that can be applied, reluctantly and as a last resort no doubt, but applied all the same, to novel forms of opportunism. It is our contention that the obligation to act in good faith plays just this residual role in civil law systems.

Good faith is the exact opposite of opportunism. In as much as the absence of opportunism is a presupposition underlying all of contract law, good faith may be said to "irrigate"

[110] Zimmerman (n. 17), p. 172.
[111] *NBW* 6:101.
[112] *BGB* 254 (2) (Mitverschulden).
[113] *Código Civil* de Francia, 1227 (2).
[114] *Código Civil* de Quebec 1479.
[115] Mackaay (n. 84), p. 441.

[116] P.P.C. Haanappel and Ejan Mackaay (translators), *New Netherlands Civil Code - Patrimonial Law / Le nouveau Code civil néerlandais - Le droit patrimonial, Kluwer*, Deventer, Pays-Bas et Boston, Mass. 1990. Books 3, 5 and 6 in original transalation are available for dowloading here: http://papers.ssrn.com/sol3/papers.cfm? Abstract_id=1737823; http://papers.ssrn.com/sol3/papers.cfm? Abst ract_id=1737848; http://papers.ssrn.com/sol3/papers.cfm? Abs tract_id=1737849.

all of it. In this sense it is a guiding principle underlying many specific crystallisations, but it is too general to be applied routinely given the need for certainty of the law. Yet where it is used, residually, to combat unusual or novel forms of opportunism for which no other "anchor" appears to be readily available, it could be seen as an open-ended rule allowing courts to engage in policy-making, filling gaps through which opportunism might otherwise creep in.

It may be helpful to illustrate this kind of reasoning by means of the example, discussed by Cohen, of the American case of Jacob & Youngs *v.* Kent, a decision by the Court of Appeals of New York[117]. Cohen summarises the case as follows:

> "Jacob & Youngs built a 'country residence' for Kent, a successful New York lawyer, for $77,000, of which Kent paid all but around $3500. One of the contract specifications provided: 'All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." Nine months after the house was completed, Kent learned that some of the pipe used was not Reading pipe, but wrought iron pipe made by other manufacturers, including Cohoes. Kent then ordered the pipe replaced, even though much of it was already encased within the walls of the house. Jacob & Youngs refused to replace the pipe, Kent refused to make the final payment, and Jacob & Youngs sued. The New York Court of Appeals, speaking through Judge Cardozo, allowed Jacob & Youngs to recover the full remaining payment, despite its acknowledged breach. Cardozo's reasoning–in different terminology, of course–is essentially that the builder was merely negligent in breaching while the homeowner was potentially opportunistic in insisting on the letter of the contract; therefore, the homeowner lost"[118].

Admittedly the contractor has been somewhat negligent in not monitoring the subcontractor closely enough to ensure that the stipulated pipe make was installed everywhere. Should he be forced to correct the defect or be deprived of a final payment of the agreed price? This would seem excessive (unfair) if the work was otherwise satisfactory. It would confer a windfall gain on the homeowner and might lead him to pursue it opportunistically.

To determine whether homeowner opportunism is present here, consider first the question of an asymmetry. The builder has completed

[117] www.courts.state.ny.us/reporter/archives/jacob_kent.htm.

[118] COHEN (n. 93), p. 990.

the building –the cost is "sunk"– but has not been paid in full – an asymmetry to the builder's disadvantage. Since this was a one-shot deal, the builder could not have relied on reputation to shield himself against this opportunism. The builder did insist on progress payments as the work advanced.

Is there exploitation in the sense of the homeowner's changing the distribution of gains of the contract to his advantage? The chances that the homeowner had a real interest in the particular make of pipe he stipulated is slight. The reason for mentioning a particular make would seem to relate to the (high) quality of pipe he desired. But the pipe installed was by all accounts of the requisite quality. There is no indication that the homeowner had any special connection with the pipe manufacturer. Nor had he taken the trouble of monitoring the installation of the pipe or of ordering the pipe himself, all of which would have indicated his special interest. All of this led the court to find against the homeowner.

Similar analyses would be possible in civil law cases, although the courts generally provide less detailed information on the facts leading them to their decisions. By way of example, in a study of recent French case law on good faith, Ancel reviews several cases in which a contracting party, obviously acting opportunistically but apparently within the letter of the contract or the law, is deprived, on the ground of bad faith, of the sanction that it would normally be able to invoke[119]. Such was the case of the malicious exercise of a right of withdrawal (*faculté de dédit*) where the court denied the withdrawal for that reason. Again where a discretionary right to convert a rent payable to an obligation of home care was exercised at a time when the debtor could not fulfil the latter obligation, having been handicapped by an accident, for the sole purpose of having the contract set aside, this latter sanction was denied[120].

These cases illustrate that opportunism may be difficult to detect, but also that examining cases in the light of potential opportunism directs one's attention to what the interests of each party are and how different acts they have accomplished or facts they have taken advantage of play into these interests. In this sense, good faith is to be examined in the light of the specific facts of each case (*ius in causa positum*), but the judgement of what facts matter is helped along by an understanding of the theory of opportunism that may colour them.

Conclusion

The starting point of this paper was that good faith appears at once as a fundamental concept in all civil law

[119] Pascal Ancel, "Les sanctions du manquement à la bonne foi contractuelle en droit français à la lumière du droit québécois", dans *Revue juridique*, vol. 45, Paris, 2011, pp. 87-113.

[120] *Ibid.*

systems, with a long history, and yet as one whose nature and contents are ill-understood and controversial. The paper is an attempt to find out whether the economic analysis of law can shed new light on it and help to clarify it.

Good faith is used in two distinct senses, which traditional legal scholarship has identified as subjective and objective. In the subjective sense, it refers to justifiable ignorance of some legal situation, such as a title defect. In this sense it is used in the law property and real rights and the law of prescription in particular. Economically, good faith can be readily accounted for here as taking adequate precautions against the risk of a misapprehension or ignorance of some relevant fact. The adequacy of the precautions is a function of the value of the object or transaction at the stake, discounted by the likelihood of a misapprehension. This logic has been developed in the economic analysis of tort or civil liability law relating to accidents. Persons who have taken adequate precautions will get their preferred option; those who have not will see their opponent get it.

The objective sense of good faith is used in contract law and, by extension, in the law pertaining to legal persons, such as business enterprises. It refers here to not taking advantage of an asymmetry in the relationship in circumstances that would lend themselves to it. The difficulty with the concept is that it is seen at once as a principle underlying all of contract law and as a (historical) mould for more specific concepts that have found their place in the Codes, but generally not as a rule to be applied directly; in the legal literature, its content is usually defined by means of concepts of equal generality.

Economic analysis would relate good faith in this sense to the concept of opportunism, indeed would see it as its exact opposite. Opportunism is present where a party to a potential or existing relationship acts seeks, by stealth or by force, to change to its advantage and to the detriment of the other party or parties the division of the relationship's joint gains that each party could normally look forward to at the time when the relationship was set up. It tries, in other words, to get 'more than its (fair) share,' an undue advantage, as determined by parties' agreement, norms prevailing between the parties, or conventional morality. There is a fair bit of literature about what the concept means. Contracts should normally benefit all parties. The absence of opportunism is the foundation of contract.

Human nature being what it is, some persons will try to get away with opportunistic behaviour and this prospect will lead all potential contractors to take precautions against "being had." These precautions are a net social loss and reduce the size of markets. Law can make itself useful by providing safeguards that are less costly than the precautions private persons can take themselves and the residual risk they assume in their absence. In principle, this would

require a wide-ranging tool commensurate with the infinite variety of opportunistic behaviour that people will come up with. But this would cause a problem of legal uncertainty, which is a cost to the private persons who are the supposed beneficiaries of such a tool. So the law provides a variety of specific anti-opportunism concepts ("anchors") throughout private law, each of which needs to be interpreted flexibly but within fairly strict boundaries if a measure of legal certainty is to be preserved. Yet situations may arise where none of the specific concepts will do the job of curtailing a specific manifestation of opportunism. Enters good faith as the residual anti-opportunism concept, to be used as a last resort and with the expectation that the new form of opportunism so tackled will in due course lead to a more specific concept that will assume an independent existence as a new "anchor." Good faith acts here as a "mould" in which new "anchors" are cast. In this conception, since absence of opportunism is the foundation of contract and a reflection of contractual justice, so is good faith.

Have we advanced our understanding by linking contractual good faith to opportunism? In as much as the latter concept is reasonably well understood, it will direct attention to what acts and facts may be relevant and need to be teased out in the concrete (novel) circumstances of a case before a court. As a theoretical concept, it allows us to see unity amongst a variety of concepts that on the surface look far apart, but whose common "deep structure" is to be tools of anti-opportunism. All of this is a contribution in the best tradition of legal scholarship.

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