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## GOOD FAITH AND REASONABLENESS IN EUROPEAN CONTRACT LAW

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1. In a speech given at the 1975 Conference on “Europe and the unity of the law”<sup>1</sup> Alberto Trabucchi, who at that time was serving as a judge in the Luxembourg Court, referred to good faith as one of the general principles likely to be applied by the Court of Justice.

Five years on, the Vienna Convention on the contracts for the international sale of goods conferred a prominent role on reasonableness besides good faith<sup>2</sup>.

Since then, the use of the good faith and of reasonableness<sup>3</sup> has been spreading relentlessly throughout European contract law: from the Directives<sup>4</sup> to the harmonization projects<sup>5</sup> and the DCFR<sup>6</sup>, up to the recent *Proposal for a Regulation on a Common European Sales Law*.

The success of these categories<sup>7 8</sup>, which has rapidly overshadowed XX century-fashioned critiques and concerns about the perils of a *flucht in die generalklauseln*, is mainly based on the ground of the *politics of harmonization*.

<sup>1</sup> See POCAR, *Il ruolo dei principi nel diritto comunitario*, in *La formazione del giurista europeo, Quaderni della Rivista di diritto civile*, Padova, 2008, 119.

<sup>2</sup> See DIESSE, *La bon foi, la coopération et le raisonnable dans la Convention des Nations Unites relative à la vente internationale de marchandises (CVIM)*, *Journal du droit international*, 1 (2002), 55 ss. and S. TROIANO, *La «ragionevolezza» nel diritto dei contratti*, Padova, 2005, 163 ss.

<sup>3</sup> S. TROIANO, *La «ragionevolezza» nel diritto dei contratti*, Padova, 2005, 163 ss..

<sup>4</sup> For good faith see especially Directive 86/653/EC; Directive 93/13/EC; Directive 2005/29; for reasonableness see especially Directive 85/374/EC; Directive 93/13/EC; Directive 99/44/EC; Directive 2002/47/EC.

<sup>5</sup> See CASTRONOVO, *Un contratto per l'Europa*, in *Principi di diritto europeo dei contratti*, ed. it. A cura di Castronovo, Milano, 2001, XXX ss.; ID., *Good Faith and the Principles of European Contract Law*, in *Europa e diritto privato*, 2005, 589 ss. e OLE LANDO and HUGH BEALE (a cura di), *The Principles of European Contract Law: Part I*, Dordrecht, Martinus Nijhoff, 1995; A. DI MAJO, *L'osservanza della buona fede nei Principi Unidroit*, in BONELL-BONELLI (a cura di), *Contratti commerciali internazionali e Principi Unidroit*, Milano, 1997, 145 ss.; S. TROIANO, *Clausole generali e nozioni giuridiche indeterminate nei Principi Acquis del diritto comunitario dei contratti*, in *I «principi» del diritto comunitario dei contratti*, a cura di De Cristofaro, Torino, 2009, 189 ss.

<sup>6</sup> MEKKI and KLOEPFER-PELÈSE, *Good faith and fair dealing in the DCFR*, 3 *European Review of Contract Law* (2008) 338 ff.

<sup>7</sup> See AUER, *Good Faith: A Semeiotic Approach*, in *European Private Law*, 2002, 279 ss.; C.M. BIANCA, *Buona fede e diritto private europeo, Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*, ed. Garofalo, Padova, 2003, 201 ss.; CASTRONOVO, *Good Faith and the Principles of European Contract Law*, cit., 589 ss.; A. DI MAJO, *L'osservanza della buona fede nei Principi Unidroit*, cit., 145 ss.; GRUNDMANN e D. MAZEAUD (ed.), *General Clause and Standards in European Contract Law*, The Hague, 2006; HOCH, *Is fair dealing a workable concept for European contract law?*, *Global Jurist* (2005), 5; LANDO, *Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*, *European Review of Private Law* (2007), 841 ss.; NAVARRETTA, *Buona fede oggettiva, contratti di impresa e diritto europeo*, *Rivista di diritto civile* (2005), I, 507 ss.; POILLOT, *Influence du droit de l'Union Européenne et primauté de la loyauté: une protection incidente du consommateur?*, *Petites Affiches* (2011), 34 ss.; VETTORI, *Buona fede e diritto europeo dei contratti*, *Europa e diritto privato* (2002), 915 ss.; ZIMMERMANN AND WHITTAKER (a cura di), *Good Faith in European Contract Law*, Cambridge, 2000, 8 ss.



European harmonization enjoys rules that can easily be shared, due to their undetailed content and ubiquity in most European legal systems. On the other hand, the flexibility of the general clauses and standards satisfies the quest for uniform criteria as well as the need to preserve “national and regional differences”<sup>9</sup>. Finally, the room which is left to the judge looks like an and that of the common law, grounded in the authority of the precedent.

But why, then, had the choice to fall precisely on the principles of good faith and reasonableness?

The answers to this question prompts our inquiry to move to the wider ground of legislative policy and technical legal reasons.

The success of the principle of good faith lies within a context of radical institutional changes and hints at the influence of several schools of thought. In the politics of the European Union the role of the market has gradually replaced the traditional statist organization, characterized by a sharp division between the quest for social justice, left to the interventionism of the State into domestic economy, and the regulation of private transactions and contracts, inspired by a laissez-faire approach to political economics<sup>10</sup>. The paradigm of market governance has prompted the idea of contract regulation as a tool for different political strategies.

Under the influence of ordo-liberal ideas akin to classical law and economic analysis<sup>11</sup>, good faith, once a stone guest in the market, was at first regarded mainly (but by no means only) in its procedural dimension, as a means for correcting the market, seen as an artificial output of the law<sup>12</sup>, through the imposition of duties of disclosure. Later on, well before the financial crisis cast an ominous shadow on the market and the whole system, the quest for justice brought about an expansion of the tasks assigned to good faith. Now it embodies the movement from a purely individualistic paradigm to a cooperative<sup>13</sup> (more than *strictu sensu* altruistic<sup>14</sup>) idea of contract, aimed to restore its human and realistic dimension, and to affirm the value of the human being<sup>15</sup> and the commutative dimension of justice that only substantive equality can realize. Finally, in

<sup>8</sup> There are also some signs of a possible decline of good faith. See in France LAITHIER, *Le déclin de la bonne foi? Annotation Cass. 2e civ., 25 févr. 2010*, no 09-11352, and in Italy CRUCIANI, *Clausole generali e principi elastici in Europa: il caso della buona fede e dell'abuso del diritto*, *Riv. crit. dir. priv.* (2011), 473 ss.

<sup>9</sup> STORME, *Good Faith and the content of Contracts in European Private Law*, *European Private Law* (2003), 13.

<sup>10</sup> The laissez-faire approach is well represented by the famous observation of BROWNSWORD, *Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law*, in BROWNSWORD-HIRD-HOWELLS (eds), *Good Faith in Contract. Concept and Context*, Ashgate, Dartmouth, 1998, 15 who says: “Just as cricket without a hard ball is not cricket, so it is widely held that contract without tough self-interest dealing simply is not contract”.

<sup>11</sup> VICKERS, *When is Trading Unfair?*, speech to the David Hume Institut, Edinburgh, 2001 (consultabile dal sito [www.oft.gov.uk](http://www.oft.gov.uk)); ID., *Economic for consumer policy*, speech to the British Academy Keynes Lecture, 2003 (consultabile dal sito [www.oft.gov.uk](http://www.oft.gov.uk)).

<sup>12</sup> See IRTI, *L'ordine giuridico del mercato*, Roma-Bari, 1<sup>a</sup> ed. 1998, ult. ed. 2004, *passim*.

<sup>13</sup> See WILHELMSSON, *Good Faith and the Duty of Disclosure in Commercial Contracting*, in BROWNSWORD-HIRD-HOWELLS (eds), *Good Faith in Contract. Concept and Context*, cit., 181.

<sup>14</sup> See KENNEDY, *La funzione ideologica del tecnicismo nel diritto dei contratti*, *Rivista critica di diritto private* (2002), 333 ss.

<sup>15</sup> RODOTÀ, *Le clausole generali nel tempo del diritto flessibile*, *Lezioni sul contratto*, Orestano (ed.), Torino, 2009, 116.



some opinions<sup>16</sup>, even these boundaries were crossed and the need to reassert the demand for social justice, poured in contract law scholarship, contesentiously affected the very role of good faith<sup>17 18 19</sup>.

When considering the reasons for the rise of the good faith clause, one might be struck by the contextual strength of the reasonableness standard. For those very reasons, in fact, unveil the false neutrality of a concept, which – unlike good faith - would actually conceal an individualistic, laissez-faire approach to contract law. Still, reasonableness endures in European law, providing the law of contract with the flexibility and openness required to match the reality, namely, the way in which contracts are drafted, particularly long-term contracts<sup>20 21</sup>.

This scenario raises a number of questions, which must be dealt with to understand whether the choice made by the European law, favouring good faith and reasonableness, actually deserves our approval.

From a legislative policy perspective, we should ask what good faith can actually do, equally attacked from the right and from the left. It should be argued whether good faith withstands the formal and institutional criticisms, that see it as a sign of the «sterilization of politics in western societies»: a kind of mechanism of compensation for the deficit of democracy and social policies in the European Union, brought about by the enlargement of judicial powers.

On the other hand, one should also consider whether good faith resists the substantial criticism, according to which «beyond the primacy of legislation, there is not a judge, who consults the justice and investigates the Good and the Evil, but [...] the automatism of a society depoliticized by the market»<sup>22</sup>. The principle of good faith is here seen as a «whitewash» on a liberal-capitalist building close to falling into ruin.

As regards to the relationship between good faith and reasonableness, several interpretations might be proposed: a possible coexistence between opposed visions of contract; a symptom of the enduring hegemony, through the standard of reasonableness, of a laissez-faire, individualistic idea of contract; or finally the emblem of a possible union, overcoming the apparent contradiction.

<sup>16</sup> See HESSELINK, *CFR & Social Justice. A short study for the European Parliament on the values of underlying the Draft Common Frame of Reference For European private law: what role for fairness and social justice?*, Centre for the Study of European Contract Law, Working Paper series n. 2008/08, 15 ss. (available from <http://ssrn.com/abstract=1270575>).

<sup>17</sup> See COLLINS, *La giustizia contrattuale in Europa*, *Riv. crit. dir. priv.* (2003) 659 ff. and 678 ff.; ID., *Social Market and the Law of Contract*, *ARSP-Beiheft 49* (Franz Steiner Verlag, 1992), 85, 87.

<sup>18</sup> KRONMANN, *Paternalism and the Law of Contracts* (1983), Faculty Scholarship Series Paper 1065;

<sup>19</sup> KENNEDY, *Distributive and Paternalist Motives in Contract and Tort Law, with special reference to compulsory terms and unequal bargaining power*, *Maryland Law Review* (1982) 41, 563 ff.; ID., *La funzione ideologica del tecnicismo nel diritto dei contratti*, *Rivista critica di diritto privato* (2002), 317 ss.

<sup>20</sup> See TROIANO, *La «ragionevolezza» nel diritto dei contratti*, Padova, 2005, 166.

<sup>21</sup> The success of the reasonableness standard can also be explained with the influence of the American law in international trade. See WEISZBERG, *Le «raisonnable» en Droit du Commerce International*, Paris, 2003, f. 34

<sup>22</sup> M. BARCELLONA, *Clauseole generali e giustizia contrattuale. Equità e buona fede tra codice civile e diritto europeo*, Torino, 2006, 290-291



From a legal-technical point of view some doubts can also be raised: the scepticism towards the imposition of categories likely to raise the reciprocal aversion of lawyers educated in different traditions; the suspicion raised by clauses, the meaning of which is controversial even within national legal orders; the deep dislike for the contextual use of canons that, according to some, tend at best to overlap.

Finally, there are plenty of doubts concerning the *politics of harmonization*, namely the fear that, through the concretization carried out by the national Courts<sup>23</sup>, the general clauses and standards might bring about a false harmonization, resulting in a further process of judicial differentiation.

1. In order to deal with these three groups of problems, it should be preliminarily made clear how the passage from a national to a European perspective influences our way of understanding the concepts of good faith and reasonableness.

Firstly, the sharp functional difference between good faith, which makes room for some flexibility in the statutory law systems, and reasonableness, which governs the application of the *stare decisis* by the Courts<sup>24</sup>, tends to get lost in the European context. The statutory nature of European law, on the one hand, the method of judicial precedent espoused by the ECJ and joined by several domestic Courts, on the other hand, make it difficult to draw a compelling distinction between good faith-civil law and reasonableness-common law.

Secondly, the relation of these categories in the European law can hardly match the variety of reactions stirred at national level by the category perceived as alien, spanning from refusal to a tendential overlapping, up to the adoption, in the place of the native category<sup>25 26 27 28</sup>.

<sup>23</sup> See BASEDOW, *Der Europäische Gerichtshof und die Klauselrichtlinie 93/13: Der verweigerter Dialog, Festschrift für Günter Hirsch*, München, 2008, 51 ff.

<sup>24</sup> See WEISZBERG, *Le «raisonnable» en Droit du Commerce International*, cit., n. 34.

<sup>25</sup> See the opinions of GOODE, *The concept of «Good Faith» in English Law* (Centro di studi e ricerche di diritto comparato e straniero directed by Bonell), Rome (1992), 3; STEYN, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, *Law Quarterly Review* (1997), 438 ff. thinks that “an overriding principle of reasonable expectation serves the same purpose as a general principles of good faith. The language might be different but the idea is the same” [BROWNSWORD-HIRD-HOWELLS, *Good Faith in Contract. Concept and Context*, Ashgate, Dartmouth, 1998, 30]. Against see DE MOOR, *Common and civil Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts*, *Rev. eur. de droit privé* (1995) 260.

<sup>26</sup> CRISCUOLI, *Buona fede e ragionevolezza*, *Rivista di diritto civile* (1984), 752 and C. SCOGNAMIGLIO, *Interpretazione del contratto e interessi dei contraenti*, Padova (1992), 352 ff.; ID., *Abuso del diritto, buona fede, ragionevolezza (verso una riscoperta della pretesa funzione correttiva dell'interpretazione del contratto ?)*, *La nuova giurisprudenza civile commentata* 26 (2010), 139 ff. read the good faith clause in the light of reasonableness. On the other hand, BROWNSWORD, *Contract Law. Themes for the twenty-first century*, 2<sup>a</sup> ed., Oxford, 2006, p. 135 observes that in the modern law of contract in England there is a tendency “for doctrine to reflect the expectations associated with good practices [...] in other words, we might expect that English Law will move towards the adoption of good faith as a requirement (in substance, if not in name)”: the name will be reasonableness.

<sup>27</sup> Favouring the idea of a close link between good faith and usages and practices, good faith could easily become reasonableness. Favouring the idea that “the reasonable man represents after all no more than the anthropomorphic conception of justice” [*Davis Contractors Ltd v. Fareham UDC*. See Hoffmann, ‘Anthropomorphic Justice: The Reasonable Man and his Friends’ (1995) 29 *The Law Teacher* 127, 128], reasonableness could become good faith.



All too well known is the aversion of common lawyers, who blame good faith for being a dogmatic and indefinite concept, saturated with elusive ethics, at odds with the adversarial logic of contract and too general and generic not to compromise the pluralistic dimension of the contract. The proposal to turn the *test of unfairness* in a *test of unreasonableness* in the Unfair Contract Terms Bill, which will consolidate the 1977 *Unfair Contract Terms Act* and the 1999 *Unfair Terms in Consumer Contracts Regulations* clearly hints at this attitude.

Equally known is the elusive character of reasonableness for civil lawyers, who see in it «*mille germes d'insécurité et d'imprévisibilité*»<sup>29</sup>, a category that would leave the judge *legibus solutus*<sup>30</sup>, «a bit like a swimmer in the ocean. In the open sea, with no earth visible in the distance, it is difficult to orientate oneself»<sup>31</sup>. This wariness mirrors in the attempts to translate reasonableness into more familiar categories, as for example the clause of diligence in the law implementing the Directive on un fair commercial practices.

On the opposite side, there are opinions which are drawn by such an osmotic vision of the relation between these categories, such a profound attention for the foreign model, to tend to replace the native with the alien category.

Indeed, if the axis of good faith is made to shift towards «what is socially normal and regular», putting the accent on the *Verkehrsitten* rather than on *Treu und Glauben* in § 242 BGB, good faith tends gradually to convert into reasonableness. Conversely, if we emphasize the part played by morality in defining the concept of proportionality and the standards that underpin social life - the reasonable man as «a measuring rod of current morality and opinion»<sup>32</sup> or «no more than the anthropomorphic conception of justice»<sup>33</sup> - reasonableness can easily drift towards good faith.

Finally, there is the idea of a latent overlapping, a tendency to virtually merge of the concepts, seen as different ways to express the same needs in different contexts: “An overriding principle of reasonable expectation serves the same purpose as a general principle of good faith. The language might be different but the idea is the same”, observes a common lawyer<sup>34</sup>, whose opinion has been recently joined by the prediction according to which “we might expect that English Law will move

<sup>28</sup> The overlap is evident in the Dutch system, see art. 2 of the Burgerlijk Wetboek – BW (1992) with its clause of “redelijkheid en billijkheid”.

<sup>29</sup> KHAIRALLAH, *Le raisonnable en droit privé français. Développements récents, Revue trimestrielle du droit civil* (1984), 444.

<sup>30</sup> BUSNELLI, *Note in tema di buona fede ed equità, Rivista di diritto civile* (2001), 555.

<sup>31</sup> LA TORRE and SPADARO (eds), *La ragionevolezza nel diritto* (2002).

<sup>32</sup> FREEMAN, *The Legal Structure*, London, 1974, 13.

<sup>33</sup> E' l'idea che HOFFMANN, *Anthropomorphic Justice: The Reasonable Man and his Friends*, 1995, 29 *The Law Teacher* 127, 128, riprende da Lord Radcliffe in *Davis Contractors Ltd v. Fareham UDC*

<sup>34</sup> Così STEYN, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, *Law Quarterly Review* (1997), 438 ss. In senso analogo GOODE, *The concept of «Good Faith» in English Law* (Centro di studi e ricerche di diritto comparato e straniero directed by Bonell), Roma, 1992, 3. *Contra cfr.* viceversa DE MOOR, *Common and civil Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts*, in *Rev. eur. de droit privé*, 1995, 260.





towards the adoption of good faith as a requirement (in substance, if not in name)”: the name of reasonableness would remain<sup>35</sup>.

But the intertwinement between the categories, emblemized by Lord Steyn’s words “there is not a word of difference between the objective requirement of good faith and the reasonable expectations of the parties”<sup>36</sup>, if on the one hand can be read as the sign that the mutual perception of extraneity is gradually overcome, on the other hand if it is taken to the extreme can be logically inconsistent with the tendency of European law to avail itself of two categories and give voice to both traditions.

European law clearly cannot cope with either adhesion and refusal or replacement and virtual indistinction, for all these attitudes would in different ways lead to the repeal of either categories. Their very coexistence should on the contrary prompt us to keep these concepts as much as possible distinct as regards to their respective form and function, while preserving their coordination and capacity to interact.

At the same time, the criticisms expressed at national level should not be left unheard – and actually they have not been. They call for an effort of clarity and reduction of the complexity that challenges even that well-known Latin maxim: «*Omnis definitio in iure civili periculosa est; parum est enim, ut non subverti possit*» [ Giavoleno (D 50. 17. 202)]. Indeed, European law – especially its project, is plenty of definitions as regards good faith and reasonableness.

3.1. According to the Draft (art. I. -1:103, co.1) and the Proposal for a Regulation on Sales law (art. 2, b) good faith is «*a standard of conduct characterised by honesty, openness and consideration for interests of the other party to the transaction or relationship in question*».

The European law therefore acknowledges the axiological connotation of good faith, setting the premise from which its difference from reasonableness can be drawn. This proves right Luigi Mengoni’s insight, that good faith and ethics do not need “constitutional crutches” in order to interact<sup>37</sup>.

Yet the reference to ethics immediately revives the common lawyers’ legitimate mistrust against a value - judgement that is likely to dissolve in the ethical pluralism dilemma: the «*china-shop of ethics*» mentioned by Powell<sup>38</sup>.

To avoid this criticism, there is nothing left for good faith but to turn to the legal system<sup>39</sup> in order to find the kind of justice contract law can achieve through good faith. Thence, if the relevant

<sup>35</sup> BROWNSWORD, *Contract Law*, cit., 135.

<sup>36</sup> STEYN, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, cit., 450.

<sup>37</sup> MENGONI, *Autonomia privata e Costituzione, Banca, borsa e titoli di credito* (1997), I, 9.

<sup>38</sup> POWELL, *Good Faith in Contracts, Current Legal Problems* (1956), 38.

<sup>39</sup> We must remember, on the one hand, that “in the Nazi period, the Courts applied the principle [of good faith] to discriminate against the Jews” (Lando, p. 845) and, on the other hand, that the modern idea of good faith has emerged from the new



system is Europe, it is up to the Treaty to clarify the meaning of good faith, in its substantive as well as its formal dimension, concerning the impact of the clause of good faith on the constitutional dynamics and institutional relations.

On the other hand, since the Treaty is crowded with principles, that are different in nature and even maybe divided between economic freedoms and non-economic (*id est* personal) values, the elements of the definition of the concept of good faith are by no means useless. Honesty, loyalty and consideration for the interests of the others easily go astray outside of the law, among different religious and secular ethical visions. Once they are conveyed in the dimension of the law, on the other hand, they can hardly lead to market freedoms - for if market is regulated by good faith, it cannot regulate its rule. Quite to the contrary, honesty, loyalty and consideration for the others lead to the principles expressing the primacy of the human being in the artt. 2 and 6 T.U.E. and in the EU Charter of Fundamental Rights: solidarity, equality and protection of human rights.

These references are by no means generic. Solidarity is more than trivial altruism. It drives the quest for a balancing point between self-interest and deference for the other's interest, which good faith commits to the judge, and for the consideration of which the involvement of a personal element may have an influence. This quest would not cause a breach of the institution of contract. Quite to the contrary, the contract can be enriched, managed and molded by good faith in its *construens* dimension. On the other hand, even the *destruens* dimension of good faith does not mark a breach of the institution of contract, provided that it steps in only when the principle of equality is betrayed by a legally relevant substantive inequality, which justifies a control on the merits of the bargain.

Up to good faith, thus, is the twofold aim of rationalizing and correcting the market: the *Market-Rational Regulation* and the *Market-Rectifying Regulation* according to the sophisticated classification proposed by Wilhelmsson<sup>40</sup>. The former prompts a substantive reaction to the problem of asymmetric information, entrusted to the principles of solidarity and consideration for the other party's position. It is about the actual capacity of the weaker parties to understand the essential and relevant information, rather than the crowding of procedural information disclosure requirements<sup>41</sup>, that so often mystify them. The latter - *Market-Rectifying Regulation* - aims to correct the asymmetries brought about by the exercise of private autonomy within the market and to

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Constitutional Principles. That's why in Italy it was refused the proposal (see the *Relazione avente a oggetto le proposte di riforma del codice avanzate dalla Commissione costituita nel 1944*) to revoke the clause of good faith of art. 1375 c.c. after the Fascist period: see U. NATOLI, *L'attuazione del rapporto obbligatorio*, I, Milano (1974, first ed. 1961), 33.

<sup>40</sup> WILHELMSSON, *Varieties of Welfarism in European Contract Law*, *European Law Journal* 19, n. 6 (2004), 718 ss.

<sup>41</sup> See BROWNSWORD-HIRD-HOWELLS, *Good Faith in Contract. Concept and Context*, cit., 30 ff. and COLLINS, *Good Faith in European Contract Law*, *Oxford Journal of Legal Studies* 14 (1994), 229 ff. on the different views of good faith.



promote a synergy between private autonomy and substantive equality. It is about to open the institution of contract to the consideration of personal, non-economic values.

These tasks are epitomized by the concept of contractual justice, justice within the contract or commutative justice, which has nothing to do with the arithmetical correction of the price. Contractual justice embodies the seeming paradoxality of a principle – such as private autonomy – which in order to fully realize itself, and maintain its human dimension, must in part scale itself down.

But can good faith attain also social justice, or distributive justice?

It is difficult to deny that contract law, particularly when it works with general categories – such as consumers, firms, etc. – has distributive effects<sup>42 43</sup>. Quite another thing is to hold that redistribution through contract regulation can effectively attain definite social policies. And definitely another thing is to maintain that the goal of redistribution can lead the judge who applies the general clauses<sup>44</sup>. Charging the general clauses – good faith and *a fortiori* the principles of public policy and morality – with distributive tasks would result in an uneven, erratic repartition of the burdens of social justice and eventually would trigger the exclusion of the poorest and weakest classes from the market.

This is not to say that contractual justice cannot bring about positive distributive effects, but that it does not need to draw its legitimacy from that goal. Above all, distributive ends should not guide the judicial enforcement of the general clauses, in the attempt to make up for the absence of governments in the implementation of social policies.

Good faith therefore draws an institutional boundary between the respective tasks of the judiciary and the legislature in the enforcement of social justice. In this sense, it stands against the background of the ideal of a social market economy (cf. art. 3<sup>3</sup> T.E.U.). In other words, the trust in the virtues of regulated markets is tempered by the awareness of its limits and the acknowledgement that social policies are needed that are not spontaneously provided by either markets or judicial intervention.

The institutional meaning of good faith, thus, lies in that it gives the judge the power to implement commutative justice, with an advertency to its relevance as a free-standing concept and its limits as well. Judicial intervention cannot substitute specific social policies. These should be taken on also by the EU, so as to protect the weakest social categories and guarantee the access to

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<sup>42</sup> CALABRESI, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *Yale Law Journal* (1991), 1211 ff.

<sup>43</sup> KENNEDY, *Distributive and Paternalist Motives in Contract and Tort Law, with special reference to compulsory terms and unequal bargaining power*, cit., 563 ff.; ID., *La funzione ideologica del tecnicismo nel diritto dei contratti*, cit., 317 ss. See also COLLINS, *La giustizia contrattuale in Europa*, *Rivista critica di diritto privato* (2003), 659 ff.

<sup>44</sup> See COLLINS, *La giustizia contrattuale in Europa*, cit., 679.





particular goods. These policies need in fact to be defined *a priori* and equally affect all those who are concerned, in a way that only statutory law (be it aimed at the contracts content or not) can perform.

3.2 The digression on the role of good faith makes somewhat easier the enquiry on the function of reasonableness.

Contrary to the Common law, which is silent on this point, the European law tries to define the concept of reasonableness: a more subjectively marked attempt, in the Lando Principles (art. 1:302); a definitely objective one, in the DCFR (art. I-1:104) and in the *Proposal for a Regulation on a Common European Sales Law* (art. 5, Annex I). Neither go directly to the point. Instead, they identify the elements, respectively concerning factual indices (*the nature and purpose of what is being done and the circumstances of the case*) and the social dimension (usages and practices).

The very obscurity of the technique of indirect definitions calls for the help of political philosophy.

According to Thomas Scanlon normative judgements requires thinking about «what could be *justified to others* on grounds that they, if appropriately motivated, could not reasonably reject»<sup>45 46</sup>.

Philosophical analysis therefore focuses on social acceptance, which is actually also what the legal indices ultimately refer to, as a suitable paradigm to draw the fundamental distinction between rational and reasonable choices.

The former is «a matter of basing our choices [...] on reasoning that we can effectively *sustain* if we subject them to critical scrutiny»<sup>47</sup>: here rationality is basically congruity between the action and the realization of an egoistic interest. Irrational therefore is the choice prompted by either a flawed critical examination (bounded rationality) or by a weakness of the will (which the Greeks termed *akrasia*). The relation to an egoistic interest does not exclude altruistic interests (even for Adam Smith, according to Amartya Sen's reading<sup>48</sup>), provided that the latter become themselves an interest of the agent.

On the other hand, if the array of reasons that prompt (or direct) the action encompasses the adequacy of the choice in relation to reasons that go beyond self-interest and include its social

<sup>45</sup> SCANLON, *What We Owe to Each Other*, Cambridge (MA), Harvard University Press, 1998, 5

<sup>46</sup> According to Josef Esser the interpretation should make clear «the relation of the meaning with a solution which is *acceptable* according to reasonableness»: ESSER, *Precomprensione e scelta del metodo nel processo di individuazione del diritto*, trad. it. A cura di S. Patti and Zaccaria, Napoli, 1983. This sentence is a starting point in the excellent essay of PATTI, *La ragionevolezza nel diritto civile*, Editoriale Scientifica, 2012, 9.

<sup>47</sup> SEN, *L'idea di giustizia*, Milano, 2010, 191 [SEN, *The Idea of Justice*, Chapt. VIII, Kindle ed., 2009].

<sup>48</sup> SEN, *L'idea di giustizia*, cit., 195 ff.



acceptability and consensus, we are moving from the dimension of rational choice to the domain of reasonable judgements. Reasonableness adds to rationality the reference to grounds that rise above personal interests and are justified by the others' acceptance, which is the basis of society.

These remarks may help clarify the interpretation of the reasonableness standard in the European law.

If reasonableness is taken as the measure of what a subject can know, expect or foresee; if, *a fortiori*, it is taken as the measure of what is due or can be claimed, then the model of reasonable subject assumed by the standard is molded by the circumstances of the case, included the conditions acted upon by the agent, who must consider the reasons which made her choice acceptable. It is clear that these reasons encompass legal rules, including the principle of good faith, as well as social conventions and customs: *any relevant usages and practices* reads art. 5, Annex I of the Regulation Proposal.

On the other hand, when reasonableness is taken as the measure of objective elements – the reasonable deadline, the reasonable price, the reasonable content – the reference to the relevant usages and practices according to the circumstances of the case are all the more justified.

The detachment of reasonableness from economic rationality, namely as individualistic agency, dispels the fear that the concept of the former might rest upon a purely egoistic vision of the bargain, which would clash with the solidaristic stances taken by the principle of good faith towards the institution of contract.

Legal rules, along with social practices, are indeed among the reasons that in the name of social acceptability concur to establish the logic coherence of reasonable acting. Good faith and reasonableness are thereby joined together without overlapping, just as the diligence standard and the general clause of good faith interact in the national legal orders.

From the openness to social practices and customs brought about by the reasonableness standard it does not follow the submission of [the law of] contract to the market, for the idea of reasonableness is flanked by that of good faith. An «improper practice» would not pass the test of the acceptability. Unfair *Verkehrssitten* cannot prevail against *Treu und Glauben*.

4. Moving from the policy dimension to technical legal considerations, several elements suggest that the relation between reasonable practices and the objective standard of good faith does not imply a conflict, nor the subordination of good faith to what is normally practised. Indeed, it is better conceived as a relation of coherence, premised on the fairness of relevant practices.



Art. 86 and art. 170 Annex I of the Proposal for a Regulation on Sales Law, respectively concerning asymmetric (B2b) contracts and overdue interest, read that a contract term is unfair if «its use grossly deviates from good commercial practice, contrary to good faith and fair dealing».

If good faith and reasonableness interact without overlapping when the elements of the reasonableness test fit in the test of good faith, they can all the more coexist without losing their identities or friction in other realms of the European law.

Apart from this case, the European law in its *destruens* dimension, aimed at restraining the content of the contract, prefers good faith to the reasonableness test. Good faith is in fact expressly called forth by Dir. 93/13 and by the Annex I of the Proposal for a Regulation on Sales Law. Moreover, it is also implicitly called upon in the judgement on the unfair exploitation that moves the fairness control from macroeconomic to so-called microeconomic asymmetries (*Draft* artt. II.-7:207; IV.H.-2:104 and Annex I art. 51).

Whilst European contract law in its *destruens* function takes a stand in favour of good faith, in its *construens* dimension it admits for good faith and reasonableness the possibility to coexist and even to coordinate.

Due to their different but not conflicting criteria, good faith and reasonableness concur to the interpretation and construction of contract. Good faith brings in a value-laden stance, while reasonableness acts as a measure of what was intended by the other party (Annex I art. 58<sup>2</sup> and Draft II.-8:101) and of parameter to construct the objective meaning of contract with a further and obvious reference to the circumstances, the uses and trade practices, the nature and scope of the contract (Annex I art. 67; Draft art. II.-8:102), elements from which also implicit terms can be inferred (Annex I art. 68 lett. a) e b) and Draft art. II.-9:101).

The coexistence evolves in coordination when the judgement pertains to the conduct of the parties. The concept of good faith, in fact, sets out rules of conduct, reasonableness measures what can be expected by the agent, taking into account the standards set by rules of conduct, *quarum* fairness (see for a paradigmatic instance: Annex I, art. 88 concerning excused non-performance).

This dialectic clearly mirrors itself in the dogmatically twisted, but substantively coherent directive 2005/29/UE on unfair commercial practices. Here a standard of conduct (what «may reasonably be expected») is identified and ascribed to the concept of diligence (not surprisingly, for reasonableness as a measure of conduct easily fades into diligence). On the other hand, «the general principle of good faith» and «the honest market practices» represent, jointly and not alternatively<sup>49</sup>, the measure to which what can be expected is to be measured (art. 2, h) Dir).

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<sup>49</sup> DE CRISTOFARO, *Il divieto di pratiche commerciali sleali. La nozione generale di pratica commerciale «sleale» e i parametri di valutazione della «slealtà»*, in *Le «pratiche commerciali sleali» tra imprese e consumatori. La direttiva 2005/29/Ce e il diritto italiano*, Torino, 2007, 121.



Also the Directive on unfair commercial practices, therefore, clearly testifies for the attitude of reasonableness to extend the range of reasons bearing on the evaluation of conduct to commercial practices, *id est*, to social rules that by virtue of reasonableness acquire legal relevance, in coordination with, and not against, good faith.

On the background of so many operational offshoots stand out different modes of enforcement.

Reasonableness is pervasive, but its enforcement follows the ramifications of the several disciplines that provide for it. This means that it cannot be extended beyond the possibility to understand «any reference to what can be expected of or by a person, or in a particular situation, [as] a reference to what can reasonably be expected» (art. 5, Annex I, Proposal for a Regulation). Conversely, the concept of good faith has a wide-open scope, expanding from the pre-contractual stage of commercial practices and advertising to the whole life of the contract and the so-called post-contract. This is evident in the Draft and its legacy: the Proposal of Regulation, at artt. 2 and 3 of the Annex I. Other Directives, on the other hand, as the disappointing Dir. 2011/83 on Consumers' Rights and the Dir. 2008/48 on Consumer credit, take on a procedural stance on the propagation of information disclosure requirements which are not backed by a general clause as art. 28, Annex I, Proposal for a Regulation. In spite of that, and perhaps *a fortiori*<sup>50</sup>, we must reassess the substantive and general breadth of the concept of good faith, as it is mirrored by its very bilateral character, felicitously acknowledged by the ECJ in *Messner*<sup>51</sup>. Nor should this stir the perplexities of the common lawyer, apprehensive of the possibility to betray the actual complexity of contract<sup>52</sup>. Good faith shows in fact a peculiar attitude to adjust to different operational contexts, as the 31st Considerando of the Proposal for a Regulation positively reasserts, as well as the capacity to play different functions, thereby acting through different remedies: from the invalidity brought about by good faith in its *destruens* dimension, to the preemption of the exercise of a right, remedy or exception, to the damages (see art. 2<sup>2</sup> Annex I).

5. The argument developed so far was aimed to stress the possibility to exploit and make the most of the wealth of good faith at civil law and the legacy of reasonableness at common law.

The solidaristic perspective brought by good faith to the contract «is not at odds with the classical law of contract»<sup>53</sup>. It does not imply a «a Franciscan renunciation to pursue one's own interests in order to help a rival»<sup>54</sup>. Rather, it recalls the Kantian idea, according to which to act justly is something we want to do as rational, free and equal agents. This idea is not unknown to the

<sup>50</sup> Just in order to guarantee an «*information circonstanciée et personnalisée*», see PAGLIANTINI, *Il contratto di credito al consumo tra vecchi e nuovi formalismi*, in *La nuova disciplina europea del credito al consumo. La direttiva 2008/48/106*, De Cristofaro (ed.), Torino, 2009, 106.

<sup>51</sup> ECJ 03.09.2009, C-489/07.

<sup>52</sup> Other than the idea of an adaptation to different context of good faith is the idea of diversifying the conceptions of the clause according to the context. For this secondism see WIGHTMAN, *Good Faith and Pluralism in the Law of Contract*, in *Good Faith in Contract*, cit., 41 ss.

<sup>53</sup> DE VITA, *Buona fede e common law. Attrazione non fatale nella storia del contratto, Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea*, Garofalo (ed.), *Studi in onore di Alberto Burdese*, Padova, I (2003), 482.

<sup>54</sup> EAD, *op. loc. ultt. citt.*



logic of the common law, though there it has taken different routes, with different legal institutes and perhaps a disposition more sympathetic to personal responsibility than to command-and-control regulation. At any rate, the detachment of the Anglo-Saxon approach from the concept of good faith is formal more than substantial and it is lessened by the familiarity with it of other common law jurisdiction.

The positive contribution brought by the reasonableness standard to contract consists, for its part, in its very capacity to appreciate the value of personal responsibility as well as with its coherence with the societal context in which contracts are made. Its disarming intuitive character, on the other hand, due to that flat and not structured *modus argumentandi* characteristic of the Anglo-Saxon thought, does not any longer confront the civil lawyers with an enigma, since it can be reconciled with an effort of reflective reconstruction. Reasonableness indeed offers a twofold face: that of rationally justified expectations, the understanding of which does not need to be conveyed by the concept of diligence, and that of the capacity to fulfill, through its reference to social practices and customs, a whole array of reasons on which social acceptance is built.

As long as the two traditions can dialogue, understand each other and interact, the methodological choice of European lawyers remains contingent on the assessment of the opportunity to adopt a technique that significantly broadens the discretionality of the judge faced the legislature.

From the point of view of the politics of the harmonization, the fear that a further process of differentiation might follow, triggered by the concretization of general clause and standards, has been – I believe - dispatched by the ECJ doctrine, especially in the judgement given by the Grand Chamber on the 9th of November 2010 (C137/08), *Pènzügyi Lizing Zrtt. V. Ferenc Schneider*. The judgement leaves it to the Court the task of interpreting «the concept of ‘unfair term’ [... and of defining] the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of that Directive, bearing in mind that it is for that court to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case». The important tasks assigned to the ECJ are made clear in this judgement with more accuracy than did the famous precedent *Freiburger Kommunalbauten*<sup>55</sup>, which was in my view unfairly criticized<sup>56</sup>.

It cannot be denied that the European Court of Justice is confined to the interpretation of the law, whereas it is up to the national Courts the application of the general rules to particular cases.. But this does not necessarily strenghten the risk of a national jurisdiction driven process of divergence. First of all, the reference to interpretive criteria leading the application of the rules suggests that the Court of Justice retains for itself the capacity to go beyond the pure explanation of the norms, in order to steer the the process of application by national Courts. Moreover, in the light of the claims made by the Court it can hardly be ruled out the possibility that the concretization

<sup>55</sup> ECJ 01.04.2004, C-237/02.

<sup>56</sup> See HESSELINK, *Case Notes. Cas: ECJ - Freiburger Kommunalbauten v. Hofstetter*, 3 *European Reviv of Contract Law* (2006), 372 ff. and CRUCIANI, *Clausole generali e principi elastici in Europa: il caso della buona fede e dell'abuso del diritto*, cit., 482





carried out at national level may in turn be the object of a reflexive synthesis by the ECJ, through a feed-back relation between national and supra-national levels. Indeed, through the comparison of the national doctrines the ECJ might eventually extract typical groups of cases (*Fallgruppen*) so as to make its hermeneutic criteria progressively more specific. In this way it would be possible to accomplish the goal of a flexible and participated harmonization, which would ensure uniformity in the application of the law while at the same time respecting national legal identities.

To conclude, the use of general clauses and standards should be positively - though prudently - valued also from the point of view of the politics of harmonization, after having been approved on broader policy and legal-technical grounds. Indeed, general clauses and standards not only outline the possibility of a fitting institutional compromise between civil law systems and common law systems, they might also provide the best frame of reference at substantive level.

Reasonableness guarantees the deepest coherence of contracts with the economic and social dimension in which they are brought about by self-responsible parties. Good faith bestows upon contracts the humanity, which makes them consistent with the ends of justice. There is no reason to doubt that the axiological dimension would jeopardize the contract, as long as it stays within the boundaries of commutative (contractual) justice, which set the limits of judicial intervention. This does not mean that we should renounce the quest for social justice. It means that this quest is entrusted to the legislature, possibly also to the European legislature, thereby involving all the powers of the state in the task of enforcing the ends of justice.

Contractual justice cannot make up for social justice, though it can join it, and both – each with its characteristic institutional competence – must assert their legitimacy, quite independently from efficiency grounds.

According to John Rawls «Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions must be reformed if they are unjust»<sup>57</sup>. Just as they must be at any rate preserved and protected - we should add - when they are just.

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<sup>57</sup> RAWLS, *A Theory of Justice*, Harvard University Press, 1971 (*Una teoria della giustizia*, Milano, 2010, 25).