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A VISION OF GOOD FAITH AS A SAFETY VALVE IN CONTRACTS

Marius FLOARE*

Abstract

This paper will try to approach the "strategic" role of the concept of good faith in contracts. Even though there are numerous attempts to discover the "tactical" value of this concept by describing all its meanings in the field of contracts, we must take a broader view and see the essential role of good faith in this area of private law. We will only discuss good faith as the equivalent of the German notion of "Treu und Glauben" , meaning good faith and fair dealing, and we will not try to approach the meaning of good faith as an erroneous belief, the equivalent to the German "guter Glaube".
We will also discuss the different approaches to this "objective" good faith, taken by different continental private law systems mainly from Germany, France and Romania, starting from very similar statutory provisions. We will conclude with a case study about the doctrine of frustration of contract as a possible application of the broader principle of objective good faith.

Keywords:

Functions; good faith; safety valve; loyalty; equity, frustration.

This study will try to approach the "strategic" role of the concept of good faith in the field of contracts. Even though there are numerous "tactical" approaches to this concept, which try to uncover all its meanings in the field o contracts, we must try to take a broader view and see the essential role of good faith in this area of private law. Naturally, our discussion will focus on the objective meaning of good faith as the equivalent to the German notion of "*Treu und Glauben"* which can be construed as "good faith and fair dealing" and we will not discuss the subjective meaning of erroneous belief *(guter Glaube)* which is adequate in the context of possession and real estate rights.

The statutory provisions referring to contractual good faith in the modern codes of France (Napoleonic Code of 1804), Romania (Civil Code

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of 1864) and Germany (B.G.B. of 1896) are very similar, but their consequences in the legal life were completely different. To explain these different approaches, one of the starting points must be that the concept of contractual good faith is one of the "safety valves" which allow the current societal moral values to deeply penetrate contracts, with the purpose of ensuring their usefulness, both for the individuals involved and for society as a whole, thus answering to reasonable expectations and enhancing the economic usefulness of the contract. The modern legal systems which also had other "safety valves" at their disposal, or where the social-economic pressure to use this good faith "valve" was not sufficiently powerful, did not use it with the same vigour and as early in their historical evolution of private law.

The content of the concept of good faith in the field of contracts is defined by doctrine through naming more or less thoroughly the various duties and obligations which bind the parties: loyalty, cooperation, tolerance, coherence, patience, sincerity, honesty and perseverance (Ancel (2011): 92). The evolution of the approach to contractual good faith in the last millennia is defined by a permanent interaction between law and the social or religious morals that infiltrate the former. The rigour and rigidity of purely legal concepts always gives ground to social pressure. Legal norms frequently represent a static image of the social vision at the time of their enactment and that is why we need fluid general concepts, such as good faith, that function as a true "safety valve", which allows the connection between contract law and the evolving morals and social-economic needs.

Good faith in contracts is a concept with a "safety valve" role, which fills the unavoidable deficiencies of any legal system, that is sometimes too abstract and always unavoidably incomplete in regard to the variety of private law litigation, which also completes every contract that the economic analyses of law has "stigmatized" as being insufficient for the variety of possible real-life situations, which diminishes conflicts specially when the *ad litteram* legal or contractual solutions violently collide with society's need for equity; good faith is called the "drop of social oil" (Auer (2006): 25) which ensures the functioning of the system of private law and its adaptation to new challenges.

Any rule that gives concrete content to the vague and flexible principle of good faith in a specific norm will eventually gain autonomy from good faith and thus separate from it. A specific rule, developed based on the principle of good faith in order to compel a party to take into account the interests of the other party will, at a certain time, also be amended on the grounds of good faith, thus compelling the second party, whose interests had already been given proper consideration, to take care of the legitimate

interests of the first party. Historically, good faith had an initial role to compel parties to perform based on informal contracts, even if there was no consideration, to prioritize the meaning given by the parties to the contractual terms in spite of their literal meaning and finally to even prioritize substantial equity over the parties' intended meaning of the contract (Storme (2003): 3-4).

Legal doctrine has identified up to four functions of good faith in contracts: interpretation, complementing, correcting (abuse of rights) and adaptive function (the doctrine of frustration of contract). The first three are also the functions of praetorian law in regard to *ius civile* in the classical Roman definition of Papinian[1] and thus arises the rhetorical question whether these are functions of good faith itself or they are the functions of the judge (Hesselink (2002): 201).

The theory of the functions of good faith has arisen as an attempt to limit judicial activism by trying to give substance to the principle in its institutional and formal dimensions (Floare (2015): 87-89). In the French and Belgian civil law, the primary function of good faith is in the area of contract interpretation, mainly to interpret those in accordance to the common intention of the parties which is, from a historical point of view, is a way of correcting contracts especially by relating to the older rule that had favoured literal interpretation (Masse (1994):224; Storme (2003): 4).

The adaptive function of good faith is illustrated by the doctrine of frustration, which allows for the modification and the re-balancing of a contract when unforeseen circumstances occur during contract performance, making contractual performance unfit for the parties initial intent (Lefebvre, 1996: 352).

The creative and "safety valve" role of good faith in German civil law is unanimously recognised today, the concept being the bedrock which allows the grounding in statutory provisions for a series of theories and "doctrines" that have gradually gained autonomy and have drifted from the original "cradle" of good faith, thus becoming self-sustaining concepts nowadays, with particular provisions in the German Civil Code or other special statutes, thus maintaining only a historical link to good faith. This creative and ulterior drifting away phenomenon allowed the downsizing of the Staudinger commentaries about article 242 of the German Civil Code,

[1]*Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam – Digeste 1,1,7*

recent editions having "only" about 500 pages (Markesinis, Unberath, Johnson (2006), p. 120).

Good faith works as a true private law "safety valve" also at the performance stage of contracts. Even if the flexibility and the ubiquity of this powerfully moral concept have been frequently criticized, some suggesting its replacement with more precise notions such as reasonableness (Ramparany-Ravololomiarana (2009)), abuse of rights (Stoffel-Munck (2000)), loyalty (Picod (1989)), coherence (Houtcieff (2000), Houtcieff (2009): 2008-2009), we believe that none of the alternatives has the breadth and versatility of this original concept, the moralizing colouring of which is frequently just an illusion, but an illusion which gives it an increased legitimacy to sustain with a legal and traditional basis diverse innovations from legal literature and case law.

Good faith always begins from a moral and equitable contractual standpoint, the excesses of contractual solidarity and altruism being diminished by the economic and utilitarian colouring that this concept has achieved in the latter half of the 20th century. Influenced by utilitarian philosophical currents and the North American-inspired school of "Law and Economics", this traditional and multi-millennial civil law concept has been "re-valued" as a quasi-objective benchmark of the contractual relationship, the relational and non-antagonistic perspective on contracts being closer to the economic reality, where long-term or prospectively renewable contracts are abundant (White (2001): 683-684, 690-695).

By analyzing the effects of good faith on contract performance, we can identify at least three traps: the altruism trap of contractual brotherhood (Thieberge-Guelfucci (1997): 357) or of seeing the contract as a small universe (Demogue (1932): 9), the cynicism trap of good faith as a notion without its own content (Houh (2005), Hesselink (2002): 193-223) or the formalism trap of seeing good faith as a merely moral and subjective concept that overshadows and sometimes unfortunately obstructs the activity of more precise institutions such as the abuse of rights (Stoffel Munck (2000)), reasonableness (Ramparany-Ravololomiarana (2009)) or loyalty (Picod (1989)).

Good faith in contracts had been targeting, in the classical analysis of the Napoleonic Civil Code and its derivatives, only the behaviour of the debtor who was required by the *pacta sunt servanda* principle to honour his given word and duly perform his duties, good faith helping to solve the dilemma of whether contract performance had truly been adequate and useful or if the debtor acted in bad faith or at least without good faith. The modern vision expands to the creditor the duty to act in good faith and avoid any bad faith behaviour, him being also a debtor in reciprocal

contracts, but in his capacity as a creditor he might have certain discretionary rights or mere factual opportunities to influence the way in which the other party's performance follows through, the creditor being able to hinder or facilitate performance, or to avail himself of *lex commisoria* or rights to unilaterally denounce the contract.

Good faith is a ubiquitous but not an immovable concept in the field of contracts, the importance of which has oscillated along the centuries, from being considered an essential principle of contracts, to a mere marginal interpretation rule without its own specific meaning. Its force and attractiveness come precisely from its inner flexibility, which allows it to fulfill the role of contractual "safety valve" in different cultures, allowing the ever changing morals of the society to infiltrate the parties deal and the complementary legal provisions.

Good faith in contract law usually has three dimensions: the substantial dimension of circumscribing the duties to a contractual ethic, the formal dimension of good faith as a flexible standard, the institutional dimension of the freedom of the judge to create law based on open standards. These three dimensions of good faith can be named called differently, the substantial dimension can be replaced by a duty to cooperate, the formal dimension can be replaced by the concept of reasonable expectations and the institutional dimension can be replaced by adjudicating in equity. Divergences can anyway appear between individual ethics, which promote freedom of contracts, and the altruistic concern for the fate of the other, between the danger of judicial arbitrariness and the need for jurisdictional flexibility to promote equity, between the legitimacy of creating broader rules by the courts and the need to constrain the judge in creating general norms (Summers, White (2010): 11-13).

There is also a tendency to narrow the meaning of contractual good faith only to its substantial dimension and transform it in an ethical concept, expressing only an altruistic morality rule. The content of good faith can thus achieve a traditional subjective hue, which narrows good faith to the absence of bad faith, the latter meant as malevolent intent *(animus nocendi),* this approach being favourable to the restrictive use of the concept of good faith by the judiciary (Summers, White (2010): 11-13).

Another reductionist tendency affirms the lack of any substantial meaning for good faith, the lack of any internal coherence of the so-called rules of good faith and that any objective legal rule could be based on this principle. Under the cover of good faith there are hidden all the additions and corrections made to previous case law by the judiciary, whatever their concrete meaning. The only role for a statutory provision about good faith

would be to remind the participants to contracts that courts frequently make the law themselves (Hesselink (2002): 208-220).

Good faith in contracts has the merit of being able to be valued both from a moralistic and equitable standpoint, but also from an economic-utilitarian point of view, thus reaching, in different ways but guided by the same principle, to the same finality of contract, which can only be a positive one from a social and economic standpoint, of increasing the value for each individual participating in the transaction and, indirectly, benefiting society as a whole.

Regardless of our chosen approach, it is a widely accepted truth than any statutory provisions containing fluid notions such as good faith is really a "delegation" of normative powers to the judiciary (Gregoire (2010): 37). Good faith is used by judges to mitigate the rigour of the general rule, the same as with concepts such as urgency and *force majeure*. The law needs similar "safety valves" to avoid the excesses of an overly meticulous or technical statute with the purpose of maintaining a just balance between legal truth and factual reality (Gabet (2004): 63-64).

In the same way, the German Civil Code (B.G.B.) of 1896 has a very careful attitude regarding the duty to exercise contractual rights in accordance to the good faith principle. The duty of good faith is specified only in article 242, which at first seemed only a marginal provision, explicitly concerning only the performance of an obligation. The courts have used this statutory provisions and have transformed it into a general principle that governs and transforms the whole German law of contracts. Article 242 of the B.G.B. has become a starting point for numerous new "doctrines" and for the modification, undermining or repealing of older ones. In numerous cases this principle has been used to avoid drastic or inequitable consequences and has been viewed many times as a "magical" solution to stamp out all the "rough edges" of private law. Nevertheless, as time went by, there were numerous critical viewpoints regarding the excessive proliferation of equitable reasons within established legal principles. On the other hand, there has been a unanimous welcome to some legitimate extensions to the principle from article 242 of the B.G.B., which have become so well established that they are now considered an unavoidable component of modern law (Zimmermann (1992): 675).

The attempt to define the concept of good faith in the field of contracts might seem at times like a struggle with windmills, an attempt to shoot perpetually moving "targets". Although, in both common law (Bayley (2009): 97-114) and especially in continental civil law countries, there have been doctrinal attempts to define the concept of good faith, the results were heterogeneous and mostly inconclusive. The pinnacle of circular definitions

was reached by defining good faith, by exclusion, as an absence of bad faith (Summers (1968): 195) and, in turn, defining bad faith as an absence of good faith.

Good faith is hardly distinguishable from equity, both of them having an objective hue in the field of contracts. Besides the proximity of the relevant statutory provisions from the French Civil Code of 1804 and our ancient Civil Code of 1864, the concept of equity is itself complex and fluid as much as good faith. It allows the judge to mitigate the strict enforcement of a rule, depending on the particular circumstances of the case (Hesselink (2002): 195). It also allows the filling of the contractual gaps, depending on what the judge finds reasonable. In this latter understanding, equity is no different from good faith, both the duty to inform and the duty of care uncovered by French case law being potentially covered by any of these two concepts. They both carry the same advantages and dangers. Good faith and equity both work as true "safety valves" that give flexibility to contracts. They allow the repression of certain behaviours, guiding interpretation and thus moralizing contracts. Both concepts are relevant to an evolution of law that diminishes the role of the parties' will and an attempt to reconcile the subjective and objective elements of contract by combining the useful with the just. The dangers arise from the fact that this reconciliation is performed under the guidance of the judge, whose role and discretionary power increase so much so that the temptation to rebuild the contract according to his or her views on what good faith and equity are might seem irresistible (Tallon (1994): 25).

Similarly to good faith, equity is also a complex concept which can have two meanings, one objective and the other subjective. Objectively, equity is tied to the notion of justice, meaning that everyone is to be given his or her due and every person must be treated equally. This way, equity reminds us of the ideas of equality and equilibrium. Subjectively, equity is a rule that contradicts the statutory provision and which only exists because the legal provision creates injustice in a particular case. Subjective equity seems not to find itself a place in a civil law system in which rules are established by the legislators and not by the courts. However, its mere existence can not be denied when parliament compels the judiciary to rule based on a concept as flexible as good faith, making the judges decide the case based on what they find to be just and equitable.

Nonetheless, good faith is not synonymous with equity because it has a much wider field of practice. Good faith strays further from equity when its range is limited in the name of transaction security. As much as equity, good faith is adapting the law to the evolution of the morals and

values of the society, being an equitable mechanism, an instrument which allows the law to answer to the needs of contractual justice. Each time the legislators allow the courts to solve a case by referring to what the judges think to be reasonable or appropriate, they are in fact allowing to judge in equity. The subjective character of equity tends to diminish over time, when the case law gets to use the notion of good faith and to uncover the duties that arise from it. The courts that take into consideration previous case law and established solutions are in fact slowly drifting away from judging in equity (Lefebvre (1996a): 24-25)

The doctrine of frustration as a function of good faith (Floare, M. (2017), volume 8: 434-438)

Romania's Constitutional Court has relatively recently established in the *obiter dicta* of Decision 623 of 2016, par. 96-101, with a strange certainty for all those who are familiar with the debates on the doctrine of frustration from our legal literature (Zamsa (2012): 1329-1331, Zamsa (2006)), that a judicial revision of contracts for frustration of performance has been applied by our inter-war case law and the post '89 case law, being an apparent exception to the rule of autonomy of the will and being grounded on good faith and equity in contract performance, provided by article 970 of the 1864 Civil Code, also being a complementary principle to the *pacta sunt servanda* general principle from article 969.

The detractors of this viewpoint have on their side vast legal literature and civil case law, from both Romania and France (Malaurie, Stoffel-Munck, Aynes (2009): 396-399), which have never significantly recognised this adaptive function of good faith in contracts (Popa (2017): 117-118; Zamsa (2006): 222). The Romanian civil law jurisprudence, the concrete identified cases of application of the doctrine of frustration under the 1864 Civil Code have been few and isolated, atypical in the inter-war period (Popa (2017): 117) and were mainly about rent revisions in long-term rental agreements and rarely in bank contracts (Popa (2017): 117; Zamsa (2006): 231-233, Hamangiu (1999, II): 468).

In France, the writers of the 1804 Civil Code have not provided anything specific on the frustration of contracts, being probably traumatized by the instability generated by the French Revolution, but also the relative economic and social stability of the 19th century has not required the case law to adjudicate it (Malaurie, Stoffel-Munck, Aynes (2009): 397). The pertinent French case on frustration of contract is a decision by the civil section of the French Supreme Court from March 6th, 1876, which had quashed the decisions of the lower courts, regarding an increase from 15 cents to 30 cents per 1900 square meters of the payment for extracting water

for crop irrigation from the canal of Craponne, level of payment which had been established more than three centuries previously, in the 16th century, the supreme court thus giving an absolute value to the parties' autonomy of the will (Malaurie, Stoffel-Munck, Aynes (2009): 397).

French civil law legal literature has not withheld discussing the necessity and usefulness of applying the doctrine of frustration, to the classical reasons about the supremacy and absolute character of the parties' autonomy of the will being opposed arguments which favour respecting the parties' implied will, such as the theory of the disappearance of the consideration for a party's performance, the theory of the contract being concluded as long as things remain unchanged *(rebus sic stantibus)*, or reasons of equity and economic or social usefulness of contracts (Malaurie, Stoffel-Munck, Aynes (2009): 398-399) that would require at least a duty for the parties to renegotiate the contract, derived from the duty of good faith in contract performance of article 1134 paragraph 3 of the initial French Civil Code (Picod (1989): 199-229).

The last great treatise on the law of obligations under the ancient Civil Code (Pop (2009, II): 533-541) synthesized the evolution of the civil law legal literature and court cases from Romania and France, showing that the firm rejection of the judicial revision, in the strictest sense, of contracts for frustration looks obsolete nowadays, good faith and contractual solidarity being the grounds that would allow contractual revisions in cases of frustration, the contract being dynamically adaptable to changes in the economic and social environment (Pop (2009, II): 540). The author detected powerful signs of the tendency of Romanian case law and legal literature to allow for the judicial revision of contracts in cases of frustration, even if the concrete cases at the time were mainly in the field of rent adjustment (Pop (2009, II): 539).

In this context of judicial contract revision for frustration, the above mentioned author showed that the principle of paying back the same nominal amount of money, which had been an argument for not applying the doctrine of frustration, is not a public order principle but only complements the parties' implied will since the time of Dimitrie Alexandresco and Constantin Hamangiu (Pop (2009, II): 536-537), our previous Civil Code having a provision in article 1579 paragraph 3, borrowed from article 1822 of its contemporary Italian Civil Code, which was missing from the 1804 French Civil Code, that seemed to favour a principle of paying back the same value, the complete opposite to paying the same nominal amount (Pop (2009, II): 537).

Looking at comparative law, the principle of good faith in contracts has this adaptive meaning, besides the interpreting, complementing and moderating functions, which is implemented by the doctrine of frustration.

The main statutory provision on good faith in contracts in German civil law is article 242 of the German Civil Code, complemented by article 157 regarding contract interpretation, which states that they will be interpreted according to the requirements of good faith, taking into account the usual customs (Whittaker, Zimmerman (2000): 18). The previously mentioned legal provisions are in no way more generous than those of the French Civil Code of 1804 or the Romanian Civil Code of 1864. What differs markedly between these law systems is the manner and the amplitude of applying this concept in case law, the French civil law giving it its due importance only in the latter half of the 20th century, while Romanian case law has successfully ignored it as an autonomous concept in the field of contracts up until the first decade of this century (Floare (2015): 91-92).

The German approach to good faith in contract performance can be described as the three-fold division of the functions of good faith and their subsequent fitting in ever expanding categories *(Fallgrupen)* of cases where the principle was used. The courts decide what good faith requires in the specific circumstances of each case but the judge can not merely reason in equity but has to determine the requirements of good faith in a manner as objective as possible (Hesselink (2002): 196-197). With the joint endeavour of both legal literature and the courts, the case law is rationalized, objectified and classified in an inductive manner, the legal literature reacting to particular cases and trying to regroup them in a coherent, rational and predictable system. From this effort emerged the system of good faith, a coherent and intelligible ensemble of specific duties, prohibitions, rules and doctrines that make up the core of this open norm (Hesselink (2002): 196-197).

Such a situation where courts were compelled to intervene was that of unforeseen circumstances, correcting the compulsory character of contracts in the absence of specific statutory provisions, the 1896 German Civil Code being written in an age of stability, optimism and 19th century legal pozitivism (Markesinis, Unberath, Johnston (2006): 131).

The creative function and the following of substantial equity in case law that German contract law gave good faith led to the emergence of the theory of the disappearance of the grounds for the transaction *(Wegfall der Geschäftsgrundlage),* the equivalent of the frustration of contracts from our legal system, that has been born in the age of hyperinflation after the First World War but which has also found its relevance in the post-German unification period in order to adjust some contracts to the spectacular and

unforeseen changes of economic and political circumstance (Auer (2006): 33).

In Germany, the judicial revision of contracts for frustration, based on good faith, met a wide and early acceptance, the first significant precedent being a decision by the Imperial Court of November 28th, 1923, that used this concept to abandon the principle of paying back the same nominal amount of money in the unforeseen circumstances generated by German hyperinflation, where 1 golden Mark was the equivalent of 522 billion paper Marks in November 1923 (Whittaker, Zimmermann (2000): 19-21).

The reason for the divergent evolution of the two major civil law systems, the French one, to which we are tributary for over 150 years, and the German one, starting from a similar statutory provision, must be searched in the different nature of the two systems as a whole and the different historical times of their codification and of reaching the stability of the jurisprudence based on those codes. The French Civil Code of 1804 was based on flexible principles, concisely written, also having a general principle for tort liability that had allowed the intervention of the judiciary in situations that would otherwise have required a flexible concept such as good faith. The German Civil Code of 1896 had been meant to be an all-encompassing statute, lacking "rubber rules", but the social needs later required, when a social and economic context arose that was different from the one at the time of writing the Civil Code, only 30 years afterwards, to use one of the few "safety valves" that this Code had, the principle of good faith in contract performance.

Our civil legal system has benefited for over 150 years from a text in article 970 of the Civil Code that was very similar to article 242 of the B.G.B., some legal literature (L. Pop (2009, II): 538-540), Zamsa (2006)) from the first decade of this century being favourable, starting from isolated but justified applications of the principle, to a generalization of judicial review of contracts for frustration, based on the adaptive function of good faith in contracts and the principle of contractual solidarity.

The pressing social need for a doctrine such as this arose especially in the transition interval from the ancient Civil Code of 1864 and the newly adopted Civil Code of 2009, which only came into force on October 1st, 2011, and which specifically provided for the doctrine of frustration, according to the modern viewpoint from comparative law. During 2006-2010, under the ancient Civil Code, there was a significant number of bank loans for 20, 30 or even 40 years. When the world financial and economic crisis of 2008-2009 struck, with its effects being felt event today, these

contracts begun to experience the classical symptoms of frustration of contracts, the regular payments of the debtors becoming increasingly unbearable for different unforeseen reasons: massive devaluation of the local currency in which they were payed compared to the loan currency, decrease in revenues because of unemployment or changes in places of employment, devaluation of real estate securities that could have served to pay back the loan and so on.

In the current Civil Code, there is no need to use article 1.170 and the general principle of good faith in contract performance to justify the judicial revision of contracts in unforeseen circumstances, because the specific provisions of article 1.271 paragraphs 2 and 3 describe the requirements and effects of frustration without calling for the "safety valve" of good faith. Good faith has possibly always been only an "emergency" justification for the judicial revision of contracts due to the human instinctive need for contractual equity and to the common historical and moral source with the *clausula rebus sic stantibus* (Markesinis, Unberath, Johnston (2006): 320).

The doctrine of frustration is autonomously recognized by the new Romanian Civil Code (Zamsa in Baias *et al* (2012): 1329-1331) and other modern civil law systems, like the German one, which has codified in the 2002 revision the previous inter-war case law on the disappearance of the grounds of the transaction, or the Dutch system, that regulated it in article 6:258 of their new civil code, which partially came into force in 1992 (Dankers-Hagenaars (1994): 316-317). We believe that, today, frustration is a doctrine which is distinctive from good faith in contract performance, with a more objective content compared to the latter, and the connections between these two institutions are of a more historical nature, going back to the first attempts to justify frustration on the *clausula rebus sic stantibus* or on a flexible general principle such as good faith, that has this "safety valve" role wherever current law has no solutions.

The dissolution of contracts for reasons of economic expediency is not seen in such a context as a right of the debtor, as it happens in the extreme case of seeing all contractual obligations as an alternative between specific performance and the almost discretionary choice of the debtor to pay expectation damages, but merely as a result of the duty of both parties to behave in good faith all along during contract performance, even if the payment from the initial creditor is substantially lower than a newer offer received by the debtor. The doctrine of frustration provided by article 1.271 of the Civil Code, which itself prioritizes renegotiation and contract adaptation, could also be used in cases of manifest economic inefficiency of the initial contract, which came about due to exterior circumstances that

were unpredictable and arose only after the contract was signed. We will readily admit that the reason for the frustration provision of the new Civil Code has more to do with equity than maximizing economic efficiency, but the good faith "safety valve" in contract performance could work even when one of the parties can make a better deal and the other party has no legitimate and reasonable motive to refuse the amicable cancellation of the contract and thus receive integral and diligently calculated damage payments, which take into account all the damages incurred by non-performance.

Conclusions

The "safety valve" of good faith in contracts is insufficiently recognized and used in current Romanian case law. Besides the adaptive function of good faith, which would have allowed a wider range for the doctrine of frustration even under the Civil Code of 1864, because the whole normative "apparatus" of article 970 is almost identical to article 242 of the B.G.B., which was the root of the widespread application of the theory of the disappearance of the ground of the transaction in German Civil law, not even the complementary function of good faith enjoys a widespread use in our system.

Both article 970 paragraph 2 of the Civil Code of 1864, which is still applicable for the contracts that were concluded before October 1st, 2011, and article 1.272 paragraph 1 of the new Civil Code would allow for a more pronounced judicial "activism", especially in the frequent consumer cases where some abusive contractual provisions are struck out and the contract becomes incomplete, but the courts frequently refuse to complement it with equitable remedies on the erroneous ground that they are not provided for by the law, although the principle of good faith has been used for centuries for similar interventions in contracts.

Comparative law and the history of private law offer enough benchmarks for recognizing and using, in contemporary Romanian private law, the "safety valve" role of good faith in contracts. It allows the judge to write law in concrete cases, where applicable law is deficient, by formally grounding his or her decision on an established legal principle. The need for predictability in case law gradually would thus create frequently usable rules.

REFERENCES

Treatises, lectures, monographs

Baias, F.A., Chelaru, E., Constantinovici, R., Macovei, I. (editors) (2012). *Noul Cod civil. Comentariu pe articole,* Editura C.H. Beck, Bucureşti

Bayley, J.E. (2009). *A Doctrine of Good Faith in New Zealand Contractual Relationships,* thesis, University of Canterbury (New Zeeland), available at *ir.canterbury.ac.nz,* retrieved 2013
Demogue, R. (1932). *Traité des obligations en général*, tome VI, Librairie Arthur Rousseau, Paris
Floare, M. (2015). *Buna şi reaua-credinţă în negocierea şi executarea contractelor de drept comun în noul Cod civil şi în dreptul comparat,* Editura Universul Juridic, Bucureşti
Floare, M. (2017). *Imprevizіunea sub imperiul Codului civil din 1864: a fost sau n-a fost?,* Curierul Judiciar volume 8: 434-438
Hamangiu, C. (1999). *Codul civil adnotat,* volume II, Ed. All Beck, Bucureşti
Hesselink, M.W. (2002). *The New European Private Law: Essays on the Future of Private Law in Europe*, The Hague, London, Boston, Kluwer Law International
Houtcieff, D. (2000). *Le principe de cohérence en matière contractuelle,* Thesis, Université de Paris XI, Cujas Library
Malaurie, P., Aynes, L., Stoffel-Munck, O. (2009). *Drept civil. Obligaţiile,* translated by D. Dănişor from the 3rd French edition (2007). Wolters Kluwer, Bucureşti
Markesinis, B., Unberath, H., Johnston, A. (2006). *The German Law of Contract - A Comparative Treatise,* Second Edition, Hart Publishing, Oxford and Portland
Picod, Y. (1989). *Le devoir de loyauté dans l'exécution du contrat,* L.G.D.J., Paris
Pop. L. (2009). *Tratat de drept civil. Obligaţiile,* volume II, Ed. Universul Juridic, Bucureşti
Ramparany-Ravololomiarana, H. (2009). *Le raisonnable en droit des contrats,* L.G.D.J., Paris
Stoffel-Munck, P. (2000). *L'abus dans le contrat – Essai d'une théorie,* L.G.D.J., Paris
Summers, R.S.; White, J.J. (2010). *Uniform Commercial Code*, Sixth Edition, West - Thomson Reuters
Zamşa, C.E. (2006). *Teoria impreviziunii. Studiu de doctrină şi jurisprudenţă,* Editura Hamangiu, Bucureşti
Zimmermann, R. (1992). *The Law of Obligations - Roman Foundations of the Civilian Tradition,* Juta & Co Ltd, Cape Town

Scientific articles

Ancel, P. (2011). *Les sanctions du manquement à la bonne foi contractuelle en droit français à la lumière du droit québécois* in "Revue Juridique Thémis" (Québec),

volume 45:1
Auer, M. (2006). *The Structure of Good Faith: A Comparative Study of Good Faith Arguments,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=945594, retrieved in 2013
Dankers-Hagenaars, D. (1994). *Rapport néerlandais, Travaux de l'Association Henri Capitant – Journées Louisianaises 1992 – La bonne foi* – t. XLIII, Litec, Paris
Gabet, C. (2004). *La vérité, l'apparence et la rétroactivité en matière immobilière* în *La verité - Rapport annuel 2004 de la Cour de Cassation,* La documentation Française
Grégoire, M.A. (2010). *Économie subjective c. Utilité et intérêt du contrat – Réflexions sur les notions de liberté, de responsabilité et de commutativité contractuelles, à la suite de la codification du devoir de bonne foi,* La Revue juridique Thémis (Québec), volume 44:1
Houh, E.M.S. (2005). *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?,* Utah Law Review, volume 1
Houtcieff, D. (2009). *L'importance d'être constant: vers une consécration du principe de cohérence,* Recueil Dalloz, volume 29
Lefebvre, B. (1996). *La bonne foi: notion protéiforme* in Revue de Droit de l'Université de Sherbrooke (Québec), volume 26:2
Lefebvre, B. (1996). *La justice contractuelle: mythe ou réalité?,* Les Cahiers de Droit (Université Laval - Québec), volume 37:1
Masse, C. (1994). *Rapport général* in Travaux de l'Association Henri Capitant – Journées Louisianaises 1992 – La bonne foi, tome XLIII, Litec, Paris
Popa, I.-F. (2017). *Imprevizіunea și creditele oferite consumatorilor. Constituie darea în plată și conversia valutară remedii ale imprevizіunii?,* Revista Română de Drept Privat, issue 1
Storme, M.E. (2003). *Good Faith and the Contents of Contracts in European Private Law* in Electronic Journal of Comparative Law, volume 7.1, available https://www.ejcl.org/71/abs71-1.html, retrieved in January, 2019
Summers, R.S. (1968). *"Good faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* Virginia Law Review, volume 54
Tallon, D. (1994). *Le concept de bonne foi en droit français du contrat,* Centro di studi e ricerche di diritto comparato e straniero, Roma
Thiebierge-Guelfucci, C. (1997), *Libres propos sur la transformation du droit des contrats*, RTD Civ volume 31-32:2
White, J.J. (2001). *Good Faith and the Cooperative Antagonist (Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code),* Southern Methodist University Law Review, volume 54:2
Whittaker, S.; Zimmermann, R. (2000). *Good faith in European contract law:*

surveying the legal landscape in Whittaker, S.; Zimmermann, R. (editors), *Good Faith in European Contract Law,* Cambridge University Press, Cambridge