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GOOD FAITH AND THE ABUSE OF RIGHT IN THE CONTEXT  
OF THE AUTONOMY OF NEGOTIATING CONTRACT

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## CHAPTER I

### The principle of good faith in Civil Law system

**Good faith** (*bone fide*) is a principle of substantive justice, universally considered as a basic rule in human relations since the origins of Roman Law, in which they had already made a distinction between *iudicia bonae fidei* and *iudicia stricti iuris*. Basically in the first ones the judge was expected to condemn the defendant to do or to give everything due according to *good faith*, or rather anything he thought proper on the basis of a general rule of correct behaviour, accepted and applied by all honest citizens mutually.

A canon like that derived from ethical and moral values on which a legal system - like the Roman one - was founded on, always solicitous to gather the opposite demands and reasons deriving from the strictness of law on the one side, and the need to adapt to evolving new requirements coming from new social issues on the other side.

In Italian legal system the principle of *bone fide* can be considered the basis of laws regulating obligations and contracts, being the “heart” of several legal dispositions, for example art.1175 from the Civil Code, affirming that “...*debtor and creditor must act according to the good faith principle...*”; or art.1358 c.c. which expressly refers to the possible behaviour of the two parties when there is a pending suit of the condition, suggesting that both should act according to *good faith* to preserve reasons of the counterparty; then art.1366 c.c., claiming that “...*the contract has to be interpreted on the basis of the principle of good faith...*”; moreover, art.1375 c.c., concluding that “... *the contract must definitely be carried out according to the principle of good faith*”.

All these dispositions somehow refer to the general principle of an objective good faith or fairness, as a rule of behaviour that all parties are expected to respect, particularly in commercial relations; and this principle differs from a subjective good faith idea, meant as the individual psychological condition of ignoring to damage or menace other parties' rights.

According to the Government Report on Civil Code, *bone fide* concept reminds *in the sphere of the creditor the consideration of the interest of the debtor, as well as in the sphere of the debtor the proper attention to the interest of the creditor.*

Moving from this authentic interpretation, previously reported, good faith represents the direct emanation, in the field of Civil Law, of social solidarity principle, defended by art.2 of the Constitution, affirming that “...*Our Republic recognises and guarantees untouchable rights of every human being, both as an individual and a part of social contexts where one’s own personality develops, and it requires the accomplishment of imperative duties in political, economical and social solidarity*”.

The same principle, which actually permeates the whole legal system, can be found out, as well, at the basis of art.41 of our Constitution, claiming that “...*Private economical activity is free. It can’t take place in contrast with public welfare, menacing or damaging public security or human freedom and dignity*”.

This particular perspective shows that freedom in economical activity, generating private contractual autonomy – as an useful tool for the previous one, like any constitutionally protected kind of freedom is included in a context of constitutional rights, hierarchically ordered, obviously limiting and conditioning its significance.

In general, as regards specific cases, we could affirm that the recognition of freedom in private economical activity has definitely to be considered part of a more general conception of the legal system, referring to the evolution of constitutional values, focused on the prevailing principle of social solidarity.

So good faith, as a direct extension of the principle of social solidarity, operating as a mutual standard, imposes to the parties involved in the binding relation the obligation to act preserving the other party’s interests, not overcoming the limits of a reasonable sacrifice, respecting reciprocal reliance, even not considering the existence of any specific contractual obligations or whatever is clearly expressed in single law articles<sup>1</sup>.

## **1.1 Objective and subjective good faith principle**

As we have already introduced, there are two different concepts of *good faith* – one is objective, the other one is subjective.

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<sup>1</sup> P. FAVA, *Il Contratto*, Giuffrè Ed., Milano, 2012, page 1438.

In particular, by the expression “subjective good faith”, we mean the convinced belief to act on the basis of common right, or rather the ignorance to interfere with other people’s rights, whenever the individual refers to a juridical situation apparently different from the real evolving one.

According to the different considered cases, laws eventually refer to a subjective condition different juridical effects, such as the preservation of the pre-existing situation a person had relied on; the limitation or the exclusion of responsibility deriving from the behaviour acted by a person committing a mistake.

For instance, art.128 c.c. establishes that “...*If the marriage is declared invalid, all the effects of a valid marriage are produced in favour of the couple till the pronounced ‘ invalid marriage’ ruling, when husband and wife got married in good faith ...*”.

Concerning, then, the principle of property, art.1147 c.c. claims that “...*we can define ‘good faith owner’ a person who owns ignoring to harm other ones’ rights*”; in the same field, laws recognise the effects of an acquired *a non domino* property to a good faith owner (see art. 1153, 1159, 1160, 1161 e 1162 c.c.).

In the same way, nobody can be under claiming when he/she has obtained *bone fide* a certificate of credit according to art.1994 c.c.

Then, as concerns the fulfilment of obligations, art.1189 affirms that “...*the debtor acting the payment to someone who seems to be legitimate to receive it on the basis of univocal circumstances is set free whereas he/she gives evidence of being in good faith.*”

Finally, art. 1415 and 1445 c.c. put good faith as an essential condition for the defence of anyone in case of simulation, invalidity or annulment of a contract affected by invalid consents.

As far as objective good faith principle is concerned, having already described the function and defined its activity range, we just need to specify its content on the basis of the experience developed in hermeneutic evolution.

Considering this, it is possible to establish that the principle of objective good faith, referred to the general duty of fairness expressed in art.1176 c.c., is basically made of two fundamental elements, turning in definite canons of behaviour of contractual parties: the loyalty and the defence of someone’s juridical position, obviously in the limits of an appreciable sacrifice. Operating as a general clause, objective good faith doesn’t impose a pre-established behaviour, but it requires different ways of acting in relation to the different evolving relevant circumstances.

Nevertheless it is possible to operate a simplification by listing<sup>2</sup> the main juridical obligations deriving from loyalty on one side, defence on the other side.

Particularly the phase of formation and interpretation of a contract highlights the duty of loyalty for involved parties, defined in three main negative behaviours: do not create intentionally fake reliance; do not speculate on fake generated reliance; do not protest against reasonable reliance somehow generated in the counterparty.

In the execution of a contract and of the obligatory relation, instead, good faith is specified in the duty of defence imposing to each party the mutual defence of both interests, apart from the possible existence of specific contractual obligations or of the extra-contractual duty of *neminem laedere* ruled by art.2043 c.c., again in the strict limits of an appreciable personal and economical sacrifice.

Among the duties deriving from the principle of compulsory defence we should highlight in particular: the execution of unpredicted supplies, necessary to defend the utility of the counterparty; changes in one's own behaviour according to the aim of giving the counterparty the opportunity to obtain a useful final result; the tolerance of changes in the performance of the counterparty, except the relevant prejudice of one's own interests (see the execution of a performance in a place which is different from the one established in the contract, or rather the alternative possibility of repairing or substituting a sold object affected by defects making it impossible to be used); the duty of information connected to a condition which could be relevant in the execution of a contract ( see any form of advice meant to avoid a damage or growing expenses).

## **1.2 Evaluating and precept conception**

As far as objective good faith principle is concerned, doctrine and Law have offered two opposing thesis, the first one proposing an evaluative concept of it, the other one proposing a precept vision.

In particular, according to the evaluative vision good faith is involved only in the dynamic phase of the obligatory relation: it, in fact, shows out as the evaluation criteria of parties' behaviour in the actuation of the obligation. From this particular point of view, good faith is proposed and considered as a second phase evaluation parameter, actually being involved *ex post*, after the creation of an obligatory relation, ruling its development as well. Such a kind of interpretation of good faith principle as a sub-primary juridical item, a synthesis of behaviour

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<sup>2</sup> C.M.BIANCA, *Il Contratto*, Giuffrè Ed. , Milano, 2000, page 507

rules defined only after the setting of the pact among the different parties, led to a limitation of the application of it restricted only to those hypothesis, eventually pre-established by the parties in the realisation of their negotiation autonomy.

On the other hand the different hermeneutic attitude I have already introduced, developed in juridical doctrine and Law mainly after the awarding of the principle of social solidarity expressed in art.2 of the Constitution – which is actually considered the basis of modern theories about good faith, rather seems to tend to a precept conception of good faith principle: according to it, the principle is a first phase criterion in the evaluation of parties' behaviour, working *ex ante* and completing the general set of rules established by the involved parties in the act of creating a negotiation duty.

So good faith principle, from a general indication offered to the judge as an evaluation criterion of the parties' behaviour in the initial phase of the obligatory relation, turns into a primary rule, an independent source of juridical duties for the parties which – even if not specifically included in the stipulated contract- can give origin, whereas unaccomplished, to different actions of accomplishment, i.e. inhibitory and refunding actions.

To refer all these hypothesis to our general law, we'd better remind the content of art. 1374 c.c. , claiming that “...*the contract obliges parties to consider and respect not just what is clearly expressed in it, but all deriving consequences as well, in reference to common law or, in case of missing references, to common habits, balance and equity*”.

The following art.1374 c.c., which actually has to be considered as strictly connected and combined to the previous one, establishes that: “*the contract must be put in act according to good faith principle*”.

From a combined reading of both law articles, we deduce that the content of the contract should be the result of a multiple and varied contribution of different law sources, not just of pacts proposed and accepted from the involved parties when the contract is set.

Art. 1374 c.c. actually lists the sources of contractual rules in our legal system, referring to the whole of principles obliging the involved parties.

As regards this particular aspect, we can distinguish autonomous sources, directly established by the parties, in opposition to those established by law.

Aiming to explain the phenomenon of the integration of contract with law support, we should highlight (in the relevant field of contractual autonomy) the passage from theories based on the so-called “Will dogma” to pluralistic theories of our legal system, exalting the finalization of private economical freedom to common social welfare aims, according to art. 41 of the Constitution. Theories referring to “will dogma”, actually coming out from jusnaturalistic

thought, consider the individual will to create as the real gist of the contract; focusing their attention on the Mastery of individual will, they gave legal system no other task but to protect and recognize such a kind of mastery.

The basis of these theories traced back to the natural right of all human beings to dispose freely of their actions and goods<sup>3</sup>. In a different way pluralistic theories concerning contracts and the legal system, moving from the origin of the decline of contractual will in our social system, finally admit the position of limits imposed by laws to freedom in private economical activity; limits which are actually justified by the need of social and substantial justice which permeates our legal system and our Constitution. From this point of view some observers notice that “...the fact that the contract doesn’t express the *jusnaturalistic ideal of Will Mastery anymore doesn’t mean that it has lost the typical features of the autonomy act... the element lost in private will is the monopoly in the constitution of the tiding interest asset, i.e. of the contractual rule...so we could tell about the contract as an instrument having several and multifunctional use, solving it, together with its traditional function of manifestation of private autonomy and self-regulation, by the function of means to the pursue of super-individual interests*”<sup>4</sup>.

Limits imposed by the law to the freedom in individual economical activity, whose contractual autonomy directly depends on, must be inspired to join those aims indicated by the Constitution so to put in act that social function art.2 and 41 Cons. refer to; and to ensure, in economic and commercial exchanges, a richness moving as correspondent as possible to justice.

Considering the effects of such an hermeneutic conclusion about market activity and development and the discipline of the contract, we should highlight three phenomena more and more diffused in commercial practice, such as: public interest, objectivity and standardization of the contract.

The first phenomenon is the consequence of public interest limits to the contractual free activity, created to preserve social utility; just think of the obligation to contract disposed for the legal monopolist (art. 2597 c.c.) having to stipulate contract with anyone who asks for

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<sup>3</sup> C.M.BIANCA, *Il Contratto*, Giuffrè Ed. , Milano, 2000, pag.25 and following, telling that: “the idea of contract as a free expression of individual will corresponded to the deep cultural and economical transformation taking place with industrialization and modern capitalism between XVIII and XIX century, leading to the affirmation of a new liberal middle class-centred society. Freedom in contracts basically meant free market and free exchanges as the basis for the great Industrial revolution. Will dogma has certainly had a high ideological importance. The definition of contract as an expression of individual will corresponded to the new liberal asset in which industrial and commercial capitalism developed. Law system had just to guarantee to any individual the essential conditions for the practise of his own free will actions and, among these, a free economic activity. Negotiations was considered as the affirmation of individual free will and it was the juridical means by which a liberal economy based on private actions came to life ”.

<sup>4</sup> F.GAZZONI, *Manuale di diritto privato*, Ed. Scientifiche Italiane, Napoli, 2007, page 780.



typical company performances, respecting treatment equality; then think as well of public service lines (art.1679 c.c.), compulsory insurance for cars and motor ships (art. 122 and following ones from d.lgs. n°.209/2005); predictions in the field location contract; co-active service (art. 1032 c.c.) and wall sharing (art.874 c.c.).Those limits, originating from law sources, are imposed to the freedom of concluding the contract or not, as well as to the possibility for parties to fix freely the obligatory contractual content ; just refer to art. 1349, 1339, 1340, 1341, 1342 c.c. , which are all expression of the principle claimed in art. 1322 c.c. affirming that: “*Parties can freely establish the general content of a contract respecting limits imposed by laws. Parties can even conclude contracts not corresponding to any of those kinds having particular regulation; nevertheless, they must be put in act to realize interests of protection according to our law system*”. Basically that merit in defense claimed by art.1322 c.c. is nothing but the transposition in contractual activity of the principle of social solidarity affirmed in the Constitution.

Consequently the rules of interests fixed by parties deserves some protection as it realizes that social function all contracts should teleologically be inspired to. Limits imposed by laws affect the free choice of the contractor: consider, for instance, the institution of legal pre-emption (art.732 c.c.); then again, the compulsory insurance vs. circulating vehicles damages (D.Lgs n.209/2005).

The second phenomenon – the objectivity of the contract – is at the origins of the integration and interpretation of the contract according to good faith principle, we have already dealt with.

The third phenomenon – the standardization of the contract – acts mostly in the field of firm activity and of the distribution of goods or mass services. As a matter of fact, this kind of contract is often stipulated on the basis of contractual conditions established unilaterally and *ex ante* by the businessman ( for ex. refer to contract general conditions) and accepted by the consumer when there is no effective previous negotiations between the two parties.

### **1.3 Good faith, diligence and equity**

The principle of good faith has to be distinguished from close principles of diligence and equity. In particular diligence is a basic criterion to evaluate the behaviour of the debtor and it checks elements concerning the responsibility for non-performing according to art.1176 c.c.

affirming that: “... *in performing obligations the debtor must use the diligence of a BONUS PATER FAMILIAS (family good father)* “.

As far as equity is concerned, it should be intended as a principle of contractual justice as well as *good faith*, which actually requires the proper integration of the parties’ different interests in relation to the aim and the kind of the business. It operates as a substantial justice principle which concerns the economic balance of the contract.

While equity, indeed, concerns objective rule profile and involving a complex integrating action acted by the judge, good faith concerns the actuation and behavior profile.

Actually equity too, it can lead to the creation of precept rules, supplying contractual missing elements. When it is not expressly claimed, it doesn’t produce any effects on the contract as economic balance is the result of free determination of the parties, not being allowed the intervention of Law to repair to the incongruity of the exchange established by the parties. Solutions indicated in the code, in fact, like rescission – art.1447 and 1448 c.c. – and resolution because of eventual overcharged duty– art.1476 c.c. – of the contract, both try to avoid macroscopic differences in the treatment which menace to the roots the fairness of contractual rules.

According to traditional conception, in fact, the judge can’t operate or debate about the content of the contractual program set by the parties when the contract is stipulated, as such a form of judgment would be in antithesis with the wideness recognized to the field of contractual autonomy, the evaluation of convenience or not in the exchange which is reserved exclusively to the interests’ owners involved in the contract definition

We are going to explain afterwards how this previous attitude is nowadays more and more overcome, especially in the field of relations between and professional tradesman, referring to the need of protection of the weaker contractor facing the misbalance of contractual strength improperly exploited by the stronger party.

#### **1.4 Pre-contractual responsibility**

Pre-contractual responsibility is regulated in art.1337 affirming that “...*Parties must behave in good faith during negotiations and in the creation of the contract*”. It is a form of responsibility condemning *culpa in contrahendo* and it is established for the safeguard of negotiation freedom owned by the parties when the contract is stipulated. The following art.1338 c.c. offers to the interpreter a specific type in correspondence of the generic formula adopted by the law system to define such a kind of responsibility, those behaviours which

integrate the violation of the duty of good faith in the negotiation phase, establishing that: *“...the party who knows or should know the existence of an invalidity in the contract and does not inform the other party must refund the damage provoked to the party who actually was confident, out of guilt, in the validity of the contract”*. This statement prevents the party and its interests from being involved in useless negotiations or from the stipulation of invalid or ineffective contracts .

Other hypothesis -offered by our laws- of possible behaviours integrating pre-contractual responsibility have sided the hypothesis we have previously introduced : the unjustified withdrawing from negotiations; the violation of the duty of information, secrecy, clearness and collaboration all parties are expected to respect; guilty misleading; violence and malice. To maintain that kind of responsibility introduced in art.1337 c.c. three conditions are necessary: parties should have started to negotiate the conclusion of the contract and those negotiations should be led to the phase when the need of an entrusting in the conclusion of the contract is justified; one of the parties should have interrupted negotiations without any valid reason, so that the entrusting generated in the other party is somehow afflicted, as that party has faced payments or renounced to more favourable occasions; finally, the party should have kept on behaving in malice and guilt, in opposition with the principles of correctness and good faith.

Jurisprudence doctrine dealing with the theme has highlighted the duties of good faith imposed to parties in the pre-contractual negotiation phase, fixing specifically: obligations of information; obligation of clearness; obligation of secrecy; obligation of fulfilment of those acts who are necessary for the validity and effectiveness of the contract<sup>5</sup>. As far as obligations of information are concerned, we could affirm actually that there is a general duty of informing the counterpart about any relevant or useful circumstance connected to the contract.

The violation of the contractual obligation of informing during negotiations gives origin to what we could define withholding information (or reticence): it is caused by missing information about all those circumstances which could make the contract invalid, ineffective, useless, or rather which could determinate some causes of non-performing.

About clearness, instead, we mean the necessity that parties use a language not exposed to misunderstandings. That's why parties shouldn't take profit of others' ignorance concerning the meaning of contractual clauses.

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<sup>5</sup> C.M.BIANCA, *Il Contratto*, Giuffrè Ed. , Milano, 2000, page 163 and following

The obligation of secrecy concerns all those reserved news parties could have obtained while negotiating and whose divulgation could damage the counterpart.

As concerns the unjustified termination of negotiations, that hypothesis takes place in abandoning without any valid justified reason the developing negotiations with the counterpart betraying the fact that the counterpart relies in the conclusion of the contract. Pre-contractual responsibility, in fact, doesn't involve automatically the obligation to conclude the contract, which, on the contrary, would give origin to a responsibility connected to contractual non performing action. So each contract preserves, during the face of contractual negotiation, its right to withdraw the agreement, revoking one's own proposal for acceptance. The rising pre-contractual responsibility is rather connected to malice or guilty behaviour acted by one of the parties making the other party trust obviously in the conclusion of the contract.

The refundable damage, coming from pre-contractual responsibility, will be, then, represented by the prejudice to the negative interest in not stipulating an invalid contract or having an altered expected content. That negative interest, differently from positive interest in the execution of conveyed terms, will be specified then in the two voices of emerging damage and ending earnings: the former being calculated on the basis of the faced expenses in the development of the negotiations and the latter on the basis of missing favourable alternatives lost because of negotiations.

The party suffering the damage has the burden of proof. The aim of the refund promise is to regain the economic and juridical position the party had before the unuseful beginning of negotiation.

According to a recent jurisprudence interpretation<sup>6</sup>, a kind of pre-contractual responsibility could take place even in the case of valid and effective contract stipulated by the parties.

As a matter of fact, the contract, even if valid and effective, could result iniquitous and unjust as it could present a worse content compared to the possible one parties should have obtained if they hadn't violated the principles of good faith and correctness. The model we refer to, deducing the existence of such a kind of responsibility, is the affecting malice, described in art 1440 c.c., affirming that: *"if the deception was not such as to compel consent, the contract is valid, even though without the deception it would have included different terms; however, the contracting party in bad faith is liable for damages"*.

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<sup>6</sup> Court of Cassation, United sections, n. 26724/2007.

In that case the damage refund the contractor in bad faith is expected to act, according to the interpretation of the united section of the Court of Cassation, represents an instrument to re-establish equity in a valid contract but it could reveals iniquitous because of the behaviour acted by one of the parties and affecting the other one in the phase of negotiation. Obviously once such an extension in the operative field of pre-contractual responsibility is accepted, relevant consequences will derive in reference to the parameter of evaluation of the suffered damage, which will be represented by the so-called “positive differential interest”. It will be calculated referring to the difference between the advantages and the economical consequences produced by a stipulated valid contract affecting the juridical sphere of the party and any consequences the contract would have produced if it had been stipulated in absence of improper behaviours.

As concern the juridical nature of that kind of responsibility, doctrine and jurisprudence propose three thesis: the major thesis of extra-contractual responsibility; the minor thesis of contractual responsibility and the mid-thesis of *tertium genus* responsibility.

In particular the thesis of contractual responsibility inspires to the mentioned duty of good faith expressed in art. 1337 c.c., deducing that it would be the violation of a obligatory term already working for the contractors when negotiations are disposed<sup>7</sup>.

The most recent legal hypothesis, in fact, refers to the theory of the so-called “social contract” to justify the contractual nature of the responsibility.

As long as the negotiation is on between the parties, a social contract would be created as a source of specific juridical restrictions and secondary legal obligations (protection obligations), which impose contractors to preserve cleverly the reliance generated in the contract protecting involved interests<sup>8</sup>.

The thesis of extra-contractual responsibility, on the contrary, highlights the profile of generic nature of the parties’ obligations in the starting phase of the relation, leading to the definition of the duty of good faith, imposed by laws in art. 1337 c.c. in the field of the wider principle of *neminem laedere* claimed in art. 2043 c.c. addressed to all figures taking part in the development of a relation. According to that interpretation, actually, in this specific case the contract is “affected”, source of relevant legal obligations for the parties, and it could just be

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<sup>7</sup> The thesis of contractual responsibility is largely analysed by German doctrine, first including in jurisprudence this form of responsibility. In particular, Jhering in his essay *Culpa in contraendo*, in 1861, considered the extra-contractual responsibility unable to protect the interests of the non-guilty contractors trusting in the fairness of negotiations.

<sup>8</sup> L.ROVELLI, La responsabilità precontrattuale, in Trattato di diritto privato, XIII, Tomo II, Torino, 2000, page235 and following.

defined as an outline of contract<sup>9</sup>. As we have already introduced, this thesis is the one accepted by the major jurisprudence affirming that : “*the pre-contractual responsibility, emerging for the violation of the principles exposed in art. 1337 c.c. defines a kind of extra-contractual responsibility connected to the violation of the general rule of behaviour established in defence of the correct development of the contract iter, so that, its existence, the refund of damage as well as its evaluation should be considered in reference to art. 2043 and 2056 c.c., taking into account the typical features of the relieved wrong*”<sup>10</sup>.

The third trend, which presumes the pre-contractual responsibility as an autonomous form of responsibility separated from both contractual and extra-contractual one, is based on the code prevision, which, ruling separately that form of responsibility, recognises a distinguished dignity in it<sup>11</sup>.

Being a *tertium genus* kind of responsibility, in the midst of the other two kinds, the discipline to act in that concrete case is entrusted to the interpreter, who will have to elaborate peculiar criteria fitting the eventually considered circumstances.

Obviously, the option in favour of the acceptance of one of the two theories foreruns relevant consequences of practical order especially in relation with the burden of proof of the suffered damage; with the relevance or not of the mental capacity, while the damaging action is taking place; with the ending of prescription; with the damage concretely refundable.

## 1.5 References to Comparative Law

Several foreign legal system refer to the principle of good faith, among which the German one, affirming in art. 242 BGB that: “*...the debtor is obliged to execute the performance as good faith principle requires and according to commercial habits*”. Interpreting the rule offered from German jurisprudence, judges are even allowed to form the right to be applied to the commercial relation any time the principle of good faith (*treu und glaupe*) requires to change something in the relation to fit it to the possible relevant circumstances in the real case.

In Anglo-American juridical experience we notice the consolidation in the interpretation of several different models of decision inspired to the general rule of good faith. In particular, in

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<sup>9</sup>F.MESSINEO, Il contratto in genere, I, in Trattato di diritto civile e commerciale, Milano, 1972, pag.34.

<sup>10</sup> Court of Cassation, United Sections , n.9645/2001.

<sup>11</sup> V.CUFFARO, Responsabilità precontrattuale, in Enciclopedia del diritto, XXXIX, page 1265.

the field of negotiation and of consent formation, good faith turns into an instrument for checking the different ways an individual economic activity can be led.

As concerns the ruling on non-performing, common law is integrated with a body of laws based on equity determining the progressive expansion of the general clause of contractual good faith.

European Union Law has deeply influenced the shape of contract in different European legal system, especially considering its role in the effectiveness and improving of the inner market activity, even by the repression of anti-monopolistic attitudes and the regulation in favour of consumers.

So the contract is surely the technical means to accomplish fundamental economic forms of freedom, such as: free circulation of goods, money and people, the free performance of services and freedom to settling.

According to this function, it is, on one side, a subject-matter of controls established to avoid the violation of antitrust laws and the abuse of dominant position; on the other side it is ruled to encourage consumers' trust, preserving the weaker party in economical relations. This final aim is often pursued imposing specific content and information obligations, or rather by all the necessary instruments to balance the asymmetry between the contractors.

## **CHAPTER II**

### **The evolution of good faith principle from a behaviour rule to an instrument for the integration of the contract**

The principle of good faith has been subject of an hermeneutic evolution in recent years, gradually extending the field of effectiveness and juridical relevance in our legal system.

This evolution can be distinguished, to make study and exposition easily available, in three well-defined different moments: in the first phase there was the transformation of good faith from a simple criterion in the evaluation of the parties' behaviour to an instrument of integration of the contract with the parties' deriving obligations; in the second phase of the evolution process there was the passage to a notion of good faith as a functional limit to the exercise of Rights, so being the basis for the prohibition of rights abuse - we are dealing with

afterwards; in the third phase, still “at work”, good faith is claimed as a rule for the validity of the contract, requiring, if not respected, damage refund. Initially the interpretation of art. 1374 c.c. ruling the contractual sources of integration limited the field of application only to those hypothesis proposed by the legal system: laws, habits equity; otherwise, as concerns art. 1375 c.c., proposing the rule of the execution of the contract according to good faith principle, they used to provide an interpretation absolutely autonomous and not tied to the previous law, involving only the evaluation of the parties’ behaviour in the phase of actuation of negotiation program disposed in the stipulation of the contract.

## **2.1 The principle of social solidarity as the basis for the evolution of good faith notion**

The joined interpretation of art. 1374, 1375 c.c. is based on the re-interpretation of the principle of good faith according to the constitutional principle of social solidarity affirmed in art. 2 Const.

Contractual autonomy, in particular, owned by parties, mostly exposed in art. 1322 c.c. and included in the wider prevision of freedom in private economic activity – see art. 41 Const. – turns itself into an instrument for solidarity aims having social utility; and for this, just in analysing social merits connected to contracts having atypical content, everyone should consider and respect the rules of correctness and good faith, teleologically pre-ordered to join exactly those aims connected to social utility.

Consequently it is not enough that the contract is stipulated in absence of formal vices, as it is considered absolutely necessary that, dealing with constitutional perspective, that the contract produces a proper result too; so, creating a welfare movement according to justice principle.

From this point of view, the obligation of acting in good faith and correctness, affirmed in art. 1375 c.c. becomes an eteronome source of integration of the contract and forces the parties to put in act all those behaviours which, even though not expressly fixed, could reveal as necessary to preserve as far as possible – and in the limits of a sustainable sacrifice, the interests and utility of the counterpart.

So each contractor, performing the contract, is expected to operate, according to a principle of solidarity,, to preserve and satisfy the juridical position of the counterpart. The range of the obligations depending on the general clause of good faith could lead the parties to modify their performances, or even to act performances not included in the contractual program, to tolerate modifications involving other subjects’ performances, whenever those modifications



do not affect considerably their own interest; to respect the obligation of information and to use properly discretionary powers. It is , in fact, a flexible clause which can eventually create different juridical obligations.

## **2.2 Protection obligations and proximity relations**

Among the exposed obligations, deriving from the general principle of good faith, protection obligations distinguish for the importance gained in commercial practice and in jurisprudential experience. These refer to the preservation of interlocutor's interests not included in the contract, involving the personal sphere and the health of the counterpart and his/her close relatives.

Consider the relations set with someone unconnected with the contract who, nevertheless, is affected by the effects of the contractual performance: we define these kinds "proximity relations".

In these cases, in fact, the juridical position of the third person not involved in the contract is so close to the one of the contractors that the established contractual performance could expose to some risk the juridical sphere. The typical example, useful to explain such a phenomenon in the relation of proximity, is the gynecological contract<sup>12</sup>, which is stipulated between a pregnant woman and her doctor: actually in that contract obligations of protection of the newborn, accessory for the doctor, take place even without any kind of negotiation or pact between the parties.

This is an example of contract with protection effects on a third party.

As a matter of fact therapy obligations for the gynecologist aim to the protection of the pregnant woman's health and to the future baby's health as well, trying to avoid any possible risk or damage for the newborn. Consequently, the subject - acquiring juridical *status* soon afterwards his/her birth – will eventually have the opportunity to act against the doctor according to contractual responsibility the doctor, whereas he/she hasn't accomplished the accessory performances he was expected to do.

The category of protection obligations was born in the XX century in Germany as a result of the theory of *culpa in contrahendo* by Jering. The theory had the aim of punish behaviours non-corresponding to the principle of good faith in the pre-contractual phase, which couldn't be referred to a perfect contract yet nor to a pre-contractual hypothesis; on the basis of the

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<sup>12</sup> C. Cassation, n.11503/1993.

relation established between the contractors, at the end they basically kept the counterpart with no kind of protection in negotiations.

The attitude of German jurisprudence could be included in the larger context of the valorization of the general principle of good faith and in the following re-interpretation of obligatory relations as complex situations, trying to overcome the simple linear scheme “creditor-debtor” focused just on the duty of performance.

In 1939 German Supreme Court dealt with “Gasuhrfall affair”, supporting the contractual responsibility of the contractor for damages suffered by the maid, working in the principal’s house, provoked by the explosion of a gas counter installed by the contractor. In that specific case, although there was no contractual tie between the maid and the contractor, the Court offered to the lady the same kind of legal defence the principal would have had right to. In the reflection developed by judges, in fact, it was reasonably impossible not to give the same kind of protection to a third party, acting permanently in the orbit of contractors, afflicted by the modality of the contract performance. In the same way, in 1971 court of Appeal in Rome affirmed the employer’s contractual responsibility in favour of the doorman’s relatives for damages suffered because of the insalubrities of the accommodation.

Recently, as concerns medical responsibility again, Court of Cassation has established that :*“... referring to the theme of responsibility of a doctor for missing diagnosis of malformations of foetus and following undesired birth, damage refund must be corresponded not only to the mother, but to the father too, according to the complex of rights and duties connected to the event of procreation by law... established, as well, that the negative effects of the doctor’s incorrect performance has not allowed the mother to choose and they affect and involve the father too, who has therefore to be considered as one of the subjects protected by the contract with the doctor, or rather as a party afflicted by missing or incorrect performance, defined as a “non-performing case”, including all the deriving consequences in terms of refunding”*<sup>13</sup>.

As we can deduce from the reported jurisprudential statements, the third parties, “external” to the contract, receiving a form of contractual protection, are subjects maintaining a different position, the so-called “proximity” to the main subjects of the obligatory relation, differently from *quisque de populo* condition which is, instead, legally protected just by the principle of extra-contractual responsibility (art.2043 c.c.).

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<sup>13</sup> Court of Cassation, n. 6735/2002.

The qualified proximity, in particular, derives from a different kind of relation (work, family, trusteeship) linking one of the contractual parties to the third one.

Over the exemplification we have offered, it's not possible to describe all the possible hypothesis including obligations of protection for the involved parties, as those obligations show out so differently according to such a huge range of possible relations.

Neither it is possible to find out, studying jurisprudence dealing with these matters, a unique definition of that kind of obligations, which can just be referred to the general duty of safeguard for the juridical sphere of subjects establishing a juridical relation, a contractual one or not, so to avoid that these subjects could be afflicted by prejudicial effects deriving from their behavior.

So the relation between two contractors giving origin to the obligation of protection basically trusts the subjects' correct behaviour, according to a constitutional interpretation focused on social solidarity (see art. 2 Const.). we can define this case a "qualified social contract" as the source of juridical obligations for the parties, according to art. 1173 c.c. including, together with the contract and the illegal fact, any other act or fact which could produce them in conformity with our juridical system.

### **2.3 The qualified social contract**

By the expression "qualified social contract"<sup>14</sup> doctrine and jurisprudence refer to a relation occurring between two or more subjects whereas the inference in others' juridical sphere lead to the creation of obligations of collaboration and protection for the safeguard of the counterpart's expectations. In those cases there is a relation with no primary obligation of performance finding its legitimate basis in art. 1173 c.c.; and in particular in the prediction, as a source of obligation, of any valid condition according to the juridical system.

In particular, this hypothesis deals with a greater specific risk for one of the parties compared to the general situation of other co-associated parties, even in the absence of a juridical relation based on the contract; a risk which is so great to reveal that contractual responsibility could not depend on a previous pact limiting condition, being a qualified social contract enough for the legal system and depending on it specific duties of protection for determined juridical goods.

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<sup>14</sup> F.GAZZONI, *Manuale di diritto privato*, Edizioni Scientifiche Italiane, Napoli, 2007, pag. 860

The difference between this kind of responsibility and an extra-contractual one (see art. 2043 c.c.) is basically connected to the circumstance that all involved subjects establishing a relation and, because of this, they trust each other, presuming the mutual respect of single juridical spheres, the protection of one's own interests; subjects could be defined as strangers expected just to respect the general principle of *neminem laedere*.

The examined category, indeed, is based on the idea of the protection of the counterpart's trusting, as an effect of one subject's behaviour. Several hypothesis by laws and jurisprudence could be connected to this category, among which we find: the pre-contractual responsibility; the responsibility for incorrect information; the responsibility of the bank in the payment of the stock by fake drawing signature; the doctor's responsibility working in the hospital structure; teachers' responsibility for student's self-damaging; Public Administration responsibility in legitimate interests offence; financial brokers' responsibility; the responsibility for real estate double-alienation; the responsibility for illegal treatment of personal data; Public Administration responsibility for missing custody of public streets. In particular, it will be useful to explain the thesis of doctrine and jurisprudence about the responsibility for incorrect commercial information. In that field, to make the institution better defined, it is possible to distinguish three types of information: courtesy or confidential ones; the so called "product-information" created to advertise and encourage the diffusion of commercial products on the market; "service-information" representing a real private or public service.

Among those kinds of information, the "product-information" shows out as obligations of result, while the "service" one is closer to means obligations.

Actually, as far as confidential or courtesy information is concerned, this kind doesn't create any right-duty of correct and complete information, because there isn't previously a qualified source which could legitimate in co-associated subjects a reasonable trusting in correctness and genuine nature of news. In those cases a sort of pre-contractual responsibility can be postulated for the one who gives information only whereas a malice behaviour aiming to the conclusion of the contract emerges.

As concerns the "product-information", instead, which establishes, as well as "service-information", that the news should come from a qualified professional figure, it can obviously create a legitimate trusting in the information users concerning its correctness. Over hypothesis expressly ruled by laws, like misleading advertisement matter (D.Lgs. n.145/2007), to protect users and consumers of the service against misleading information, in these cases, Law affirms that between the professional figure charged to give information and

the user a qualified social contract is established, which is the basis of the supposed completeness and correctness of information on one side and generates the obligation to offer correct information to the other party.

Finally, about “service-information” there is a large debate on the responsibility of the bank for the incorrect information given to another asking bank. In those cases, in spite of the lack of explicit juridical obligation to offer information concerning the presence of funds in one costumer’s current account, the jurisprudence claims that banks are obliged to offer correct information to ensure the security of affairs, moving from the basis of the social contract established by qualified professionals, which inspires trusting in mutual behaviour fairness.

Even concerning public sector, juridical system has faced the question of CONSOB responsibility for the incorrect information given to consumers. In particular, the Court of Cassation<sup>15</sup> has underlined that the news contained in the informative paragraph are destined to guarantee the accessibility of the movable market and the certainty of juridical traffic, as CONSOB owns a definite position of guarantee, protection and control of the investors.

So together with the responsibility of the revision society for the mistakes and omissions in the informative prospect, the responsibility of CONSOB for the omission in control has been claimed, whereas the private subject realizes an investment trusting the correct action of supervision Authority.

As concerns the responsibility of the bank for the payment of a non-negotiable drawing cheque to a person different from the benefit receiver indicated in the title, jurisprudence indicates even in this case the configuration of a social contract between the bank and the subjects reasonable trusting its professional competence. As a matter of fact, they apply to the drawing cheque art.43 of the royal decree n.1736/1933, affirming that the non-negotiable cheque can be paid only to the payee who can only transfer it to a banker for cash. Moreover the law establishes the responsibility for the one who pays a non-negotiable cheque to a different person from the payee or the endorsee banker.

Nevertheless, Court of Cassation United Section<sup>16</sup> have defined the bank responsibility for the payment of a certificate with false drawing signature in the field of contractual responsibility, basing it on qualified social contract established between the bank itself and he subjects who trust correct circulation of certificates of credit and in specific professional profile of the banking institute; a contact from which specific obligations of protection derive for the bank,

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<sup>15</sup> Court of Cassation, n. 3132/2001

<sup>16</sup> Court of Cassation, United Sections, n. 14712/2007.

justified by particular competences and by the instruments the bank could use performing its services. The opinion of the Cassation about this topic has great importance even because connects the contractual responsibility deriving from qualified social contract not to other acts or facts valid to produce obligations according to legal system – see art. 1173 c.c. – but to an autonomous responsibility defined contractual *latu sensu*.

## **2.4 Forms of payment of pecuniary obligations by bank draft**

The clause of good faith, as a general principle of correctness addressed to all contracting parties, concerns not only the expected debtor's behaviours but also all those expected creditor's behaviours. In particular among creditor's duties, we have had the opportunity to list the collaboration aiming to make performance easier; the information necessary for the positive conclusion of the contract and the tolerance of modifications in the performance not hardly affecting the sphere of interests.

The principle of social solidarity we have already dealt with requires, indeed, even to the creditor to act and have behaviours aiming to make the performance easier and to avoid non-performing or to reduce prejudicial consequences, in a context of collaboration between contractors and in the consideration of the bilateral nature of the contract. The claims in art. 1218, excluding responsibility whereas non-performing can't be a debtor's guilt, and art. 1227 c.c., reducing the amount of the damage refund when the creditor's guilt contributes to it, they confirm the interpretation just explained.

An application of that final hermeneutic conclusion has taken place in the field of pecuniary obligations performing by alternative means to money. The traditional trend<sup>17</sup> developed about the matter excluded the functionality of bank draft moving from three kinds of reason: first the payment by alternative means would generate a *datio in solutum*, ruled in art. 1197 c.c., requiring to be valid a specific pact and the creditor's acceptance; secondly, the place of the performance, as well as the subject of the performance, would change; finally, the creditor's required sacrifice would overcome the appreciable limit imposed by good faith and would be improper.

Recent jurisprudence<sup>18</sup>, instead, has affirmed that the principle of good faith allows to consider equipollent the payment by bank draft and the one by a sum of money, considering the phenomenon of the increasing evanescence of money as well.

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<sup>17</sup> Court of Cassation, Sect..III, n. 3254/2007

<sup>18</sup> Court of Cassation, Sect..III, n. 27158/2006

This hermeneutic conclusion is the consequence of a re-elaboration of the same nature of pecuniary obligations, according to the evolving interpretation of art.1277 c.c., going over literary meaning.

In particular, the mentioned law affirms that: “... *Pecuniary debts get extinguished by money having legal currency in the State by the time of payment and for its nominal value*”.

So, after the intervention of Court of Cassation United Sections about this matter, the expression used by laws must be intended<sup>19</sup> as referred not to the subject of payment but to a way to act the payment, finding out the subject of payment in money value and amount. So money is an ideal unity of the value of nominal values.

This interpretation of the literary content, focusing on substantial aspects rather than on the formal ones, admits, for the accomplishment of pecuniary obligations, different instruments of payment, equipollent to the money and having the same solving effects, which allow the creditor to satisfy his/her pretensions.

Cassation, actually, affirms that “...*this effect is surely produced by bank draft or cheque by which, being pre-constituted the reserve, a transfer of a sum of money is realised with the intermediation of a bank or with disposition of the creditor. The risk of convertibility or the possibility that for any reason the bank is not able to ensure the conversion of the cheque in current money, is kept by the debtor, who is finally set free when the transaction is positively over*”.

That's why jurisprudence eventually considers in opposition to the principle of good faith the creditor's refuse without any justified reason to accept the debtor's bank draft instead of current State money, except when the creditor notices particular circumstances inducing him/her to doubt about the authenticity of the cheque and the eventual positive conclusion of the economic transaction.

Creditor's acceptance of the cheque as an alternative means for payment instead of cash money, could be considered as a collaborative behaviour, aiming to an easy solution to set the debtor free from responsibility; a solution the creditor is expected to take part in - in the limits of a sustainable sacrifice.

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<sup>19</sup> Court of Cassation, United sections, n. 26617/2007, affirming that: “*in pecuniary obligations , whose amount is Less than 12,500 € or for which it is not imposed by law a different form of payment,, the debtor is allowed to pay, by cash money or bank cheque;in the former case, the creditor can't refuse payment; on the contrary, he can refuse in the latter case only for justified reasons to be evaluated according to the principles of good faith and correctness; the extinction of the obligation with freeing effect on the debtor takes place in the former case as soon as money are delivered and in the latter when the creditor acquires concretely the juridical disposal of the sum of money, referring the risk of invalidity of the cheque only to the debtor*” .

## 2.5 Obligations of information

As we have already analysed in the paragraph about pre-contractual responsibility, obligations of information represent a typical explication of good faith in the phase of negotiations for the conclusion of the contract. These obligations impose the parties to give each other information about relevant circumstances in the business, in particular about the possible causes of invalidity, ineffectiveness or uselessness of the contract, so to avoid reticence phenomena, giving origin to a responsibility.

If the reticence of one of the parties leads the other party to misunderstand fundamental elements in the contract, the extreme case of invalidity because of mistaken consent could even take place (art. 1427 and following c.c.).

The obligations of information, fixed to defence one party's trusting in the correct behaviour of the other one, are relevant in the executive phase of the contract too, as the respecting of these contribute to the correct and complete realisation of the contractual program established by contractors. Their violation in that phase could give origin to a contractual responsibility, whereas non-performing owns a relevant importance.

There are several specific hypothesis ruled by laws, especially in the field of contracts stipulated between professionals and consumers, characterized by a structural information asymmetry (we are going to deal with this topic later).

## 2.6 Receding a contract

The principle of objective good faith in an instrument of evaluation and control of contractual rules, based on the principle of social solidarity – see art.2 Const., which allows judges, in a certain measure, to check also the economical balance of the contract, to integrate the opposed interests of the parties. The problem of the jurisdictional discussion on economical balance in the negotiation was proposed, in doctrine and in jurisprudence, with a special care to the theme of receding *ad nutum*, often included as a contractual clause from the parties and evoked in case of lack of proper justification.

Recess is the unilateral receptive act, expression of a potestative right, by which one of the parties shows the intention of dissolving contractual obligation . According to art. 1372 c.c.: “...a contract is binding between the parties. It cannot be dissolved except by mutual consent or for reason permitted by law...”; the faculty of recess can be practiced only when it



expressly established by parties or by law, it represents the main derogation to the principle of obligation in contracts.

So it is true that parties are free, in the practice of their contractual autonomy, to include any clause in the contract not forbidden by laws, or in contrast with public order and common proper habits; nevertheless, the practice of receding power must be put in act respecting some general determined canons aiming to the defense of the counterpart's interest trusting the reliability of the contractual engagement.

In particular, the Court of Cassation claimed in a recent ruling<sup>20</sup> that the evaluation of the relation of forces existing between the parties must be led in terms of conflict.

Establishing that parties will represent necessarily opposite interests, we can notice the proportionality of means used by them in mutual relations so that any party could go beyond the limits of arbitrary acts or overwhelming the other one. This ruling dealing with arbitrary recess highlights a clear reference to the right abuse and to good faith principle, as the implicit limit to the practise of all rights.

In particular, the Court points out the essential elements of rights abuse, which are: *“the ownership of a subjective right for an individual; the possibility that asserting concretely that right could be practised in several ways not strictly pre-determined; the circumstance that the concrete assertion, even if formally respectful of the legal framework about the right, could be practised according to methods which would be reproachable by an evaluation criterion, juridical or extra-juridical; the circumstance that, because of such a way of asserting, an unjustified excessive disproportion between the benefit of one contractor and the sacrifice of the counterpart.”*

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<sup>20</sup> Court of Cassation, S.III, n.20106/2009, according to which: “... nowadays the principles of objective good faith, and of rights abuse as well must be selected and put under revision according to the constitutional principles of social function, ex. art.42 Const. and of the definition of absolute subjective rights. From this particular point of view, the two principles gather and integrate each other, as good faith represents a general canon to which parties' behaviour should be strictly tied, even in a private law relation, and the interpretation of a juridical act of private autonomy and, predicting the abuse, the need of a correspondence between the powers given and the aim they have been given for. Whereas the pursued aim is not allowed by laws, an abuse will take place. In that case, the overcoming of internal limits or of some external limits of rights will determine his abusive action...”

### CHAPTER III

#### THE ABUSE OF RIGHT

Art. 7 of the definitive project of Civil Code in 1942 affirmed that: “*Nobody could assert his/her own right in contrast with the aim because of which he obtained the right...*”; this affirmation was eventually deleted in the law text. Therefore at the moment Italian Civil Code doesn’t contain any disposition defining the notion of abuse of right or even referring to it.

To face such relevant legislative omission, a part of doctrine and jurisprudence, more faithful to law claiming, considers that the abuse of right takes place only in those hypothesis expressly established by laws, needing to apply in most cases the Latin brocard *qui suo iure utitur neminem laedit*, especially for the safeguard of the principle of right certainty.

The most recent and jurisprudential position, aware of the changing needs in juridical transactions, instead, admits the existence in our legal system of the general principle of forbidding the abuse of right, intended as an all inclusive category establish to absorb in it every single hypothesis in which a right is asserted out of the law limits and damaging other subjects’ juridical sphere.

So the abuse of right becomes a limit external to any assertion of a subjective right protected by laws; in spite of the wideness and of the absolute nature of its significance, each right will be asserted in the full respect of other subjects’ juridical sphere and not turning into arbitrary practise, observing the constitutional rule which puts the pursuit of social function and solidarity before any kind of individual freedom (in particular see art. 42 Const. affirming that:”... *Private property is recognised and ensured by law, determining buying and enjoying methods and its limits to guarantee its social function and to make it available to everyone*”), and this is expected to be oriented just to that final aim.

“...*From this point of view, each right must be asserted gathering and integrating the needs imposed by a social milieu and finally satisfying a real interest: when a behaviour is just apparently in line with the assertion of a subjective juridical situation of power, but actually it is in conflict with the interest justifying the attribution of that power by laws, such a behaviour has to be considered out of protection or rather illegal*”<sup>21</sup>.

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<sup>21</sup> G.CHINE', M.FRATINI, A.ZOPPINI, Manuale di diritto civile, Nel diritto ed., 2013, page 753.

### **3.1 Good faith as a functional limit to the assertion of right**

As we have already introduced, there is no trace in our civil code of references to the principle of the abuse of right. In spite of this legislative omission, traditional theories usually find the legal basis of this principle in art. 833 c.c., concerning real rights and affirming that “... *The owner cannot act having such aims as damaging or disturbing other subjects*”. It is the so-called prohibition of emulative acts which represents the main limit to the unconditioned expansion of the right of property (traditionally intended as *ius utendi, fruendi et abutendi*). In particular, in the field of emulative acts, one of the first jurisprudential theses requires two elements in the integration of this particular situation: an objective one, consisting in the total absence of utility in the act performed by the owner; then another subjective one, consisting in the so-called *animus nocendi*, or rather in the intention to bring other subjects prejudice or inconvenience.

According to a different jurisprudential interpretation of the analyzed institution, on the contrary, the objective element required to define the abusiveness of emulative act doesn't consist of the total absence of utility, but of the excessive difference between the suffered sacrifice from the third party and the utility brought to the owner.

Otherwise in relation with the traditional vision just exposed, more recent doctrine and jurisprudence put the abuse of right in the field of the evolving notion of good faith. In particular, good faith shows out as the functional limit to the assertion of right. From this point of view there is no other right giving the owner an unconditioned power, as the right owning always results to be rather conditioned by the aim because of which laws recognize that right. So in the field of obligatory relations as well, the creditor's behaviour cannot go over the faculties he/she receives by laws, neither pursue an aim which is different from the one justifying because of which the right is recognised and protected by laws.

### **3.2 The anti-elusive principle developed in the EC context**

The principle of the abuse of right and the connected prohibition of the abuse of right is particularly important in EC ambit.

According to the principle of the abuse of right, developed most of all in fiscal field, there is an abuse when the aim of law is completely deleted in spite of its formal observance, to obtain an advantage through the artificial creation of the conditions necessary to obtain it. In Halifax

and University of Huddersfield ruling<sup>22</sup>, the jurisprudence produced by the Court of Justice of EU affirmed that the subjects by right cannot refer abusively or fraudulently of EU laws.

In particular, to avoid the phenomenon of fiscal elusion Community jurisprudence has considered “abusive” the financial operations aiming to obtain a fiscal advantage in contrast with the established laws aim concerning this matter. Moreover judgment C425/08 from the Court of justice has clarified that the abuse could occur even when the aim to obtain a fiscal advantage is not exclusive, but other economic reasons are involved in the agent’s intentions.

Reading the pronounced judgements by the Court of Justice, the category of the abuse of right clearly emerges, requiring the co-existence of three assumptions: the first one is objective and based on the by-passing of the national law; one is subjective, connected to the awareness of the abusive nature of one’s own behaviour; the last one is theological deriving from the pursue of an aim which is different from the one based on the Community law at the basis of one’s own behaviour.

Accepting the content of the EC pronounced decisions in the field of the abuse of right, the United Sections of the Court of Cassation have eventually affirmed that: “...*the principle of contribute capacity and of progressiveness in the imposition are at the basis of both imposing rules and of the ones who give the contributor any kind of advantages and benefits, aiming these laws evidently to the complete effectiveness of these principles. Consequently it cannot but be considered included in the legal system, as directly deriving from constitutional laws, the principle affirming that the contributor cannot obtain improper fiscal advantages by a distorted use (even if not contrasting with any specific disposition) of juridical instruments valid to obtain fiscal savings, in absence of economically appreciable reasons justifying the operation, different from the simple expectation of that fiscal saving... recognising a general prohibition of the abuse of right in tributary system doesn’t turn into the imposition of further patrimonial obligations not deriving from law, but the refuse of abusive effects of negotiations put in act with the only aim to elude the correct application of fiscal laws...*”<sup>23</sup>.

The solution proposed by the Court of Cassation against the abuse of right is, indeed, the refuse of protection by laws involving all those rights and interest practised in violation of objective good faith rules.

So the abuse of right is realised in the altered use of the formal scheme of right, whereas the agent intends to pursue further aims and differently from those ones put at the basis of the rights established by laws.

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<sup>22</sup> Court of Justice C255/02, C419/02, C233/03.

<sup>23</sup> Court of Cassation,, United Sections .30055/2008, 30056/08, 30057/08.

### 3.3 The *exceptio doli generalis* as a possible solution

In Roman Right the *exceptio doli generalis* allowed the defendant in a civil process to paralyze the actions of the one behaving, even if authorized by *ius civilis*, pursuing basically fraudulent aims.

In these cases the *equitas*, by the *exceptio pretoria*, rescued the subject afflicted by the abusively effective action. This kind of exception is not contemplated in our civil law system, nevertheless doctrine and jurisprudence often refer to it to punish the abuse of right.

In particular, this exception is based on two principles: *venire contra factum proprium* and the need to deny juridical protection to the subject who wants to get advantage from his/her previous incorrect behaviour.

By the expression *venire contra factum proprium* we indicate the behaviour of someone asserting a right after behaving unilaterally and making the counterpart trust in order to his/her will of not asserting it. The Court of Cassation usually distinguishes in this field between *exceptio doli generalis seu praesentis* and *exceptio doli specialis seu praeteriti*. By the former definition a general remedy is fixed against abusive behavior put in act with malice present at the moment of the presentation of judicial question. The second definition, instead, is put in defense of the party who intends to highlight in the judgment phase the abusive behavior at the moment of the conclusion of the contract. In this last case, actually, we deal with incident malice influencing the possible ways of concluding the contract and its own conditions. One concerns the functional moment, the other one the genetic moment of the contract

### 3.4 The abuse of process right by the judicial subdivision of credit

Doctrine and jurisprudence have dealt with the problem of admissibility of the so-called judicial subdivision of credit, i.e. the possibility, by judicial way, for the creditor to ask for the subdivided accomplishment of an originally unique performance, as it would be based on the same contractual relation. A first ancient affirmation considered legitimate that behaviour of a creditor acting in judgment to ask for subdivided accomplishment of credit, particularly according to art.1181 c.c., admitting partial accomplishment of a performance.

Recent jurisprudence, instead, considers this kind of creditor's behaviour abusive, as it is contrary to general principle of objective good faith and correctness, operating even in the

pathological phase following the missing or incorrect performance conclusion. The United Sections of the Court of Cassation<sup>24</sup> trying to compose the jurisprudential contrast created about this matter, have admitted this second vision, inverting the previous ruling n.108/2000 which actually had denied the invalidity of this kind of behaviour by the creditor. The mentioned judgment recognises for the first time the effectiveness in our legal system of a general prohibition of abuse of right, connected to art. 1174 c.c., to be read combined to art. Const. and art. 1175 c.c., allowing to affirm that each subjective juridical situation of advantage finds its origin in the same reason justifying the protection of laws. In particular the Court claimed that: “...a creditor for a determined sum of money, based on a single obligatory relation, is not allowed to subdivide the credit in several judicial requests of accomplishment, contemporary or split in time, as such a scission of the obligation content, operated by creditor for his/her exclusive utility with unilateral modification making worse the position of debtor, is in contrast with both the principle of correctness and good faith, which must define the relation between the parties not only during the execution of the contract but also in the possible phase of judicial request to obtain accomplishment, and with the constitutional principle of good process, as the parcelling of judicial request aiming to the satisfaction of the credit claiming in an abuse of process instruments offered to the party by laws, in the limits of a correct protection of his/her substantial interests”.

The teleological limit of the aim in the law attributing the right operates, indeed, in every field of civil law system, for real rights as well as for rights of credit. In process matter, in particular, the judicial parcelling of credit cannot be considered as in conformity with good faith and correctness, as it would expose the debtor to an excessive prejudice (see the extension of the co-active obligation he/she would be exposed; to the increasing process expenses, to the need of continuous opposition, the risk of contradictory judgement about the same event).

### **3.5 The responsibility of the bank in abusive granting of credit**

The abusive granting of credit consists of an allocation of financial resources from a bank to a businessman already having unsolved debts, so that it makes a third party a misleading trusting about the solidarity of the businessman's company when the third party comes in touch with it.

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<sup>24</sup> Court of Cassation, United Sections, n. 11794/2007

Actually, in allocating a loan the financial supporter should evaluate the risks deriving from the creditor's position as well as from the negative consequences on the market because of the credit granting.

As a matter of fact, whereas the supported businessman's credit is finally unsolved, the loan realises the prosecution of the state of insolvency and artificially maintains in activity the financially supported company provoking damages to the other operators of the same sector – the competing ones in particular – trusting its solvency.

According to the prevailing opinion in doctrine and jurisprudence, the abusive concession of credit would be source of a double responsibility for the emitting bank: a first form of responsibility having extra-contractual nature<sup>25</sup> dealing with of the creditors of the financed company, of any third party connected to it; of the competing companies suffering the prejudice deriving from the individual situation; and a second form, as well, having extra-contractual nature whereas a damage to the patrimony of the society takes place.

As concerns the extra-contractual responsibility, having to evaluate the subjective element of malice for the bank, the granting of financial support has been considered licit, whereas this one results to be granted to solve the company crisis on the basis of prevision of the reliance of the firm, aiming to a global growth of activity with a common advantage for all the sector operators.

Otherwise the supply has to be considered as far as the state of non-performing for the company could result, according to a prognostic judgement, irreversible.

### **3.6 The abuse of juridical personality in companies**

The abuse of juridical personality occurs when the company scheme is used to practise an individual business activity or in common, so that the real owner or the real administrator of the activity can be hidden, obtaining the aim of using in any case of the benefits of limited responsibility.

This could also be considered an indirect practise of a firm activity: it is a phenomenon characterised by the scission between effective director of the company and real *dominus* of it. The general accepted principle in our legal system in relation to the subjective imputation of acts and connected effects is the so-called “name spending” according to which the centre of

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<sup>25</sup> Court of Cassation, United Sections, n. 7030/2006

the imputation of acts and of the juridical effects is the subject whose name has been validly used in juridical transactions.

This principle, created in defence of the certainty of commercial and economical relations, implies that only the subject whose name has been used in economical negotiation will be obliged with the third party, although other subjects could be interested in the business conclusion and final receivers of the act effects.

After establishing this, whereas the phenomenon of company activity takes place by interposed person, there could be a dissociation between the one acting by his name the company business (hidden or indirect businessman) and the subject who offers the first party the necessary means, effectively leads the company, and takes all his/her own profits (real *dominus* of the company).

Solutions proposed by legal system, against such a distorted use of company principle and of the rules created for its effective activity, are connected to the technique of the overcoming of juridical person and of the *fictio iuris* of the dissociation of the juridical person and physical person representing its human structure, both allows to overcome the rules attributive rules of the benefits by the re-creation of an unlimited responsibility and the personal subjection to failure of individuals belonging to the juridical person in case of failure.

So in this case, too, the abuse of right is represented by the absence of protection for the subject that acts business activity over the limits allowed by laws.

Moreover there is a single doctrinal interpretation (theory of the power of a company) affirming that a principle of indivisibility between power and responsibility is practised in our system, so that a shared responsibility of the evident businessman and the company *dominus* can be pointed out.

This thesis applies a substantial criterion of imputation of company activity overcoming the simple formal criterion of “ name spending” and individuating the concrete forms of responsibility in the company activity.

### **3.7 The abuse of economic dependence in the field of third contract**

Art. 9 , L. n. 191/98, dealing with the theme of companies sub-supplying contract, affirms that: “... *it is forbidden the abuse by one or more companies of the condition of economic dependence involving a client or supplying company. We consider economic dependence the situation in which a company is able to determine, in commercial relations with another company, an excessive gap in single rights and duties.*”



*Economic dependence is evaluated considering also the real possibility for the party suffering an abuse to find satisfying alternatives on the market.*

*The abuse can even be based on the refuse of selling or buying, the imposition of unjustified contractual conditions both expansive and discriminatory, the arbitrary interruption of commercial relations in act. The pact giving origin to the abuse of dependence is invalid”.*

The content of this law presents an exceptional limitation private autonomy in the field of company relations. The sub-supplier is protected against the abuse by law as he/she is considered weaker contractor. The contract of sub-supplying is a contract between companies according to which businessman gives another sub-supplier businessman the task to produce parts of the final product or to act some phases of the productive process, whereas this can be divided into parts.

D.Lgs. n.231/2001 deals with the so-called asymmetric contracts, ruling delay in payment of commercial transactions in actuation of EC indications. In particular, laws affirms the invalidity of any kind of negotiation concerning the date of payment, as well as the consequences of delaying payment which could result hardly iniquitous with creditor's damage, even after considering the correct commercial praxis, the conditions of contractors and their commercial relations.

As the laws dealing with commercial relations shows out, there is a new contractual category, the so-called “third contract”, siding the first contract (traditional model) and the second contract ( stipulated between consumers and professionals). In the third contract, actually, the asymmetry is relevant as it concerns two professional categories: one as the stronger party, the other one as the weaker party in the obligatory relation.

In international system, the contractual asymmetry is highlighted in the *Principles of international commercial contracts*, a body of rules coming out from international praxis, by a scholar commission referring to UNIDROIT (international institute for the unity of private law).

These rules concerning pacts can be applied only when expressly established by contract parties. In particular art. 3.10 of the exposed principles allows the party to ask the invalidity of contract or of one single clause if, while concluding it, those give an unjustified advantage to the counterpart. The party can also ask for a judicial intervention aiming to create a new balance in the contract or in the single clauses determining a “gross disparity” in rights and duties.

The excessive advantage of one party in the conclusion of a contract is however considered illicit when an incorrect behaviour follows, in spite of the formal respect of rules.

Contractual asymmetries are analysed also in the *Principles of European contract law*, elaborated by the European contract law Commission: art. 4.109 establishes the sanction of invalidity of the contract or specific clauses provoking an unjust profit or iniquitous advantage, contemplating as well the possibility for the judge to correct the iniquity of the contract according to good faith.

## **CHAPTER IV**

### **Good faith as rule of validity of the contract**

The last jurisprudential elaboration of the principle of good faith is represented by its valorisation as a rule for the validity of contracts.

In its traditional interpretation, good faith is intended as a rule of behaviour for the parties and as a source of juridical obligations which, even though not expressly included in the contract, comes out from the general principle of social solidarity – see art. 2 Const.

The established remedy against the violation of good faith obligation and correct behaviour is the refund of damage provoked by illicit actions. Over the hypothesis of contractual and pre-contractual responsibility, we have also highlighted how the other possible solution from the party suffering prejudice for the other party's incorrect behaviour is the *exceptio doli generalis*, offering protection to the debtor against the abusive practise of the right of credit.

However, recent doctrine has established to overcome this notion of good faith to elevate it to a control instrument in negotiation autonomy, so to allow the judge a debate on the balance of the contract.

As a rule of validity, the violation of good faith will lead to the virtual invalidity of the stipulation ex art. 1418 c.c. because of the violation of an absolute code.

#### **4.1 Virtual invalidity and invalid protection in the Code of Consume**

Virtual invalidity are ruled by the first comma of art. 1418 c.c. affirming that: “... *the contract is invalid when it is contrary to imperative codes, except when laws establish differently*”.

These are non-expressly declared invalidities deriving from a specific law claim, which can be deduced from the contrast between the act of private autonomy and an imperative code.

A code is considered imperative when it is functional to the affirmation of public interest values and fundamental principles of the legal system.

As concerns the invalidity of protection, it has been introduced in our system to protect the weaker party against the contractual counterpart.

In this case, law reserves the power to claim the invalidity only to the protected contractor, denying it to the counterpart.

Art. 36 of the Code of Consume (D.Lgs. n.206/2005) punishes by invalidity, in a form called “protection invalidity” in defense of the consumer, weaker party in the relation, all the abusive clauses realizing a significant inequality of rights and duties in the damage of one party and the advantage of the other one. In particular, it is a sanction created to protect the procedural justice, or rather of the injustice not simply of the contract (substantive justice), but of the contract of the abuse acted from a stronger party on a weaker party. The whole code of consume offers a range of laws and codes for the protection of the consumer getting in contact with a professional in the asymmetrical relations in which there is no real individual negotiation similar to another one.

As an evidence of this, we can see art. 2 of the analyzed code, recognizing as a fundamental right for consumers the one of correctness, transparency and equity.

#### **4.2 The violation of information obligations by a financial intermediary**

The Unique Text about financial intermediation (D.Lgs. n.58/1998), as well as the Consob actuation rule code n. 11522/1998 impose to the financial operator several information obligations to give to the consumer, related especially to the risks connected to financial negotiations and investment.

Jurisprudence dealing with the topic in recent years has elaborated two thesis in the attempt to define the sort of contract stipulated in violation of information obligations exposed.

A minor trend supports the invalidity of contract, needing to protect the investing consumer who because of the information deficit, hasn't been able to develop a free conviction about

the contract stipulation. According to this point of view, actually, the law imposing information obligations for the financial intermediary would be part of those imperative rules – see art. 1418 c.c., whose violation would provoke an established virtual invalidity by law.

In particular, this thesis is based on the assumption affirming that whereas we have, like in this case, a relation of asymmetrical relations it is not possible to distinguish between behaviour and validity rules of the contract.

As a matter of fact, the asymmetry of parties' positions leads the weaker party to be influenced by the other one's prevalence so far that he/she will not be able to develop a full and autonomous knowledge and awareness of the content of the stipulation.

It is useful to repeat the distinction between behaviour rules and validity rules of the contract to understand better the matter of the doctrinal debate.

The rules of validity of the contract establish its structural features and impose to the contractors duties to be observed for the final validity of the contract itself.

The rules of behaviour, instead, fix the mutual behaviour obligations and define the correctness of a power practised on a determined subject.

The main difference between the rules of validity and behaviour concerns the effects on the contract and on the responsibility in case of their violation: the first ones determine the invalidity of the contract if violated; the second ones determine only the pre-contractual or contractual responsibility of the party violating them and the following refund to the damage.

The major theories seem to be in favour of the inclusion of this rules in the matter of information obligations by the financial intermediary within the context of rules of behaviour, not of the rules of validity of the contract.

Jurisprudence has, in fact, claimed that articles 1418 c.c., recalling the imperative codes, whose violation gives place to a virtual invalidity, refers to those rules forbidding the contract to be stipulated in its structure, content and form, not being included in the whole of imperative laws, those ones who forbid the incorrect behaviour in pre-contractual phase<sup>26</sup>.

According to all this, the financial intermediary not supplying the necessary information, or rather supplies incomplete information, not sufficient to fully protect the weaker contractor in the relation against the risks of the negotiations, violates the rule which doesn't involve the prohibition of the contract, but denounces the incorrect pre-contractual behaviour in application of the general rule in art. 1337 c.c. in these cases the sanction of the invalidity has to be excluded, not just as excessive but also as not necessary to protect the interests of the

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<sup>26</sup> Court of Cassation, Sez. I, n.19024/2005.

weaker contractor who, in spite of the information gap, would rather maintain the stipulated contract.

The major thesis then has been adopted by the United sections of Cassation<sup>27</sup> considering unjustified the use of the instrument of protection of the radical invalidity of the contract in case of simple violation of rules of behaviour.

In particular, according to the Court, the violation by part of the subjects authorized to the performance of financial investment services of behaviour rules which impose information obligations will give origin to the refund remedy as a pre-contractual responsibility whereas the violation refers to a previous or contemporary phase in the contract stipulation.

The violation of the obligations of information dealing with the following phase of the stipulation can assume the traits of true contractual non-performing, whereas indications in art. 1455 c.c. are integrated for the resolution of the non-performed contract.

Jurisprudence comments and affirms a relevant principle of good faith and correctness: “... *the obligation of good faith and of behaviour in general are absolutely connected to circumstances in the concrete case to be considered definitive principles of validity which, concerning the certainty of relations, should be verify according to pre-fixed rules*”.

This principle seems to reduce the expansion of good faith limits as a general principle in legal system for the hetero-integration of contractual content.

#### **4.3 Distinction between substantive justice and procedural justice: economical and juridical balance of the contract**

As concerns contractual autonomy we usually distinguish juridical and economical balance of the contract. The first one is the synthesis of rights, obligations, duties, responsibilities and risks deriving from the contractual program; the economical balance, on the contrary, concerns the economic value of the performances in contractual negotiations.

Doctrine and jurisprudence consider the principle of mastery of will or will dogma absolutely out of discussion as the judge must not interfere with the economic balance of the contract, an aspect kept out of the control of law system being part of the wide sphere of contractual autonomy of the parties.

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<sup>27</sup> Court of Cassation, Sez. I n. 26724/2007

In spite of the macroscopic disproportion in the field of negotiation performances, our legal system cannot interfere with the individual freedom owned by parties.

Recently jurisprudence has questioned about limits in jurisdictional discussion on the congruity and equity of contractual program. Actually, according to an advanced hermeneutic reconstruction contracts should be characterized by a *quid minimum* of equity and proportionality.

Doctrine has recently dealt with the theme of economic balance especially in the field of contractual relations affected by the weaker position occupied by one of the contractors: just think of to consume contracts (second contract) and to the relation between professionals (third contract).

The new evaluation of the limits of jurisdictional debate about economic balance of the contract moves from the re-interpretation of the limits of contractual autonomy according to the central role of the principle of social solidarity – see art. 2 Const.

Concerning this law affirms that “...*there is no real freedom when it is not arbitrary and unlimited. The freedom of a system based on solidarity must be ruled, conformed to high values the system inspires to*”<sup>28</sup>.

So according to this principle negotiations should not take place or be considered valid when they are objectively iniquitous.

#### **4.4 Possible remedies from jurisprudence to contractual misbalance**

Jurisprudence has questioned about possible remedies against contractual misbalance over the hypothesis specifically affirmed by laws.

According to a first thesis the damaged party could try refund action ex art. 1337 c.c. so obtaining an equivalent refund.

A second thesis, on the contrary, tends to affirm the invalidity of a iniquitous contract. In particular, as we have already pointed out, it would be a virtual invalidity because of the violation of imperative laws, ex. Art. 1418 c.c.

In the same time we have noticed that a majority jurisprudence has overcome this theory and offered two original solutions: the resolution of the contract as non-performed and damage refund.

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<sup>28</sup> P. PERLINGIERI, Relazione di sintesi, in *Equilibrio delle posizioni contrattuali e autonomia privata*, Napoli, 2002, page 167.

The resolution of the contract in particular would take place in all cases where the violation of the principles of good faith, correctness and equity of the contract concern the executive phase, affecting the correct performance of contractual obligations imposed to the parties.

Damage refund, instead, would be a consequence of the pre-contractual responsibility every time the violation of these principles takes place in the negotiation phase, before the final stipulation of the contract.

The possible intervention of the judge on the economical balance of the contract is clearly so limited, being not allowed to substitute the parties in the practise of their negotiation autonomy.

So the judge could eliminate the whole contract or single clauses only in those cases established by law.

In other cases the judge's intervention would just preserve or correct, aiming to re-establish equity in negotiation without overcoming the sphere of free contractual autonomy

## CONCLUSIONS

The global exam of the evolution of the principle of objective good faith in jurisprudence highlights the fact that the hermeneutic speculation on it reflects the defence of constitutional values of social solidarity, of equality and of the social function of property.

Actually the central position assumed in our system by the supreme principles expressed by art. 2, 3, 41 and 42 Cons. has led to the re-interpretation and to the following re-definition of the limits to private autonomy in the direction of the balance of contrasting interests found out in the discipline of obligatory relations.

That way the great consideration reserved to the contractual autonomy has gradually decreased to leave its place to the protection of the weak contractor, of the counterpart's contractual trusting, of the appearance of rights, of the so-called substantial equality: all principles permeating in general the canon of good faith.

The phenomenon interests civil right as well as all other branches of law: for instance, the increasing number of omission crimes, both improper or penal, as a consequence, them too, of the principle of social solidarity; as concerns administrative laws, just consider the growing highlighting of occasions of citizen's participation to administrative procedures (L. n. 241/1990) as a direct consequence of the duties of social solidarities and of the engagement in public life expressed by art. 2 Const.

So private autonomy itself becomes a means to obtain higher aims of social solidarity in a system proposing the contract as an instrument with multiple functions and uses, aiming the realisation of the contractors' interests besides other super-individual interests, sometimes prevailing.

So we can affirm the hetero-integration of contract, whose content corresponds not just to what the parties has established while stipulating it, but even to anything valid to integrate it according to laws: habits, equity and good faith.

It is true that in observance of constitutional principle an interpretation of contractual autonomy is expected according to good faith, but it is also true that the limits imposed by laws and the wideness of the judge's debate about the contract cannot reach the unexpected invalidity of the effects of a private pact, invaliding the act itself.

This limit to the expansion effectiveness of the principle of good faith is summed up by the famous judgement in 2007 we have already exposed, by which the United Sections clearly affirm the distinction between validity and effectiveness rules in the contract.



In that occasion, the Court of Cassation clearly established the definitive principle according to which forms of invalidity cannot derive from the violation of the behaviour rules of good faith.

Official pronouncement surely represents a margin to the uncontrolled expansion of the principle of good faith and clarifies the need of compensating the consequences of the violation of behaviour rules by refund means.

Referring to our analysis it is clear that only when the protection of individual interests is put in act, laws must impose incisively their intervention on contractual autonomy, limiting its expansion, balancing as well opposed interests and pointing out the prevalence of the collective interest on the individual one.

Supporting this vision, we can consider the several hypothesis of invalid protection presented dealing with contracts with consumers or dealing with contractual relations between companies, whereas the need to keep the economic contractual balance safe prevails, according to the market needs, to guarantee the certainty and security of commercial negotiations.

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