ROMAN MARKS TO EUROPEAN LAW OF THE CONTRACTS GOOD – FAITH

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Abstract

Beyond its political destinations, Europe is a civilization that each of its constituent parts has contributed its genius, over time. Or Rome, its original matrix, has sent her fundamental right. To what extent can it be another tool for reflection, for mutual understanding, sometimes of harmony, here's what seems to be necessarily raised, albeit briefly, by this favored means of communication and exchange, that it has always been the contract.

Since then the issue is explained by the need to have a contractual law in the middle of this community adapted to the needs of this new burning community, in Europe of the beginning of the third millennium. In fact, market opening has led to considerable development of trade between the EU-counties and this is exactly cross-border flow through contracts.

In this context we aimed to determine the role that it has one of the most important and current principles of law, that of good - faith in European contract law building.

It is known that good - faith is experiencing a very special embodiment in the contract, where it assumes many functions. She is the subject of many studies and analysis and is likely to grow rapidly in national and supranational rights.

Although contract law has evolved considerably, the theme is present and justified, under conditions which the Roman foundations remain. European contractual universe and its possible developments do not exclude but require an approach in terms of Roman law.

Methodologically, the paper is structured as follows: good - faith in contracts, the birth and evolution of the concept (ancient Rome, Middle Ages, modern and contemporary) and contemporary applications - abuse of right, information requirements, hardship principle.

Key words: *obligation, the consumer, unfair terms, abuse of rights, autonomy of will.*

1. Introduction

Roman private law is the most powerful element, because it was mostly applied, especially the law of obligations and contracts. Pragmatism has known the most beautiful success in contracting, indispensable to the development of trade in the bosom of a mosaic of communities that had, first of all its members to facilitate exchanges.

Today, in Europe at the beginning of the third millennium, the varieties of rights appears as an obstacle against trade and develop economic wealth. Multiple objects of creation and adjustments, contract law has evolved considerably, however, divergences between national laws impede the functioning of the internal market of contracts. To meet these needs are known actions to develop a European code of contracts, actions based on co-creation of a common legal culture.

The importance of our study is that it explains to what extent the roman legal approach still deserves to be considered in context with a profound mutation and the phenomenon of acculturation seems inevitable.

In this sense we proposed to determine the role that has one of the most important and actually principles of law, the principle of the good faith, in building the European contract law, knowing that good faith assumes more functions in contractual positions.

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Interpretation may have a role completely, modifying or extinguishing, merging these various issues sometimes. This could qualify for „good - faith chameleon".[1]

A significant part of work regards good - faith approach in historical perspective, especially since the concept is subject to all current attentions and is likely to grow quickly in the national and supranational rights.

The idea of this paper was born from the work of the „European contract law Committee" chaired by Ole Lando, which drafted the *European law principles of contract*, result of a concerted European action, if not common in this area

The project consists in presenting the „reflection of a pool of solutions to the problems of contract law" and a simple glance at the headings of *Principles* makes it possible to find a number of familiar concepts, existing already before our époque to the attention of magistrates and lawyers in Rome as well: good faith, consent, error, coercion, fraud, price, assignment of receivables, etc. penalty for failure, etc.

The structure and content of work is consistent with the theoretical requirements of the problem, but taking into account the practical realities of business

It is also in line with recent and intensive doctrinal, legal and jurisprudence perspectives concerns on accomplished actions and perspectives for developing an European code of contracts.

2. Paper content.

2.1. Good - faith in contracts

Cicero defined *as honesty in words* (*veritas) and fidelity (Constantia)* in commitments[2], good - faith is found in the various fields of private law, which reserves for it the specific rules that can be invoked and can produce legal effects[3].

However, it is recognized that good - faith experiences a very special embodiment in the contract. And more, good - faith meets new significance in the recent developments in contract law, presenting new situations of the old principles of law.

Good - faith in contracts is as objective behavior rule: not to harm the other party. In this sense be interpreted as art. 970 par. (a) of the Civil Code [Art. 1134 par. (3) Civil Code fr.] that: *agreements to be executed in good faith.*

The code meaning that the authors have given to the legal text, these provisions require the implementation of the contract in accordance with the commitments made under contract or under the given word. Although conflicting interests, with the finalized agreement, the parties have created a common law, which dictates a behavior consistent with the honesty required in good faith.

Fidelity task execution and contracting parties to cooperate are depicted as two aspects of good faith to enforce contracts[4].

But, invested in solving the cases regarding the sanctions of the behavior of the contracting parts, the courts appealed to this statutory text to interpret the behavior of the contracting parties during pre-contractual period of time.

In this context, most often based on lack of clarity artifice of the moment that separates the contract signing from the contract's execution, judge imposed contractual penalties in case of pre-

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[1] Y. Loussouarn, *Rapport de synthèse*, in *La bonne foi (journées louisianaises),* Travaux de l´association Henri Capitant, (Paris: Litec, 1992, tome 43), 14., apud René – Marie Rampelberg, *Repères romains pour le droi européen des contrats,* (Paris: L.G.D.J. – Montchrestien, 2005), 43.

[2] Marcus Tullius Cicero, *De officiis,* L I, §.7., apud. Dimitrie Gherasim, *Good faith in civil legal relations,* (Bucureşti: Academy Publishing House of the Socialist Republic of Romania, 1981), 7.

[3] It is also the case for many applications of good faith in relation to real rights (subjekt of this study). See also, Felician Sergiu Cotea, *Good - faith. Implications of ownership,* (Bucureşti: Hamangiu Publishing House, 2007), 20-7.

[4] Dimitrie Gherasim, *op.cit.,* 78.

contractual breach of good faith or contrary, non-contractual penalties have been applied to stage an event of default of obligations during the contract[5].

However, while decisions take her into account, the lack of autonomy of good faith does not ensure full effectiveness[6].

Therefore, under the pressure of new social and economic phenomena that requires balancing the demands of fairness and legal certainty, the principle of autonomy with its subspecies: freedom to contract, the binding force of contract and relative effect of contract, is redesigned, it talks about becoming more than a new culture of contract[7].

Coupled with another concept of maximum generality, this also justifies the intervention on the contract, namely: public order, good - faith proves its effectiveness. As a rule it limits freedom of contract and autonomy of will by default.

2.2. The birth and evolution of the concept

2.2.1. Rome

At Rome, until around the third century before Christ, in an era of change less frequently, it was necessary to conclude the contract, to respect the solemn forms, verbal or written. With time, geographical and demographic expansion of the Roman Empire is increasing a disorder in his law, especially in the field of contract.

Relations with the peoples with different traditions, not Roman citizenship status, could not be conducted in the *ius civile*, the privilege of citizens to the third century after Christ, when by an edict of Emperor Caracalla, seems to grant citizenship to all free peoples of the Empire; this makes it indispensable rules for all. All of them are *ius gentium*, less formalistic, no way religious.

In the context of trade with the pilgrims, rapidly growing, area of business is preferred. Generated by practice, this right is reinforced by the edicts of praetorians and provincial governors, the imperial constitutions and jurisprudence.

Emergence of the concept of good - faith is the essential foundation and Greek thought influence its consecration[8]. In fact, philosophical thought practiced by Greek allows Romans to reach the fundamental concepts and introducing the notion of good - faith in relationships of obligation and other innovations of classical Roman law, which remain the basis for modern legal systems, would undoubtedly have been possible without the Greek inspiration.

This new conception opens the contractual system to ethics of fair and equitable contract, the latter after Cicero's dream, linking all people, citizens or pilgrims, in the *boni viri* universal society, appertaining to the people well intended.

Bona fides obliges the judge to decide who should answer each other and on this basis, *ius gentium* introduces a fundamental principle in contractual matters: consensualism.

Thus, the contract is distinguished from consensual agreement as strictly as is sanctioned by an act of „good - faith", allowing discretion of the judge unknown until then[9].

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[5] Varied in this respect is the French law regarding penalties for fraud and hidden defects in material or means available to the debtor's fingertips - the victim of lack of information. For more, see: Y. – M. Serinet, *Erreur et vice caché : variations sur le même thème,* in *Le contrat au début du XX – e siècle, Études offertes à Jacques Ghestin,* (Paris: L.G.D.J., 2001), 789; M. Fabre – Magnan, *De l´obligation d´information dans les contrats, Essai d´une théorie,* (Paris: L.G.D.J., 1992), 425.

[6] J. Calais – Auloy, F. Steinmetz, *Droit de la consommation,* 4e éd., (Paris: Dalloz, 1996), 161.

[7] For more, see Tekla Tibád, „Findings unfair clauses to consumer contract", in *Romanian Journal of Business Law* (4/2005), 39 – 45. C. Prieto, *Une culture contractuelle commune en Europe,* (Droit 21, 2002), 4 apud René – Marie Rampelberg, *op.cit.*, 9.

[8] S. Kerneis, *Fides en droit romain. Aux origines de l´obligation juridique,* Conférence à l´École doctorale des Sciences juridiques du 25 avril 2001, apud René – Marie Rampelberg, *op.cit.,* 44.

[9] Emil Molcuţ *Roman Private Law*, Revised and enlarged edition, (Bucureşti: "Universul" Legal Publishing House, 2004), 77-8.

In such an action formula it is prescribing to the judge to seek - to assess the value of the conviction, all it has to give and accomplish as good - faith; whether it allows to know if the behavior of one of the parties is disproportionate to the attitude of a „loyal man". Moreover, good - faith is a means to temper the rigidity of contractual terms, the judge, in his interpretive mission, also using equity.

To illustrate the importance of the concept in Rome as well as its limitations, we created the site as a reference base of information, misuse of law and improvidence.

For the first issue, the example of the sale contract, the archetype of consensual contract of good - faith can better outline the proper function of good - faith in the Roman law, and in particular its completive role. The safeguards put into account of the seller, the Roman law required it to inform the buyer of any event that could disrupt its newly acquired right.

Abuse of law draws attention, as some of the most important roman provisions were almost taken by some major legal systems, such as the German system. Thus:

- a party can not acquire a right through dishonest conduct;
- loses its right - is German *Verwirkung* - if it does not run his own service, etc.

In connection with improvidence, Roman law has not established that such lack of foresight theory. Few passages of lawyers, such as Ulpianus, refer to it. However, certain writings of Cicero, Seneca and St. Augustine testify the existence of Rome, in the absence of specific clauses, recognition of the principle of *rebus sic stantibus*.

For example, the guarantee against eviction arises from simple contract term value. Parties are free to use it or not. However, classical jurists admit appeal to the action of "good - faith" open automatically to the purchaser, if the seller has volunteer sold a thing whose property or free and undisturbed possession by the buyer may be disturbed, because there is violation of good – faith obligations[10]. Therefore, the action can be exercised whenever the seller will refuse to insert into a contract stipulation regarding the guarantee of eviction. It is true also for the guarantee against hidden defects. Admitted first in the archaic *mancipatio,* she current becomes a current clause in the sales contract in the classical age. The action exercised by the buyer is admissible whenever the action does not meet the specifications announced by the vendor[11].

His defraud is similar to a fraudulent action, but buyer must demonstrate his bad faith.

Thus, with the edicts issued by edili curuli (*aediles curules*) in the II-I centuries before JC, it has the means of action designed to push the pressure to compel the seller to accept a contractual guarantee clause of hidden defects.

2.2.2. Middle ages

Jurists of the XII-XIV century perceive the concept of good - faith after three different approaches. First, I see him linked to the given word covenant. Force of the given word is explained by appealing to the concept of natural obligation that exceeds the requirements of the law. On the other hand, good - faith and fairness seem to oppose such lawyers, as in Rome, fraud and injustice. Finally, they consider that the first may involve unforeseen obligations in the contract, but an honest man respects it when concluding an agreement.

For a long time, the authors have never made the connection between nature and substance of the contract, on the one hand and good - faith and fairness on the other[12]. They study good - faith in terms of morality. Being „right rules of conscious life"[13] it is inherent to acts done in society, particularly in the contract; thus concluded that all contracts are good - faith, but this approach

[10] Emil Molcuţ, *op.cit.,* 293-4.
[11] Emil Molcuţ, *op.cit.,* 295.
[12] R.Zimmermann et S. Whittaker, *Good Faith in European Contract Law,* (Cambridge, 2000), 105.
[13] René – Marie Rampelberg, *op.cit.,* 48.

reaches prohibit enrichment without cause or deception arising from endangering natural law and equity, as was the case in Rome.

Actual efforts of lawyers to systematize the concept good - faith in terms of enrichment without cause, have strongly contributed to the spread in different legal systems.

2.2.3. Modern times and modern ages

French Civil Code of 1804, greatly influenced by the roman concepts and techniques, did not give a true devotion to the good – faith[14]. The abandonment of the good – faith necessity strongly influenced the doctrine that has almost forgotten the concept. It is clear that the drafters of the Civil Code did not want to make this a general principle, beyond contractual matters. Article 1134 has only one interpretative purpose of the conventions and is merely a tool in the hands of judges[18]. Its importance is therefore limited.

This preference is mostly given to the principle of autonomy of the will which includes strong legal thinking in the nineteenth century and first half of the twentieth century[15].

Involving the binding force of contract and its intangibility, it leaves little place for the good - faith as a principle of law correction.

The Civil Code interpretative doctrine in the nineteenth century refers to three main ideas on the good - faith.

The first is the rejection of the Roman distinction between strictly law contracts and agreements as good – faith.

The second idea links the good - faith with the equity, that should dominate the in the interpretation of contracts.

A third idea: good - faith can allow the judge to make a value-judgment on the parties' conduct.

Between the two wars, authors such as Demogue or Ripert, begins its return to the contractual sphere[16].

According Demogue she serves as the foundation for the cooperation obligation imposed on each party, which should aim to achieve contract purpose as well[17].

Ripert believes that the reference to the good - faith is the means used by the French law to include a moral rule in the contractual relationship[18].

In *usus modernus pandectarum,* German law continues to distinguish between agreements as strictly law and contracts of good - faith.

This dichotomy will remain until age of Pandects School in the late nineteenth century.

Contracts for good - faith were considered more flexible, the judge having a broad discretion for interpretation here.

Based on the roman concept of *bona fides*, German doctrine of the last century has developed its own theory about the good – faith.

The German authors have proposed for good - believe two terms, namely: *Treu und Glauben* - meaning loyalty and trust as required in legal acts and *guter Glaube* with the meaning of as wrong and excusable faith, protected as such, equivalent to a right[19].

Under these two forms good faith is founded on fair and honest intention.

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[14] J.-P. Chazal, *De la signification du mot loi dans l´article 1134 alinéa 1 er du code civil,*(RTDciv 2001) 263, apud Tekla Tibád, *op.cit.,* 44.

[15] Tekla Tibád, *op.cit.,* 30-31.

[16] P. Stoffel – Munk, *L´abus dans le contrat, essai d´une théorie,* (Paris: LGDJ, 2000), 70.

[17] R. Demogue, *De la déclaration de volonté,* (Pichon, 1902), 351 apud. Tekla Tibád, *op.cit.,* 40.

[18] G. Ripert, *La règle morale dans les obligations civile,* (Paris: LGDJ, 3e éd., 1935, nr. 6) 11, apud. Tekla Tibád, *op.cit.,* 40.

[19] Dimitrie Gherasim, *op.cit.,* 26.

Going further than his French counterpart, the German Civil Code, BGB, reappraise, at § 138, the notion of contractual morality, resumed from the Roman conceptions. Under its provisions, is void "any legal act contrary to morality".

In particular is invalid any legal act whereby a person, exploiting the need, ease or other non experience, promises or grants, either to himself or another person in return for such a benefit, of economic benefits exceeding the value of the benefit to a point as well - taking into account the circumstances - these economic benefits are disproportionate to the benefit of a shocking manners[20].

Cicero's vision is clear here. Also, under § 157 and 242: "Contracts must be interpreted as required by good - faith, considered permitted uses in business" and "the debtor must provide services as required by good – faith considered permitted uses in business".

These rules allow the judge to guide the interpretation of the contract as required by good – faith *(Treu und Glauben)*, but also to revise or to rebalance the name of fairness[21].

German law has remained more pragmatic than the French law, its more objective approach requires Parties to behave honestly, whether a failure or an action.

But here the emphasis is on the declared will of contractors, contrary to French law, seeking their real intention, uploading in this way the good - faith with a dose of subjectivity.

Whatever the system, contemporary judge may, as in Rome, to interpret the contract using the good - faith to determine the content or complete it.

It is a proof of the continuity of Roman law because „the idea of creative and corrective function of the *bona fides* remained vital and operated in used German law"[22].

German doctrine has influenced many legal systems, such as Austria, Switzerland, Holland or Portugal.

Dutch Civil Code in 1992 goes away as good - faith not only completed the obligations arising from the contract here, it may also modify and extinguish them[23].

The principle of good faith does not receive equivalent recognition in *common law* systems. Moreover, in English, *good faith* only denotes a state of mind: will to act honestly and fairly. It is a subjective concept: a person should not exercise a way of knowing she would have neither a benefit only with the intent to harm the other party.

In retaliation, *fair dealing* means that to act with loyalty is an objective criterion[24].

It should be noted that in the *common law*, the existence of a right is intimately linked to that of a procedure as in Roman law: "*there is a right if there Is a Remedy*": absence of good - faith is penalized by the denial of appeal as discretion doctrine of *estoppel*[25].

In Romanian law, the Civil Code does not contain a definition of good - faith but attached it to various forms of manifestation in the legal relations

According to art. 970 par. (1) of the Romanian Civil Code (precise transposition of the art. 1134 par. (3) of the French Civil Code), the good - faith means the obligation of loyalty and cooperation that requires the parties to the contract execution[26].

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[20] René – Marie Rampelberg, *op.cit*, 50.

[21] R. Zimmermann, S. Whittaker, *op.cit.*, 30.

[22] F. Ranieri, „Bonne foi et exercice du droit dans la tradition de la civil Law", *Revue international de droit comparé*, (1998), 1072.

[23] René – Marie Rampelberg, *op.cit*, 51.

[24] For a comparative approach to the good - faith and its possible functions in a future European Civil Code, see M. Hesselink, *Good Faith,* (Toward a European Civil Code, Ars Aequi Libri, Kluwer Law Internacional, 1998), 285 – 310.

[25] Rule of consistency. Fore more, see K.R. Abbolt, N. Pendlebury, *Business Law,* ed. a VI –a, (Londra: DP Publications, 1993), 72; A. Levasseur, *Les contrats en droit américain,*(Paris: Dalloz, 1996), 47 – 9.

[26] Liviu Pop, *Romanian Civil Law. The general theory of obligations,* (Bucureşti: Lumina Lex Publishing, 1998), 62-3; Ion Turcu, Liviu Pop, *Commercial contracts. Training and Enforcement,* vol.II, (Bucureşti: Lumina Lex Publishing, 1997), 33.

The New Civil Code expressly includes a text of good faith. Thus, according to art. 14 par. (1): „Natural and legal persons involved in civil legal relations must exercise their rights and perform its obligations in good faith, in accordance with public order and morals".

UNIDROIT[27] Principles and the Lando Commission[28] recognize the interpretative function good - faith. Rules of interpretation refer to this latter but also to other concepts, such as the common intention of the parties, uses, and their behavior. It also takes into account their legitimate expectation. However, research of the real will of the parties is less marked here than in some national legal systems. The concept is still larger than each of its applications.

Its purpose is to promote collective standards of correction, loyalty and reasonable in economic transactions. It complements the special provisions of the Principles and even get ahead of them when a limited application would lead to an unjust manifested result.

2.3. Contemporary illustrations

2.3.1. Abuse of law

Expansion of the role of good faith regarding the limiting of a right is observed mainly by the concept of abuse of rights whose applications multiply.

Many legal systems recognize that, using a contractual provision to its foreign purpose or its economy, the lender commits an abuse of law[29]. But bad faith may also result from the way that you use the law, for example, by malice or bad will.

Finally, the abuses can be found as a result of the use of law can achieve, especially when it involves a very large imbalance between rights and obligations of the parties.

In French law, based on doctrine and jurisprudence hesitations, is difficult to draw a clear border between the abuse of law and good - faith, undoubtedly related, first because hardly seems to be only a special application of more general principle of good - faith, even if it has acquired a certain autonomy.

In Germany, the right of a party may be limited, even off, if its performance is analyzed in an abuse, which was recognized in the assumptions, all inspired by Roman law.

Thus BGH, the German Federal Court of Appeal, vigorously interpreting § 138 of BGB, allows to revise the „continuing contract produce results intolerable, incompatible with the law and justice".

Anglo Saxon technique, of the *estoppel* prohibits to a person, who by his statements, his actions or his attitude, has led another to change its position to its detriment or benefit of the first one, to profit of own contradictions at the expense of other parties[30].

A person may be proud with a right for a valid reason: but this right should be protected in court if its foundation is questionable, *fortiori* if no reason justified it. Resumed by the international law, the concept of *estoppel* is the mark idea of a good - faith.

In the Roman doctrine it holds that the abuse of rights may include a very wide range of acts committed in the exercise of civil rights being contrary to good faith.

Thus: „... the exercise of a right is not abused when it is based on good faith; breach of good faith in this area means abuse of law".[31]

At the normative level, the New Civil Code provides in art. 15 that: „No rights can be exercised in order to harm or injure another or in an excessive and unreasonable, contrary to good faith", abuse of law involving such breach of good faith requirements.

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[27] Capitolul 4 relating to interpretation – art. 4.8.

[28] Capitolul 5 relating to interpretation – art. 5. 102.

[29] Ph. Stoffel – Munk, *op.cit.,* 61.

[30] C. Cam Quyen Truong, *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI,* (Paris: Litec, 2002), 245.

[31] D. Gherasim, *op.cit.,* 114.

In this area, Lando Principles repeated a number of current provisions implemented in various European rights.

So, the good - faith leads to interdict the forced execution of a contractual obligation, if includes unreasonable effort or expense for the debtor[32].

The principle of good - faith also applies to situations where one party creates complications for no reason.

Also, as in Rome, if someone has made statements or demonstrated behavior which acted on the basis of the contractual partner, is deprived of his right, if then take a position inconsistent with his past conduct[33].

2.3.2. Information

Rights enshrines the current legal framework, for example, guarantees completing the roman sale contract, above mentioned, developing more precise information obligation incumbent on the parties, based generally on the principle of good - faith.

This contract allows either complete or significantly change of its contents.

Thus, in the French law, the completive function in the strict sense [*stricto senso*] is lightened by doctrine and jurisprudence.

The judge has full power to impose contract obligations as the information, justified his approach by the principle of good – faith[34]. Even has the possibility to use the concept of equity to compel a party to provide information.

Some authors see, in addition, the guarantee against hidden defects, a consecration of the obligation to clarify the contractor on the not apparent defects of item[35].

Under German law, the buyer, properly informed - and it especially focused, but not limited to consumers - they can decide whether they want to acquire goods, even if there not in the best condition.

Contractors can not negotiate price but only as subject to a very precise and detailed information on the characteristics of the respective goods. The good - faith serves to judge also to define additional modalities of contract performance; so it may require from a party the information obligation (Aufklarungspflicht) when it was not expressly provided for by the parties[36]. In this area, the impact of the BGB reform in 2002, widely attributed to a willingness to conform to the spirit of European directives, had a special weight, as evidenced in particular the right of sale. Indeed, agreement on the quality of goods sold consists among others in information of the buyer about their characteristics. Also, the *common law*, as under French law, parties are required to change any information likely to influence their consent, but this is tempered by the fact of mutual obligation, to inform.

Finally if it is reasonably possible to obtain the information requested, the need of information doesn't provide the right to passivity.

Pre-phase fault information is often considered a vice of consent, meaning a reluctance fraudulent[37]. English law doesn't know the general need for information, only as statutory exception. The position was recently confirmed by the House of Lords refusing to admit a pre- contractual information requirement.

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[32] Art. 9. 102.

[33] Art. 2. 202 (3), 2. 105 (4), 2. 106 (2), 3. 201 (3), 4. 105 (1), 4. 109 (3).

[34] Court of Cassation, Civil Division, 28 February 1989, *Revue trimestrielle de droit civil*, (1990), 651.

[35] Under the French Civil Code Article 1641, M. Fabre – Magnan, *op.cit.,* 215.

[36] H. Shulte – Nölke, *The New German Law of Obligations : an Introduction,* apud René – Marie Rampelberg, *op.cit*, 57- 58.

[37] H. Mazeaud, L. Mazeaud, J. Mazeaud, *Leçons de droit civil,* tome II, vol. I, (Paris: Montchrestien, 1963), 154. For Roman law, see: D. Cosma, *General Theory of the juridical act*, (Bucureşti: Scientific Publishing, 1969), 167.

The duty to inform gained importance[38] in the Romanian law, finding a maximum application to the area of consumer protection.

It is found not only in regulating framework established O.U.G. no. 21/1992 on consumer protection[39], but also in various sector regulations such as those relating to contracts concluded away from business premises[40], the distance contract[41], insurance[42], credit for consumption[43] or tourism[44], etc.

European principles developed by the Lando neclect not more completive function of good - faith, and Article 4107, relating to fraud, provides a special obligation to information arising from this.

2.3.3. Lack of foresight

The systems that allowed a good general principle of good - faith, present throughout the contractual process, supports today the lack of foresight; Judges can then consider that a contractor of good - faith is committed under such circumstances, but it would not be done in other.

In contrast, rights hostile of recognition of general principle values of good - faith refuses to devote revising the contract for lack of foresight, in the name of respect for the binding force of conventions.

However, this objection must be refined by other techniques, the judges, particularly French judges, acknowledge implicitly the theory of the lack of provision.

Taking into account the theory of lack of provision in the contractual matter is due, in part, to the German doctrine and jurisprudence.

Under inflation that followed after the First World War, judges have wade interpreted the general concept of force majeure to include that of „economic impossibility" to free the debtor of commitments.

In addition, there is a school of thought, where the debtor is subject to benefit only in the limits of the good - faith, thus reviving the medieval jurists information.

Jurisprudential consecration of unpredictable theory, founded on the principle of good - faith, is maintained up to the reform of the BGB in 2002.

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[38] For more, see Ionuț - Florin Popa, „Undue influence and reciprocal obligations required information in contracts", *Dreptul review* (7/2002), 62 – 81.

[39] Republished under the provisions of art. V of Law no. 476/2006 amending and supplementing O.G. no. 21/1992 on consumer protection, published in Official Gazette no. 1018 of December 21, 2006.

[40] O.G. no. 106/1999 Contracts concluded away from business premises, republished under the provisions of art. V point. c) of Title III of Law no. 363/2007 on combating unfair practices of traders with customers and harmonizing regulations with European legislation on consumer protection, published in Official Gazette no. 899 of December 28, 2007.

[41] O.G. no. 130/2000 regarding protection of the consumer to sign and execute contracts away, republished under the provisions of art. V point. c) of Title III of Law no. 363/2007 on combating unfair practices of traders with customers and harmonizing regulations with European legislation on consumer protection, published in Official Gazette no. 899 of 28 December 2007.

[42] Law no. 136/1995 on insurance and reinsurance in Romania, published in the Official Gazette. no. 303 of 30 December 1995 was supplemented and amended successively by: GO no. 27/1997, Law no. 172/2004 (Official Gazette No. 473 of May 26, 2004), O.U.G. no. 61/2005 (Official Gazette No. 562 of June 30, 2005), Law no. 283/2005 (Official Gazette No. 897 of 7 October 2005), Law no. 113/2006 (Official Gazette No. 421 of 16 May 2006), Law no. 172/2006 (Official Gazette No. 436 of 19 May 2006), Law no. 180/2007 (Official Gazette No. 413 of June 20, 2007). On topic, see Irina Sferdian, *Insurance Law*, (Bucureşti: CHBeck Publishing, 2007), 81-6.

[43] O.G. nr. 50/2010 on credit agreements for consumers, published in the Official Gazette. no. 389 of 11 June 2010.

[44] O.G. no. 107/1999 on the marketing of travel packages, republished in the Official Gazette no. 387 of 7 June 2007. On topic, see Emilia Mihai, „About the contract for the sale of tourist services"*, Romanian Pandects* (5/2007), 40-2.

Currently, to revise the contract if circumstances change is legally permissible, regarding to § 313 BGB to disturbances on contractual basis.

German conception regarding the theory of lack of foresight has influenced many countries like the Netherlands, Portugal and Italy.

In the French civil law was developed the concept according to which the judge is entitled to amend the contract and in some cases unforeseen by the law, if during the execution of the agreement under certain unpredictable circumstances which broke the balance of the successive regular benefits, obligations of either party becomes very burdensome[45].

One of the first decision of the Commercial Court of Cassation Chamber of 3 November 1992 establishes indirectly an obligation to renegotiation of the contract when it became disadvantageous to one party from unforeseen economic circumstances[46].

Resorting to the notion of good - faith, the French judges accept the default theory of lack of foresight.

English law doesn't know the theory of unpredictability.

However, other means, admits that a change of unforeseen circumstances beyond the control of the contractual parties may amend the content of the contract at the point of making impossible his execution.

Founded on the notion of *frustration of the contract* contained an implied term, cancellation of the contract in case of impossibility of performance under a change of circumstances is justified by reference to the reasonable man.

English law also enshrines a notion that is no stranger to the idea of good - faith. Among other things, it grants the termination of the contract, requested by one party, in case of *economic duress*.

In Romanian law, the rule is binding power of the contract under Art. 969 par. (1) Civil Code: „legal agreements have the force of law between contracting parties". Excepting the principle of binding force of contract the doctrine accepted the revision of the legal act due to the breaking of the contractual balance as a result of changing of the circumstances agreed by the parties at the conclusion of the legal act[47].

The New Civil Code expressly states hardship principle in art. 1271.

Under these provisions the parties are obliged to negotiate in order to adapt the contract or its termination if enforcement becomes excessively onerous for one party because of a change in circumstances.

Then the text gives the possibility to the judge to adapt the contract to distribute the benefits equitably between the parties and losses resulting from changing circumstances, if the parties do not agree in a reasonable time [art. 1271 par. (3) letter a)].

Lando principles provide, in Article 6111 that the parties are obliged to fulfill obligations and to renegotiate „to adapt or end their contract if the performance becomes onerous for one of them by virtue of a change of circumstances."

Thus, we can say that the theory of unpredictability admitted by *Lando principles* bears the imprint of the good - faith.

3. Conclusions

Most contemporary authors refused to define the good - faith.

Finally, its ability to adapt to different situations is difficult to reconcile with an acceptance that limits it to a more rigid frame. In addition such a definition would limit excessive the scope.

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[45] G.Ripert, *La règle morale dans les obligations civiles,* 3 e, éd. (Paris: LGDJ, 1935),152 and following, apud Paul Mircea Cosmovici, *Civil law. Real rights. Obligations. Legislation.*, (Bucureşti: ALL Publishing House, 1994), 133-4.

[46] J. Mestre, *Revue trimestrielle de droit civil*, (1992), 760 - 1.

[47] Aspazia Cojocaru*, Civil Law, General Part* (Bucureşti: Lumina Lex Publishing House, 2000), 255 – 6; Sache Neculaescu, Civil Law, Introduction to Civil Law., (Bucureşti: Hamangiu Publishing House, 2008, 174 – 5.

Therefore, we have to return to Rome and Cicero's broad conception.

However, the polymorphism of good - faith compelled the doctrine, accusing finally this ancient concept because too moralistic approach, the other terms used to better identify the realities they cover.

Its use, combined with the equity, is surprising a little, regarding to the Roman and medieval history, because the two concepts are undeniably common foundations and frequently overlap, as already pointed out for Rome.

Still other elements were juxtaposed to the good – faith.

It is proposed triptych loyalty, solidarity and fraternity, they relied on the principle of proportionality or equilibrium contract[48].

But the base remains the more general concept of good - faith, often enshrined in the texts, on which resolves the question whether all other subdivisions of doctrine evolved, just as good - faith integrates these different aspects.

Obviously, *Bona fides* of the Romans is an open content; she always carried a correction effect of rigidity of the legal and contractual rules.

Its use today as over two thousand years is proving its full contribution.

It thus appears as a fundamental concept and we believe that the future research will have to deepen this topic. As well *UNIDROIT* and the *Lando Principles* give an exceptional imperative value. Moreover, its consecration dominants the European plan making the good – faith one of constitutive element of eventually *ius commune*.

References:

Books:

- Abbolt, K.R., and N. Pendlebury. *Business Law.* ed. a VI –a. Londra: DP Publications, 1993.
- Calais – Auloy, J., and F. Steinmetz. *Droit de la consommation.* 4e éd. Paris: Dalloz, 1996.
- Cojocaru*,* Aspazia, *Civil Law. General Part.* Bucureşti: Lumina Lex Publishing House, 2000.
- Cosma, D. *General Theory of the juridical act*. Bucureşti: Scientific Publishing, 1969.
- Cosmovici, Paul Mircea. *Civil law. Real rights. Obligations. Legislation*. Bucureşti: ALL Publishing House, 1994.
- Cotea, Felician Sergiu. *Good - faith. Implications of ownership*. Bucureşti: Hamangiu Publishing House, 2007.
- Fabre – Magnan, M. *De l´obligation d´information dans les contrats. Essai d´une théorie.* Paris: L.G.D.J., 1992.
- Gherasim, Dimitrie. *Good faith in civil legal relations.* Bucureşti: Academy Publishing House of the Socialist Republic of Romania, 1981.
- Hesselink, M. *Good Faith*. in Toward a European Civil Code. Ars Aequi Libri. Kluwer Law Internacional, 1998.
- Jamin, Ch. *Playdoierpour Le solidarisme contractuel,* in Le contrat au début du XXIe siècle, Études offertes à Jacques Ghestin. Paris: LGDJ, 2001.
- Levasseur, A. *Les contrats en droit américain*. Paris: Dalloz, 1996.
- Mazeaud, H., Mazeaud, L., and J. Mazeaud. *Leçons de droit civil*. tome II. vol. I. Paris: Ed. Montchrestien, 1963.
- Mazeaud, D. *Loyauté, solidarité, fraternité : la nouvelle devise contractuelle?* in *L´avenir du droit. Mélanges en hommage à François Terré*. Dalloz, PUF, Éditions du Juris - Classeur, 1999.
- Molcuţ, Emil, *Roman Private Law*. *Revised and enlarged edition.* Bucureşti: "Universul" Legal Publishing House, 2004.

[48] D. Mazeaud, *Loyauté, solidarité, fraternité : la nouvelle devise contractuelle?,* in L´avenir du droit. Mélanges en hommage à François Terré, (Dalloz, PUF, Éditions du Juris - Classeur, 1999), 603 and following; Ch. Jamin, *Playdoierpour Le solidarisme contractuel,* in Le contrat au début du XXIe siècle, Études offertes à Jacques Ghestin, (Paris: LGDJ, 2001), 441 and following.

- Neculaescu, Sache, *Civil Law, Introduction to Civil Law*. Bucureşti: Hamangiu Publishing House, 2008.
- Pop, Liviu. *Romanian Civil Law*. *The general theory of obligations.* Bucureşti: Lumina Lex Publishing, 1998.
- Rampelberg, René – Marie. *Repères romains pour le droi européen des contrats.* Paris: L.G.D.J. – Montchrestien, 2005.
- Serinet, Y. – M. *Erreur et vice caché : variations sur le même thème,* in *Le contrat au début du XX – e siècle, Études offertes à Jacques Ghestin,* Paris: L.G.D.J., 2001.
- Sferdian, Irina. *Insurance Law.* Bucharest : CHBeck Publishing, 2007.
- Stoffel – Munk, P. *L´abus dans le contrat, essai d´une théorie.* Paris: LGDJ, 2000.
- Turcu, Ion and Liviu Pop. *Commercial contracts. Training and Enforcement.* vol.II. Bucureşti: Lumina Lex Publishing, 1997.
- Truong, C. Cam, Quyen *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI.* Paris: Litec, 2002.
- Zimmermann, R., and S. Whittaker. *Good Faith in European Contract Law*. Cambridge, 2000.

Articles:

- Hesselink, M. „Good Faith". *Toward a European Civil Code, Ars Aequi Libri, Kluwer Law Internacional* (1998): 285 – 310.
- Mestre, J. *Revue trimestrielle de droit civil.* (1992): 760-1.
- Mihai, Emilia. „About the contract for the sale of tourist services". *Romanian Pandects magazine* (5/2007): 40 -2.
- Popa, Ionuț – Florin. „Undue influence and reciprocal obligations required information in contracts". *Dreptul review* (7/2002): 62 – 81.
- Ranieri, F. „Bonne foi et exercice du droit dans la tradition de la civil Law". *Revue international de droit comparé* (1998): 1072.
- Tibád,Tekla. „Findings unfair clauses to consumer contract". *Romanian Journal of Business Law* (4/2005): 39 – 45.