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**Good Faith in Civil Law Systems –  
A Legal-Economic Analysis**

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# Good Faith in Civil Law Systems – A Legal-Economic Analysis \*

*Ejan Mackaay*<sup>†</sup>

## Résumé

La bonne foi apparaît à la fois comme un concept fondamental dans tous les systèmes civilistes, avec une longue histoire remontant au droit romain, et comme une notion dont la nature et le contenu sont mal compris et controversés. Le présent texte vise à explorer dans quelle mesure l'analyse économique du droit permet de jeter un éclairage nouveau sur ce concept et de le clarifier ainsi.

Le concept de bonne foi est employé en deux sens distincts, que la doctrine traditionnelle identifie comme le sens subjectif et le sens objectif. En son sens subjectif, la bonne foi correspond à l'ignorance justifiée d'une situation juridique, en particulier une déficience de titre. L'ignorance est justifiée dans la mesure où la personne a pris les mesures adéquates pour l'éviter. L'adéquation est fonction de l'importance de l'enjeu et de la probabilité d'une méprise. Formulée ainsi, la logique rappelle celle des accidents et de leur prévention, développée dans l'analyse économique du droit de la responsabilité ou du *tort law*.

En son sens objectif, la bonne foi peut être présentée comme l'exact contraire de l'opportunisme, concept passablement déblayé dans la littérature économique. L'opportunisme se manifeste lorsque, dans un rapport de coopération entre deux ou plusieurs personnes, l'une d'elles s'affaire à modifier, par la ruse ou par la force, à son avantage et au détriment des autres, la répartition des gains conjoints résultant de ce rapport que chaque partie pouvait normalement envisager au moment de la création du rapport. Il perturbe le caractère gagnant-gagnant que doit avoir le contrat ou autre rapport de coopération et qui reflète la justice contractuelle. Le risque d'être victime d'opportunisme, de « se faire avoir », amène les acteurs économiques à prendre des précautions qui sont coûteuses et qui réduisent l'étendue des marchés. Le droit se rend utile en combattant l'opportunisme dans toutes ses multiples formes. En partie, cette défense prend la forme d'un éventail de concepts spécifiques qu'on trouve à travers les codes civils. Pour maintenir la certitude du droit, la bonne foi, concept anti-opportuniste de dernier ressort, mais aux contours flous, est employé seulement là où aucun concept spécifique ne peut faire l'affaire. Son utilisation devrait conduire à terme à de nouveaux concepts spécifiques qui vont mener une existence autonome dans le code. La bonne foi, comme absence d'opportunisme, demeure le principe résiduel sous-tendant l'ensemble du droit des contrats et des sociétés commerciales. La compréhension de l'opportunisme focalise l'attention du juriste sur des actes et des faits qui peuvent être pertinents dans des situations inédites d'opportunisme qui se présentent devant les tribunaux. L'analyse économique du droit permet de « retrouver » le concept de la bonne foi d'une manière significative, contribuant ainsi à la science juridique.

**Mots clés** : droit civil; contrat; bonne foi; opportunisme; analyse économique du droit.

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## Abstract

*Good faith appears at once as a fundamental concept in all civil law systems, with a long history going back to Roman law, and yet as one whose nature and contents are ill-understood and controversial. The paper is an attempt to find out what new light the economic analysis of law can shed on it to help to clarify it.*

*Good faith is used in two distinct senses, which traditional legal scholarship has identified as subjective and objective. In its subjective sense, good faith as justifiable ignorance of a relevant legal situation refers to having taken adequate precautions against such ignorance, the adequacy being a function of what is at stake and the likelihood of misapprehension. This is reminiscent of the logic of accident and accident prevention law developed in the economic analysis of tort or civil liability law.*

*In the objective sense of not taking advantage, good faith is analysed as the exact opposite of opportunism. On opportunism there is a reasonably well-developed economic literature. Reciprocal gain, the founding concept of contract and of extensions such as the law of business enterprise, presupposes the absence of opportunism. Good faith in this sense may be said to underlie all of contract law. Yet human nature being what it is, individuals may be tempted by opportunistic acts and their potential victims are led to take costly precautions to guard against it. Law can make itself useful by providing safeguards against opportunism that are less costly than what contracting parties themselves can come up with. Together, these safeguards have to be as wide-ranging as is opportunism itself, yet individually they have to be specific enough to ensure legal certainty. Good faith itself remains as a residual concept, to be applied sparingly, with which to tackle situations on which the specific concepts provide no proper grip. Yet at the same time good faith, being the quintessential anti-opportunism concept, underlies the more specific concepts one finds in the Codes and allows one to see their unity. On a different level, an understanding of opportunism focuses attention on acts and facts that may be relevant in concrete novel situations to be judged by a court, where opportunism may be an issue. Economic analysis of law allows one to make sense of good faith in a meaningful way.*

**Keywords:** *civil law, good faith, contract, contractual justice, opportunism, law & economics.*

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## Introduction

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

“...el principio de buena fe que debe estar presente en todo contrato. En efecto, como lo ha comprendido la doctrina y la jurisprudencia en nuestro medio jurídico, la buena fe contractual que exige el artículo 1546 del Código Civil, ha de estar presente en todas las etapas de desenvolvimiento del contrato, esto es, desde las negociaciones preliminares, pasando por la celebración y ejecución del mismo, hasta las relaciones posteriores al término del contrato inclusive.”<sup>3</sup>

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

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

<sup>1</sup> [http://www.fundacionfueyo.udp.cl/catedra\\_derecho\\_continental.php](http://www.fundacionfueyo.udp.cl/catedra_derecho_continental.php) .

<sup>2</sup> [http://www.fundacionfueyo.udp.cl/archivos/catedra\\_der\\_cont\\_informe\\_chile.pdf](http://www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_chile.pdf) .

<sup>3</sup> *Glide Diversiones Limitada con Compañía de Inversiones y Desarrollo Sur S.A*, 19/05/2008, N° Legal Publishing 39372, quoted in *Proyecto principios latinoamericanos de derecho de los contratos - Cuestionario Chile*, oct 2010 – Pregunta 1, nt 6 ([http://www.fundacionfueyo.udp.cl/archivos/catedra\\_der\\_cont\\_informe\\_chile.pdf](http://www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_chile.pdf) ) "... the principle of good faith that must prevail during the entire contract. Indeed as legal scholarship and case law in our legal environment have understood it, good faith as required by art. 1546 of the Civil Code must be present in all phases of the unfolding of the contract, that is from the preliminary negotiations through the entering into and performance of the contract through to the relationship following the termination of the contract."

<sup>4</sup> Argentina: art. 1198; Chile: art. 1546; Columbia: art. 1603; Uruguay: art. 1291; Venezuela: 1160. The responses from each of these countries can be downloaded from [http://www.fundacionfueyo.udp.cl/catedra\\_derecho\\_continental.php](http://www.fundacionfueyo.udp.cl/catedra_derecho_continental.php) .

<sup>5</sup> *Proyecto principios latinoamericanos de derecho de los contratos, Cuestionario Colombia*, Junio - 2010,

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

## I - Good faith as justifiable ignorance

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

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

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

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no 1-a-4, p. 3;

[http://www.fundacionfueyo.udp.cl/archivos/catedra\\_der\\_cont\\_informe\\_colombia.pdf](http://www.fundacionfueyo.udp.cl/archivos/catedra_der_cont_informe_colombia.pdf) .

<sup>6</sup> Proyecto principios latinoamericanos de derecho de los contratos, Cuestionario Colombia, Junio - 2010, no 1-a, pp 1-2.

<sup>7</sup> <http://www.servicioweb.cl/juridico/Codigo%20Civil%20de%20Chile%20Libro%20Segundo.htm> ;

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

"A possessor is in good faith if, when his possession begins, he is justified in believing he holds the real right he is exercising. His good faith ceases from the time his lack of title or the defects of his possession or title are notified to him by a civil proceeding."<sup>8</sup>

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

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

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

The problem for the court, and for any outsider for that matter, is that the relevant values are subjective and difficult to assess. What is the value to the

Translation: Good faith is the awareness of having acquired ownership of the thing by legitimate means, exempt from fraud or any other vice.

Thus as regards titles that can transfer ownership good faith presupposes the conviction that one has acquired the object from a person who had the faculty to transfer it and that no fraud or other vice has occurred as part of the act of transfer or the contract.

A mere error of fact does not stand in the way of good faith

But an error of law constitutes an irrefutable presumption of bad faith.

<sup>8</sup> The Civil Code of Quebec (CCQ) may be found here: <http://www.canlii.org/en/qc/laws/stat/sq-1991-c-64/latest/sq-1991-c-64.html> .

<sup>9</sup> Calabresi 1970.

<sup>10</sup> For surveys of the field, see Levmore 1994; Faure 2009.

purchaser of the good to be returned? What, the cost of precautions? As a rule of thumb, one would expect precautions to be more extensive as the good acquired is more valuable, but this will not get us very far. To make the decision problem tractable, the Codes of many countries provide a simplifying rule holding that acquirers who have to return a good to the true owner are entitled to the price they paid for it if they took the precaution of dealing with a merchant in similar ware or at an open market.<sup>11</sup> This criterion looks relatively easy to apply. Moreover, it contributes to the effort of restraining the market for stolen goods, by having the acquirer reveal the merchant dealt with, which facilitates policing efforts.

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

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

2163. "A person who has allowed it to be believed that a person was his mandatary is liable, as if he were his mandatary, to the third person who has contracted in good faith with the latter, unless, in circumstances in which the error was foreseeable, he has taken appropriate measures to prevent it."

In the light of the cost of accident logic, as the probability of a mishap

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<sup>11</sup> On the virtues of simple rules in a complex world, see Epstein 1995.

<sup>12</sup> Art. 1707 (CCQ).

<sup>13</sup> Arts 1323, 1362, 2163 CCQ.

<sup>14</sup> Art. 1452 CCQ.

<sup>15</sup> Cooter 1988, 2008

<sup>16</sup> Schwartz, 2011, pp. 16-18.

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

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

## II - Good faith as not taking advantage

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

### *A Good faith in law texts*

Good faith in this sense is a key concept in all civil law systems.<sup>17</sup> It played a major role in late Roman law and in pre-codification French law.<sup>18</sup> Within the modern civil law family, most civil codes have one or more general good faith provisions.<sup>19</sup> Besides the already mentioned systems of Latin American countries, the most prominent example is perhaps art. 242 of the German Civil Code, which has been interpreted expansively and plays a central role in the civil law of that country (*Treu und Glauben*).<sup>20</sup> The Dutch recodification towards the end of the twentieth century recognised as a fundamental principle of civil law the objective notion of good faith as loyalty in contractual dealings, for which the distinctive term ‘reasonableness and equity’ (*redelijkheid en billijkheid*) was introduced.<sup>21</sup>

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

6. Every person is bound to exercise his civil rights in good faith.

<sup>17</sup> Litvinoff 1997; Whittaker 2000a; Hesselink 2010.

<sup>18</sup> Charpentier 1996; Cordeiro 1996, 230; Litvinoff 1997, 1651 f.; Lluellas 2006, nos 1972 f, 1064 f.; Ourliac 1969, no 67, p. 83

<sup>19</sup> Hesselink 2010, 619 mentions: Art. 1134, section 3 French Civil Code; § 242 German Civil Code; Art. 2 Swiss Civil Code; art. 1175 and 1375 Italian Civil Code; Art. 288 Greek Civil Code; Art. 762, section 2, Portuguese Civil Code, artt. 6:2 and 6:248 Dutch Civil Code. For a survey, see Whittaker 2000a.

<sup>20</sup> Art. 242 BGB (German Civil Code): [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/); Wieacker 1956.

<sup>21</sup> Arts 3:12, 6:2, 6:258 similarly 1990

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

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

At the international level, good faith has found its way into the Vienna *International Sales Convention* of 1980 (art. 7) (providing that '(1) In the interpretation of this Convention, regard is to be had to (..) the observance of good faith in international trade'),<sup>22</sup> the *Unidroit* principles (art. 1.7) (providing that 'each party must act in accordance with good faith and fair dealing in international trade' and that 'the parties may not exclude or limit this duty'),<sup>23</sup> the *Principles of European Contract Law* formulated over a decade ago (Article 1:201: Good Faith and Fair Dealing (1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty.)<sup>24</sup> as well as the more recent *Draft Common Frame of Reference for European Private Law*<sup>25</sup> (I. – 1:103: Good faith and fair dealing - (1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment.)<sup>26</sup>

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

The United States are in an intermediate position. Until the 1960s, received scholarship was generally reluctant towards good faith.<sup>31</sup> That position changed

<sup>22</sup> *United Nations Convention on Contracts for the International Sale of Goods*, done in Vienna, 11 April 1980; <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> .

<sup>23</sup> Unidroit principles of international commercial contracts 2010 <http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf> .

<sup>24</sup> Lando 1999.

<sup>25</sup> DCFR 2009, 178.

<sup>26</sup> DCFR 2009, 178.

<sup>27</sup> See overview in Bayley 2009.

<sup>28</sup> A rather vocal advocate of this position is Michael Bridge; see Bridge 1984, 1999, 2011.

<sup>29</sup> For instance, Stapleton 1999.

<sup>30</sup> Zimmermann 2001, 170-171, summarising Zimmermann 2000.

<sup>31</sup> Summers 2000.

during the 1960s<sup>32</sup>. A seminal article by Summers in 1968 was influential in this change.<sup>33</sup> By the 1980s the concept of good faith had formally entered into American law through Section 1-203 of the *Uniform Commercial Code*<sup>34</sup> and Section 205 of the *Restatement (Second) of Contract*,<sup>35</sup> and thence into the law of various States.<sup>36</sup> By 1997 Farnsworth could observe that "the Americans have, or so it might seem, too many meanings of good faith."<sup>37</sup>

### *B Legal scholarship on good faith*

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

A wealth of recent legal scholarship attempts to clarify the contents of the concept.<sup>42</sup> In pre-revolutionary French law, good faith was considered to require 'that consent be valid, that parties abstain from trickery, violence, any dishonesty or fraud; but also that it be plausible and reasonable; and finally that the contract not be contrary to divine law, to good morals, nor to the 'common weal' (*profit commun*)'<sup>43</sup>.

In modern times, good faith seems to have taken on a narrower meaning in contract law ('objective good faith'). To capture this meaning, legal scholarship resorts to terms like "fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of solidarity, community standards of fairness' and 'honesty in fact,"<sup>44</sup> "an objective

<sup>32</sup> See for instance Farnsworth 1963.

<sup>33</sup> Summers 1968.

<sup>34</sup> <http://www.law.cornell.edu/ucc/ucc.table.html>

<sup>35</sup> [http://www.lexinter.net/LOTWVers4/restatement\\_\(second\)\\_of\\_contracts.htm](http://www.lexinter.net/LOTWVers4/restatement_(second)_of_contracts.htm)

<sup>36</sup> See overview in Sepe 2010.

<sup>37</sup> Farnsworth 1997, 161.

<sup>38</sup> Hesselink 2010, 622.

<sup>39</sup> Peden 2002, 246.

<sup>40</sup> Peden 2009, 61.

<sup>41</sup> Rolland 1996, 384.

<sup>42</sup> An extensive bibliography appears at pp. 156-170 in Zimmermann 2000, which itself is a most significant contribution to the literature. For a sample of recent contributions, see Litvinoff 1997; Lefebvre 1998; Widmer 1998; Van De Mensbrugge 1999; Jaluzot 2001; Jamet-Le Gac 1998; Grégoire 2003, 2010; MacQueen 1999; Powers 1999; Cohen 2002; Beatson 1997; O'Connor 1990.

<sup>43</sup> Ourliac 1969, 83, n° 67.

<sup>44</sup> Keily 1999, 17-18.

standard based on decency, fairness or reasonableness of the community, commercial or otherwise,"<sup>45</sup> "having regard to the interests of the other party"<sup>46</sup> and their French equivalents: 'loyauté',<sup>47</sup> 'honnêteté', 'intégrité',<sup>48</sup> 'fidélité', 'droiture', 'véracité'<sup>49</sup>, 'comportement loyal', 'souci de coopération', 'absence de mauvaise volonté', 'absence d'intention malveillante'<sup>50</sup>; the absence of good faith signals 'unconscionable' behaviour<sup>51</sup>, which in French is characterised as 'blâmable', 'choquant', 'déraisonnable'<sup>52</sup>. In some recent Quebec theses, good faith is described as present everywhere,<sup>53</sup> "a foundation of contract, necessary to attain contractual justice,"<sup>54</sup> yet "not standing in the way of a party's taking advantage of a healthy competitive situation, but tending to avoid abuse."<sup>55</sup>

Do these formulas usefully clarify the concept? Perhaps not all that much: they appear mostly to translate one general term into other general terms. This would seem to be reflected in the view of good faith as a "shoreless ocean"<sup>56</sup> and justify Jaluzot's exasperated conclusion that "good faith, having no objectively determinable content, may be used to justify any rule of contract law or even of other fields."<sup>57</sup> As her comparative study examines German law as well as French and Japanese law, her observation covers the German Civil Code, in which the general good faith provision of the famous art. 242 suffuses all of the law of contract. It would also apply to the newer Netherlands Civil Code, which goes even farther along this path with the concept of "*redelijkheid en billijkheid*."<sup>58</sup>

Other scholarship sees good faith as a general mould in which more specific doctrines can be cast, then to assume an independent existence within the positive law of different nations.<sup>59</sup> A prominent example of this development is the concept of *culpa in contrahendo* in German law.<sup>60</sup> Zimmermann lists as "doctrines which in some legal systems do the job for which in others a good faith provision is available [...] *culpa in contrahendo*, *obligations d'information*, *laesio enormis*, the abuse of rights, personal bar, interpretation of the parties' intentions (whether

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45 Farnsworth 1963, 671.

46 Peden 2002, 245.

47 Charpentier 1996, 305.

48 Pineau 2001, 35.

49 Rolland 1996, 381.

50 Cornu 2000, V<sup>o</sup> Bonne foi.

51 Keily 1999, 17.

52 Pineau 2001, 44.

53 Lefebvre 1998, p. 257.

54 Grégoire 2003, 92.

55 Grégoire 2010, 254.

56 David-Constant 1990, 7 : "La bonne foi : une mer sans rivage."

57 Jaluzot 2001, no 1840, 539 (En réalité, la bonne foi n'ayant aucun contenu objectivement déterminable, elle peut servir à justifier toute règle du droit des contrats et même hors du droit des contrats.)

58 Zimmermann 2001, 172.

59 Cordeiro 1996.

60 Cordeiro 1996, 231 f., Zimmermann 2001, 89-92.

standard or 'supplementary'), unconscionability, doctrines of change of circumstances or erroneous presuppositions, force majeure, and mutual mistake".<sup>61</sup> Common law systems, in his view, have a comparable range of doctrines: "implied terms, estoppel (including proprietary estoppel), part performance of a contract in equity, the *de minimis* rule, qualifications of a legal right by reference to the notion of reasonableness, relief against forfeiture in equity, the maxim according to which no man can take advantage of his own wrong, breach of confidence, fundamental mistake, repudiation, and, occasionally, even good faith in the exercise of a contractual power."<sup>62</sup>

Perhaps the most dramatic conclusion drawn from this unsettling debate is expressed by Hesselink in his already mentioned survey: "Good faith is not the highest norm of contract law or even of private law, but no norm at all, and is merely the mouthpiece through which new rules speak, or the cradle where new rules are born. What the judge really does when he applies good faith is to create new rules."<sup>63</sup> Why would such a masquerade be necessary? Hesselink's answer to that question is that "judges in continental European systems have felt uncomfortable with their role as creators of law [since] the judge's task is to apply the law."<sup>64</sup> He is of the view that "if the role of the judge as a creator of rules is fully recognised, there is no need for a general good faith clause in a code or restatement of European private law."<sup>65</sup> Where there is doubt about the proper role of the courts, good faith may have a place as a formula empowering the courts to create new rules. In this role, nothing can be said, in Hesselink's view, about the content of good faith without knowing the system in which it will be operating. Ideally, he adds, it should be empty.<sup>66</sup>

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

### *C Law-and-economic scholarship on good faith*

One of the earliest contributions to this approach was the already mentioned piece Summers published in 1968.<sup>67</sup> Summers posits that good faith is best understood not as a positive concept, but rather, negatively, through what it excludes, that is a heterogeneous set of bad faith behaviours.<sup>68</sup> In the article Summers presents an extensive survey of the way the courts in fact apply good faith in American law and lists five forms of bad faith behaviour in the Negotiation

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61 Zimmermann 2001, 172.

62 Zimmermann 2001, 172-173.

63 Hesselink 2010, 645.

64 *ibid.*

65 Hesselink 2010, 647-648.

66 Hesselink 2010, 649.

67 Summers 1968.

68 Summers 1968, 196, 201 f.

and Formation of Contract,<sup>69</sup> six in Performance,<sup>70</sup> four in Raising and Resolving Contract Disputes<sup>71</sup> and four in Taking Remedial Action.<sup>72</sup> Summers' excluder approach is criticised by Burton, who believes that a positive understanding of good faith is possible and helpful. He proposes to define opportunism as "discretion [...] used to recapture opportunities foregone upon contracting."<sup>73</sup> Summers and Burton have discussed their differences in the literature.<sup>74</sup>

Summers' approach seems close to the characterisation of good faith in a recent civil law treatise by Pineau *et al.*: 'one should not profit from the inexperience or vulnerability of other persons to impose on them draconian terms, to squeeze out advantages which do not correspond to what one gives them.'<sup>75</sup> This formula adds to the debate an implicit pointer to the concept of opportunism used in economic discourse. On this view, bad faith should be equated to opportunism and good faith, to abstaining from opportunistic conduct in circumstances that lend themselves to such conduct. This connection was first made by Muris, in 1981.<sup>76</sup> Let us look at it in more detail.

### 1. OPPORTUNISM

Muris describes opportunism as follows: "A major problem occurs when a performing party behaves contrary to the other party's understanding of their contract, but not necessarily contrary to the agreement's explicit terms, leading to a transfer of wealth from the other party to the performer—a phenomenon that has come to be known as opportunistic behavior."<sup>77</sup> For Muris, an unagreed wealth transfer is of the essence of opportunism.<sup>78</sup> He adds: "Because of the wealth transfer, parties have an incentive to avoid becoming victims of opportunism, yet whatever strategy of self-protection they choose, deterrence will be costly."<sup>79</sup> Many legal doctrines appear to be cost-effective means of deterring opportunism, in comparison to self-protection by the potential victims. Good faith could be seen as one such doctrine.

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

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69 Summers 1968, 220-232.

70 Summers 1968, 232-243.

71 Summers 1968, 243-248.

72 Summers 1968, 248-252.

73 Burton 1980, 373.

74 Summers 1982; Burton 1984.

75 Pineau *et al.* 2001, 44: "que l'on ne profite pas de l'inexpérience ou de la vulnérabilité d'autrui pour lui imposer des conditions draconiennes, pour lui soutirer des avantages qui ne correspondent pas à ce qu'on lui donne". Romain 2000.

76 Muris 1981, 566: "Opportunistic behavior provides a ground upon which to separate good from bad faith."

77 Muris 1981, 521.

78 Muris 1981, 522.

79 *Id.*, 522.

*free riding* – where a result can be brought about only by the contribution of all or most, but it is not feasible to supervise everyone, the free rider abstains from contributing, yet shares in the spoils;<sup>80</sup>

*shirking* in a labour relationship, where the employee, who cannot be fully supervised, gives the employer a lesser performance than promised;<sup>81</sup>

*agency problems* – where one must pursue one's plans by relying on other persons' good offices without being able to fully supervise them, the other persons may pursue their own interests at one's expense;<sup>82</sup>

*moral hazard* – originally in insurance contracts, but subsequently with wider application – is also a supervision problem; it occurs where the insured, once the insurance contract is underwritten, behaves less carefully than promised or demonstrated when the premium was set;<sup>83</sup>

*hold-out* – where a collective project will go forward only with everyone's consent, hold-outs suspend their consent in the hope of securing more than their proportional share of the spoils. The opportunism stems here not from an information (supervision) problem, but from the monopoly power conferred by the veto;<sup>84</sup>

*hold-up* situations, i.e. those in which one party is able to force the hand of others to get more than its promised or fair share of the joint gains of the contract or other relationship.<sup>85</sup>

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

<sup>80</sup> de Jasay 1989; Farnsworth 2007, 109 f.; Sugden 1986, 122-144, Araújo 2007, 578.

<sup>81</sup> Buechtemann 1999, at 172; , Araújo 2007, 578.

<sup>82</sup> Jensen 1976; Bishop 1998; Scott 1998; Farnsworth 2007, 87-99, Araújo 2007, 578.

<sup>83</sup> Kotowitz 1987.

<sup>84</sup> Cohen 1991; Epstein 1993; Danzon 1993; Mackaay 2008, 67 (no 246).

<sup>85</sup> Klein 1996, 1998; Shavell 2007; Trebilcock 1995, 96 f., Araújo 2007, 578, 632 f.

<sup>86</sup> Cf. Cohen 1992, at 953-4: " Economists agree more on examples of opportunistic behavior than on definitions of it, though the term has achieved general acceptance."

<sup>87</sup> Williamson 1996, 49 writes: "Economists are thus late comers to the opportunism science."

<sup>88</sup> Cohen 2010. As if to illustrate this, the most recent edition of Posner's textbook (Posner 2011), whilst recognising combating opportunism as a major objective of contract law (p. 123), has no entry for opportunism in its index.

<sup>89</sup> Williamson 1975, 26 and 1985, 47, 64-67.

promises' about the opportunist's own future conduct.

In a major contribution to this literature in 1992, George Cohen presents opportunism as a very general phenomenon affecting *all* phases of contracting and hence as a phenomenon with which one may expect contract law to be concerned in many different ways.<sup>90</sup> He defines it as 'any contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality.'<sup>91</sup> He contrasts it with another impediment to the proper creation and performance of contracts, to wit negligence, and is of the opinion that where both opportunism and negligence are present in a contractual dispute, combating opportunism should take priority. This is so because opportunism left unchecked would lead all potential contractors to raise their guard, taking more extensive protective measures against "being had" by opportunistic behaviour. The ultimate precaution is to forego a contemplated contract altogether. If many potential contractors adopt this ultimate precaution it will shrink the market. Precautionary measures short of abstaining from contracting are simply wasteful (welfare reducing; a social cost).<sup>92</sup> Or as Dixit puts it, opportunism refers to a class of actions that may look tempting to individuals but will harm the group as a whole.<sup>93</sup>

Negligence on the part of one party may also lead the other party or parties to undertake more extensive precautions. Whilst this may not be the cheapest option, it is nonetheless not entirely wasteful in as much as precautions by one party are often substitutes for those by the others. Cohen adds: "even if negligent behavior is punished, people do not "trust" others to be careful to the same degree that people trust others to be honorable, because people realize that even if others are generally careful, some negligence is inevitable."<sup>94</sup> Opportunism is more damaging to general welfare than is negligence.

These developments may be summed up by the formula that a party to a potential or existing relationship acts opportunistically where it seeks, by stealth or by force, to change to its advantage and to the detriment of the other party or parties the division of the relationship's joint gains that each party could normally look forward to at the time when the relationship was set up. It tries, in other words, to get 'more than its (fair) share,' an undue advantage, as determined by "parties' agreement, contractual norms, or conventional morality," to use Cohen's formula.<sup>95</sup> Opportunism may involve getting a person to enter into an agreement it would not willingly have consented to had it been fully informed, or spuriously entering into

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<sup>90</sup> This would extend to company law: Kraakman 2009.

<sup>91</sup> Cohen 1992, at 957; repeated in Cohen 2011, 139, but with the addition that it may be alternatively "an attempted redistribution of an already allocated contractual pie, that is, a mere wealth transfer".

<sup>92</sup> Posner 2011, 9.

<sup>93</sup> Dixit 2004, 1.

<sup>94</sup> Cohen 1992, at 977.

<sup>95</sup> Art. 3.10 of the Unidroit *Principles of International Commercial Contracts* (1994) speaks of an 'excessive advantage'.

negotiations when one has no intention of entering into a contract, or again breaking off negotiations arbitrarily at the end of a lengthy process when parties appear to be on the verge of an agreement (*ex-ante* opportunism); it may also involve later exploiting unforeseen circumstances the contract does not explicitly provide for in order to change the division of gains implicitly agreed upon when the contract was entered into (*ex-post* opportunism). In a prisoner's dilemma game, this would correspond to defection where the other party or parties choose cooperation.

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

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

Responses to opportunism must develop apace. Combating opportunism is a pervasive and fundamental objective of contract law as well as of corporate law.<sup>99</sup> Contract law is the foremost domain where the rules are set by contracting parties themselves and where law plays a supplemental role, providing the framework. Guarding oneself against opportunism is first a responsibility of the contracting parties. The legal system can, however, make itself useful where its presence allows parties to "lower their guard," i.e. reduce their self-protection and loss-absorption costs and where this can be accomplished at a cost of the rule itself and its enforcement that is lower than the savings so generated.<sup>100</sup> One may expect such gains where public authorities have access to greater scale economies in

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<sup>96</sup> Buckley 2005, 168.

<sup>97</sup> Term first used in Goetz 1980, 1273 and quoted in Cohen 1992, 999.

<sup>98</sup> Muris 1981, 526: [opportunism] "is subtle in two ways: first, the behavior is inherently difficult to detect; second, although the activity is detectable, it is easily masked as legitimate conduct, and thus its opportunistic nature is discoverable only at a high cost."

<sup>99</sup> Posner 2011, 123; Kraakman 2009.

<sup>100</sup> Elsewhere I have labelled this the "Wittman test", in reference to Wittman 2006, 194. See Mackaay 2010, 427; Mackaay 2008, 373 f, nos 1333 f.

framing and enforcing rules than are open to private actors. One broad principle reflected in many legal rules is to attribute a burden to the party who can best or most cheaply influence the occurrence or cost of a mishap. Calabresi has proposed the term ‘cheapest cost avoider’ for this principle.<sup>101</sup> A good deal of civil contract law appears explicable as applications of the ‘cheapest cost avoider’ principle.<sup>102</sup> Where opportunism is at stake, the opportunist is almost invariably the cheapest cost avoider.

## 2. GOOD FAITH AS ANTI-OPPORTUNISM

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

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

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

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

1401. Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that

101 Calabresi 1970, 139 f.; Calabresi 1972, 1118 f.

102 De Geest 2002.

103 Williamson 1996, 48.

104 Cordeiro 1996, 236, 240.

105 Pothier 1764, 42, no 28, referred to in Pineau 2001, 175, no 85 : "On appelle dol, tout artifice dont on se sert pour tromper quelqu'un".

106 Pothier 1764, 44, no 30.

107 See for instance Lluellas 2006, 282 f, nos 601 f.

error, the party would not have contracted, or would have contracted on different terms.

Fraud may result from silence or concealment.

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

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

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

Civil law systems contain a number of such "anchors." We encountered several in the earlier mentioned list by Zimmermann.<sup>110</sup> Consider also legal warranties against latent defects or against eviction in sale or obligations to inform and to cooperate and to avoid conflicts of interest that are part of the contract of mandate and of relationships in which one person administers the assets of another. The common law duty to mitigate damage imposed on the person suffering a loss due to the acts of another can be seen as responding to a moral hazard problem. The Dutch,<sup>111</sup> German,<sup>112</sup> Italian<sup>113</sup> and Quebec<sup>114</sup> Civil Codes

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108 Lluelles 2006, 305 f, nos 649 f.

109 On the virtues of theory guiding one's inquiry, see Wonnell 1990, 450, quoted by Cohen 1992, 1014.

110 Zimmerman 2001, 172.

111 NBW 6:101.

112 254 (2) BGB (Mitverschulden).

113 1227 (2) Codice civile.

114 1479 CCQ.

have formal provisions codifying this obligation.<sup>115</sup> By way of further example, consider how the new Netherlands Civil Code deals with either party to a contract interfering with the fulfilment of a condition stipulated in it:

Art. 6:23 - 1. If reasonableness and equity so require, the condition is deemed fulfilled in the event that the party who has an interest in the non-fulfilment of the condition prevents its fulfilment.

2. If reasonableness and equity so require, the condition is deemed not to be fulfilled in the event that the party who has an interest in the fulfilment of the condition brings about its fulfilment.<sup>116</sup>

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

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

The duty to act in good faith is applied as a rule of last resort in exceptional cases, in the expectation that this will lead in due course to the crystallisation of a new concept, a new "anchor" applicable to a specific set of problems, as has happened with *culpa in contrahendo* in German law. This "anchoring" process may be operated by the courts under the general cover of good faith. It may also be undertaken by the legislator through statutes and regulations. Labour law, in origin, and, more recently, consumer protection law would seem to reflect this logic. Currently, the steady elaboration of rules dealing with conflicts of interest in various fields seems to be a further illustration.<sup>117</sup>

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

It may be helpful to illustrate this kind of reasoning by means of the example, discussed by Cohen, of the American case of *Jacob & Youngs v. Kent*, a decision

<sup>115</sup> See Mackaay 2008, 441, n° 1624.

<sup>116</sup> Haanappel 1990.

<sup>117</sup> See [http://en.wikipedia.org/wiki/Wikipedia:Conflict\\_of\\_interest](http://en.wikipedia.org/wiki/Wikipedia:Conflict_of_interest) where a variety of forms of opportunism are listed. The relationship with opportunism seems obvious.

by the Court of Appeals of New York.<sup>118</sup> Cohen summarises the case as follows:

"Jacob & Youngs built a "country residence" for Kent, a successful New York lawyer, for \$77,000, of which Kent paid all but around \$3500. One of the contract specifications provided: "All wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture." Nine months after the house was completed, Kent learned that some of the pipe used was not Reading pipe, but wrought iron pipe made by other manufacturers, including Cohoes. Kent then ordered the pipe replaced, even though much of it was already encased within the walls of the house. Jacob & Youngs refused to replace the pipe, Kent refused to make the final payment, and Jacob & Youngs sued. The New York Court of Appeals, speaking through Judge Cardozo, allowed Jacob & Youngs to recover the full remaining payment, despite its acknowledged breach. Cardozo's reasoning—in different terminology, of course—is essentially that the builder was merely negligent in breaching while the homeowner was potentially opportunistic in insisting on the letter of the contract; therefore, the homeowner lost."<sup>119</sup>

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

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

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

Similar analyses would be possible in civil law cases, although the courts generally provide less detailed information on the facts leading them to their decisions. By way of example, in a study of recent French case law on good faith,

<sup>118</sup> 129 N.E. 889 (N.Y. 1921) ([http://www.courts.state.ny.us/reporter/archives/jacob\\_kent.htm](http://www.courts.state.ny.us/reporter/archives/jacob_kent.htm)); Cohen 1992, 990 f.

<sup>119</sup> Cohen 1992, 990.

Ancel reviews several cases in which a contracting party, obviously acting opportunistically but apparently within the letter of the contract or the law, is deprived, on the ground of bad faith, of the sanction that it would normally be able to invoke.<sup>120</sup> Such was the case of the malicious exercise of a right of withdrawal (*faculté de dédit*) where the court denied the withdrawal for that reason. Again where a discretionary right to convert a rent payable to an obligation of home care was exercised at a time when the debtor could not fulfil the latter obligation, having been handicapped by an accident, for the sole purpose of having the contract set aside, this latter sanction was denied.<sup>121</sup>

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

## Conclusion

The starting point of this paper was that good faith appears at once as a fundamental concept in all civil law systems, with a long history, and yet as one whose nature and contents are ill-understood and controversial. The paper is an attempt to find out whether the economic analysis of law can shed new light on it and help to clarify it.

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

The objective sense of good faith is used in contract law and, by extension, in the law pertaining to legal persons, such as business enterprises. It refers here to not taking advantage of an asymmetry in the relationship in circumstances that

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<sup>120</sup> Ancel 2011.

<sup>121</sup> Ancel 2011, 106, referring to Civ. 3e, 11 mai 1976, D. 1978.269, note Taisne and Civ. 1e, 7 fév. 2006, D. 2006.1796, note A. Penneau.

would lend themselves to it. The difficulty with the concept is that it is seen at once as a principle underlying all of contract law and as a (historical) mould for more specific concepts that have found their place in the Codes, but generally not as a rule to be applied directly; in the legal literature, its content is usually defined by means of concepts of equal generality.

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

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

In principle, this would require a wide-ranging tool commensurate with the infinite variety of opportunistic behaviour that people will come up with. But this would cause a problem of legal uncertainty, which is a cost to the private persons who are the supposed beneficiaries of such a tool. So the law provides a range of specific anti-opportunism concepts ("anchors") throughout private law, each of which needs to be interpreted flexibly but within fairly strict boundaries if a measure of legal certainty is to be preserved.

Yet situations may arise where none of the specific concepts will do the job of curtailing a specific manifestation of opportunism. Enters good faith as the residual anti-opportunism rule, to be used as a last resort and with the expectation that the new form of opportunism so tackled will in due course lead to a more specific concept that will assume an independent existence as a new "anchor." Good faith acts here as a "mould" in which new "anchors" are cast. In this conception, since absence of opportunism is the foundation of contract and a reflection of contractual justice, so is good faith.

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

opportunism. All of this is a contribution in the best tradition of legal scholarship.

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