THE GOOD FAITH PRINCIPLE IN CONTRACT LAW AND THE PRECONTRACTUAL DUTY TO DISCLOSE: COMPARATIVE ANALYSIS OF NEW DIFFERENCES IN LEGAL CULTURES.

Alberto M. Musy

Professore Associato Università del Piemonte Orientale

Facoltà di Economia, Novara

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ABSTRACT

The purpose of this paper is to delineate new similarities and future differences between legal systems, using pre-contractual liability and good faith. Instead of focusing on the differences between common law and civil law, we focus our attention on the gap between Europe, England included, and United States. All over Europe, under the influence of good faith jurisprudence, duty to inform has been extremely broadened. Contemporary debate confirms that European Legal Academia overemphasizes the importance of the quest for central common principles of European private law, like Good Faith and obligation de renseignement*, and ignores questions regarding cost-benefit effects of disclosure, parties informational rent seeking and general policy considerations. A stereotyped legal doctrine, concentrating on the influence of EU directives on national legal system and, in some cases, unification as a forthcoming national-positive law can create an undesirable effect in the creation of future case law.*

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1. Introduction

The recent American debate[1] about the limits of pre-contractual reliance provides the opportunity to recall some European and Comparative Law notes.

Are we dealing here with an area of law where western legal systems substantially differ from each other as far as both general evaluations and specific results are concerned?

This inquiry appears to be all the more important since both the Principles of European Contract Law as proposed by the "Lando group"[2] and the Principles of International and Commercial Contracts as published by UNIDROIT[3] contain certain general provisions according to which "each party must act in accordance with good faith and fair dealing".

The purpose of this article is to delineate new convergent similarities and future possible differences between legal systems, using pre-contractual liability and good faith as a focal point of investigation[4].

The first part of the article tries to reframe the ordinary picture of Good Faith in European contract law.

Western legal systems differ as to the scope of the good faith principle. In the Civil Law system, the minimalist view is represented by the French courts, who have not relied on the *bonne foi* to the same extent that their German and Italian counterparts did. An even more minimalist approach is represented by the common law of England does not recognize any general obligation of the parties to a contract to conform to the standard of good faith.

The second part of the article focuses the prism of the good faith investigation by concentrating on the pre-contractual duty to inform and by trying to map reciprocal influences, and differences between Europe and United States.

2. The Principle of Good Faith in Europe

a. French law

"The contract is law between the parties" (art.1134 c.c.).

This seems to be the main concern of French contract law; such a declamatory[5] principle forced French legal literature to find creative ways to impose good faith duties against the party freedom of contract[6].

The *alinéa* n.3 of art.1134 c.c. then states that "*les conventions doivent être executées de bonne foi*", art.1135 c.c. adds that "*la convention oblige à toutes suites que l'equité donne a l'obligation d'après sa nature*", the Obligation Section of the French civil code does not contain other explicit references to the good faith principle.

The French scholars, though, starting from the late seventies expanded the number of situations where the good faith principle applies[7]:

1) in the Formation of contract the parties must deal in good faith; the freedom of contract principle, thus, is limited by the good faith principle. French *jurisprudence*, anyway, looks for a very substantial deviation from pre-contractual reliance in order to establish a basis for liability in tort (art.1382 c.c.) or for a classical situation of deceit (artt.1110, 1116 c.c.);

2) in the Performance of contract there are at least two main applications of the Good faith principle: the Duty of Loyalty[8] and the Duty of Cooperation[9].

a) The Duty of Loyalty, according to the Cartesian tradition is divided into two cathegories: *obligation de moyens* and *obligation de résultat*, in the latter case the *débiteur* must obtain the exact goal foreseen by the agreement between the parties quite apart from good faith evaluation, while the *créancier* must avoid any behavior imposing the performance difficulties.

In case of an *obligation de moyens* the *débiteur* has to accomplish his obligation simply by acting with due care, as that of a "*bon père de famille*".

b) The Duty of Cooperation too is divided into two different applications: the utmost good faith contracts (*contrat de societé, de travail, d'assurance*) and the duty to disclose (*obligation précontractuelle de renseignement*).

The French *bonne foi*, even if strengthened by the doctrinal efforts, is still weakened by the judicial suspicion of introducing *valeurs d'équité*. The perceived danger is the risk of too broad judicial discretion in spite of the Positive Law traditional French approach[10].

Moreover both the French doctrine and courts are not making a clear distinction between subjective and objective good faith (the German *Guter glaube* and *Treu und Glaube*), particularly in the context of cooperation cases, such as *réticence dolosive, erreur sur la substance*[11].

b. German Law

The contractual obligations according to German law, are subject to the standard of "good faith". This has been read both by doctrine and courts into a seemingly rather marginal provision (§ 242 BGB), which relates specifically to the manner in which the obligation is to be performed.

§ 242 BGB has thus, by way of interpretation, been transformed into one of the famous "general clauses"[12] by means of which Germany's "case law revolution" was effected[13].

It has provided a convenient starting point for countless new doctrines and for the modification of old ones[14], and innumerable cases[15] as it has been employed to avoid "harsh or inequitable results"[16].

Over the years much criticism has been leveled at the excessive proliferation of equitable inroads into established legal principles[17]. On the other hand, however, consensus has emerged over a whole range of legitimate applications of the principle of good faith.

The efforts of academic commentators (starting with an influential study by Franz Wiaecker[18]) have established much to domesticate legal categories of cases as they are listed in any modern commentary sub §242 BGB.

Those doctrinal efforts of categorizing have become so firmly established that they are seen today as forming an indispensable part of the legal landscape.

§242 BGB says that the recipient must perform her/his obligation in good faith according to trade usage.

Both doctrine and case law implemented the use of the good faith paragraph in order to devise a remedy for the following code gaps:

1) in spite of the existence of § 242[19] there is no provision in the BGB dealing with *culpa in contrahendo*;

2) there is no provision protecting the recipient from a partial or incorrect performance;

3) last but not least, there is not a general principle of *neminem laedere* (general tort of negligence) in the German civil liability provisions (§§ 823 ff. that protects individuals against damages to life, body, health, property); there is no room to expand tort liability to protect some pre-contractual, contractual or post-contractual situations.

In order to protect the parties in those situations and avoid harsh or inequitable results, scholars have pointed to typical situations where the good faith "general principle" must

be enforced[20]. The late development in this trend is to avoid any use of the §242 BGB as an equitable remedy and lately there seems to be a strong reluctance to admit any new applications of the doctrine[21].

The first group of standard types is listed under the label of contract ancillary duties (duty to inform, duty to protect, duty of precise performance); then follow the *venire contra factum proprium* principle, the "abuse of its own right" and the "tacit renunciation" (forfeiture of right, especially by *laches*); and lastly the "*rebus sic stantibus*" principle and the "contractual basic assumption" (*Voraussenzung*) doctrine.

In order to see how those principles work we can take as an example the rules on *Positive Vertragsverletzung* (duty of precise performance): the judge must look if the contractual duties are implicated (*Schuldverhaltnis*), and then evaluate which required ancillary duty violated, and finally decide if there is negligence.

c. Italian law

The Italian 1942 Civil Code has been drafted in an epoch when Italian scholars were fully aware of German case law on paragraph 242 of the BGB[22]. Therefore the Italian Code highlights the importance of "good faith" in the contractual relationships in several code articles: art.1366 "Contract must be interpreted in good faith", art.1375 "Contract must be executed in good faith"; art.1175 "Debtor and creditor must behave according to good faith and fair dealing rules" and finally, article 1337 provides that "parties must behave in good faith during the pre-contractual bargaining and contract drafting".

Modern Italian contract law scholarship[23], after the 1942 Code, has rejected the concept that an actual, subjective meeting of the minds is necessary to form a contract, in favor of a theory protecting parties reasonable expectations in relying on promises and communications[24].

According to the latter approach the *buona fede* principle has been interpreted by scholars as a synonym of German *Treu und Glaube* even if the Italian case law[25] seems still to place a lot of importance on the idea that the parties enter into a bargaining process under the principle of freedom of contract.

Until the beginning of the seventies the main stream of the Supreme Court of Cassation held that the good faith provisions did not offer an autonomous ground for a legal

action[26]. Those articles were to be used by courts only to strength the protection of a self standing *diritto soggettivo* (fully recognized legal title)[27].

In the late seventies, under a vehement doctrinal debate[28], the case law changed to recognize the *buona fede* principle as an autonomous basis for a cause of action. As is usually the case, the courts chose to develop the doctrine by focusing on certain types of cases, which include:

1) The right to organize special form of strikes;

2) Labor law contractual relations; and

3) The duty to inform and the duty to protect the other party interest[29].

A 1975 decision by the Milan Court of Appeal[30] considered the violation of art.1375 c.c. an autonomous ground for action in tort, pursuable by art.2043 c.c. (the Italian provision for tort liability: the *neminem laedere* principle).

The Italian scholars are skeptical about the usage made by courts of the good faith principle in as much as it could be used for redistributive purposes; some of them[31] are worried about the temptation to use it as a general equitable principle, a solution that might vest too broad discretionary power in the judge hands.

On the one hand the Italian doctrine has not been able to offer the judges a clear systematic picture of good faith standard situations[32]; on the other, the Italian doctrine, until the late seventies was strongly influenced by the German doctrine, and clashed with Italian judges still influenced by the French doctrine and courts. This cultural incommensurability[33] is now posing a difficult problem of conflicting theories about good faith and culpa in contrahendo[34].

d. English law

There is no general positive duty of good faith imposed on the parties to a contract in the English law today[35]. English merchant law, indeed, recognized the principle until the disappearance in the XVIII century of the Admiralty[36].

The utopian idea of the common law is that manners in business are oriented by a "rough and tough" rule and according to this rule Courts are used to take a fairly extreme position on the duties of the parties to look after themselves and to stay, so to say, "on their own feet"[37].

The rule of equity, still sound and alive in the English law of remedies, offered protection against the most harsh and tough situations. It is not by chance that the

equitable remedy of Promissory Estoppel has turned from being a shield into being a sword[38] and can offer adequate protection against promise revocation or unjust withdrawal from negotiations.

During the period that one author called the Decline of Freedom of Contract (1870-1980)[39] English law started to stress some pre-contractual duties between the parties, and to elaborate new doctrines that could be easily brought under a good faith heading[40].

One after the other a certain number of contractual relations has been added by good faith special duties.

Beside the *uberrimae fidei* contract (like in French law: insurance, company), that have always required an utmost duty of good faith, fiduciary relationships in general provide several instances of duties that in the civil law world would be related to the good faith principle.

Family and professional-client relations (special relation or good faith relation) require a duty of good faith and full disclosure.

Like in France, Legal duties may arise between negotiating parties in tort: parties may owe duties of care to each other[41].

The English courts are offering remedies to the party claiming a breach of good faith duties, indeed they prefer to do it without referring to a general principle, which apparently seems to create a problem regarding the predictability of the legal outcomes of cases[42].

There are many cases in which English courts are reading "implied terms" into a contract, adopting a standard of interpretation similar to the anti-formalistic approach used by continental courts in good faith cases.

The absence of a general duty of good faith, can probably be best described as an illustration of English attitude to see the law as a self standing domain and a world distinct from business and politics. Judges do not like to wield the power to determine whether the parties have acted in good faith or not[43].

Jane Stapleton writes that even if English lawyers do not call it good faith they believe in the need for legal doctrines that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound[44].

3. The duty to inform and the Good Faith principle within European legal systems

The French *bonne foi*, the German *Treu und Glaube*, the Italian *buona fede e correttezza* and the English g*ood faith situations* are not synonymous; they are phenotypes of a broader genotype offering the legal professionals a way out from the harshness of the strict application of the rules of *contrat*, *Vertrag* or *contract*. They all call for some judicial discretion in the name of fairness.

A recent contribution about the need of a good faith principle within a future European civil code suggest there is no need of such an undefined and broad principle[45].

Within this general frame and this narrow common core[46] of general principles the inquiry has to proceed by focusing on a narrower list of factual situations.

I choose to investigate factual situations where a duty to disclose is involved for two reasons: first some systems see the duty to inform as a specific problem of the general principle of good faith; second it is

The main objective of the second part of this study is to examine one specific problem related to the Good Faith principle - the duty to inform - from a comparative prospective and to point out the differences between the common law and the civil law in treating this problem.

My comparative analysis of the duty to inform covers France, Germany, England and Italy, as well as the United States[47]. All these systems impose certain limitation on the duty to inform.

Consider Cicero's classic example[48] - recalled by Saint Thomas Aquinus[49] - of the starving Rodhians who meet the Egyptian merchant first landing on the island after passing other *triremes* full of corn.

This example is still debated. Is the merchant under an obligation to disclose the information about the arrival of other ships?

There are many modern examples: does a trader have to reveal to a buyer that the leading tobacco port, now closed because of a naval blockade, is going to open soon?[50]

Does the owner of a house have to disclose to the buyer that the house is badly infested with termites?[51]

Does a franchiser have to disclose to a franchisee his intention to withdraw from negotiations? When does he have to tell it in order not to be considered liable for frustrating the franchisee's expectations?[52]

Do I have to tell the buyer of my company shares that the main project of the company is going to be more expensive than what I have foreseen?[53]

We can continue with many other possible examples and all of us can think of solutions our respective legal systems can offer.

It is important to recall some of the possible solutions in all systems:

mistake – *erreur*;

fraud – *dol*;

culpa in contrahendo - promissory estoppel;

presupposizione – Voraussetzung.

Legal Theorists all over Europe, under the influence of the German *Treu und Glaube Prinzip*, are at the stage of developing new interpretation of those solutions according to the good faith principle.

Let's focus our attention on the differences.

Instead of focusing on the differences between common law and civil law, I propose that we focus our attention on the gap between Europe, England included, and the United States.

All over Europe, under the influence of good faith jurisprudence the duty to inform has been extremely broadened:

Following the intuition of de Juglart and the work of Muriel Fabre Magnan and Jacques Ghestin, French scholars call the duty to disclose *obligation d'information*[54] and French courts are now applying it as a matter of course[55].

Rodolfo Sacco's[56] and Giovanna Visintini's[57] works are gradually influencing the Italian Courts to pay attention to the *reticenza dolosa* (misrepresentation) as a possible trigger of contract voidability and reliance damages recovery[58].

Jane Stapleton's re-mapping of the English law demonstrates that the good faith principle and the duty to inform are no longer continental institutions[59]. Significantly, she criticizes the Gunter Toebner[60] idea that good faith is a legal irritant evidencing the incommensurability between common and civil lawyers.

Even if I consider the Gunter Teubner idea extreme, and even if I do not agree with the oversimplification of the two conceptions of capitalism: the Anglo-Saxon and the Continental, Colbert against Adam Smith, I do have to draw your attention to the fact that the most important and recent differences between American and European

theoretical approaches to the duty to inform are at the doctrinal level, and this fact, I predict may generate further differences in the future.

In Europe we are close to a strong assimilation of the ways of solving factual situations concerning the pre-contractual duty to inform implying the use of good faith as a general principle[61].

I do believe that the European Legal Academia overemphasizes the importance of the quest for the central common principles of European private law, like Good Faith and *obligation de renseignement*, and ignoring questions regarding the cost-benefit effects of disclosure, parties informational rent seeking and general policy considerations.

A stereotyped legal doctrine, mostly concentrating on the influence of the EU directives on national legal system and, in some cases, unification as a forthcoming national-positive law can create an undesirable effect.

There is a chance that the European legal culture starts again to derive a dogmatic approach instead of a critical prudentialistic one, boxing legal theory into an Ivory Tower disconnected from real world. There is a deep cultural gap between Europe, England included, and the United States.

The doctrinal German idea of *Treu und Glaube* has captured American legal thought in the 1920's and 1930's [62], and started to affect legislation and case law in the United States.

Terms like reliance, good faith, duty to inform pervade State legislation, the various Restatements and the Uniform Federal legislation, principally the Uniform Commercial Code.

The Uniform Commercial Code, strongly influenced by Karl Llewellyn, who was extremely familiar with German law, reveals the unstated influence of various civil codes.

UCC §1-203 states that "*every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement … the good faith is a basic principle running through this Act*".

Moreover, §205 of the Restatement (Second) on Contracts, inspired by the uniform commercial code, declares that "*every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement*".

However, when some authors like Summers, Farnsworth and Kessler[63] were telling us the history of the acceptance of the good faith principle and the related duties within the American legal system, something happened and overturned the easy prediction of a complete harmonization of the American and Continental Europe Contract Laws.

The anti-positivistic, anti-formalistic and anti-dogmatic gene, Legal Realism, had already vaccinated American legal thought against some of the most pernicious cultural diseases of the Old Continent.

Since the seventies the American legal scene, once occupied by legal realism, has been captured by two new movements: Law and Economic and Critical Legal Studies.

Both movements, even though they disagree on almost everything, launched a lethal attack to the prudentialist tradition of the legal scholarship[64].

Anthony Kronman and Mary Ann Glendon[65] are describing this change as the end of the Lawyer Statesman Paradigm and the birth of a kind of, let me suggest, Super Lawyer, strongly committed to many scientific disciplines.

The Super Lawyer is studying Economics instead of Roman Law, Sociology instead of Legal History[66].

The economic analysis of law changes the perspective of the investigation about the duty to inform from fairness and justice to efficiency: when disclosure could thwart efficient results Law and Economics opposes disclosure and *vice versa*.

The Critical Legal Studies changes the prospective of the investigation about the Duty to Inform from fairness and justice to an ideological struggle between people in different cultural, race, gender and economic positions[67]. Each of these interpretations and/or adjudication is protecting different desired results[68]. The Duty to disclose does not mean anything until information is in the hands of economic or political élites.

My point is that Europe and United States, at the doctrinal level, are now divided by different theoretical ways of addressing legal issues: prudentialism still means something in Europe (England included)[69].

European Scholars, not enough influenced by the Legal Realism, are too devoted to classification. Few authors perceive the importance of meta-legal perspectives to understand social and institutional changes affecting legal matters[70].

The Rodolfo Sacco[71] school of Comparative Law and the Norbert Rouland[72] Anthropology of Law are offering, within civil law academies, different perspectives.

They adopt, indeed, a "choice for candor"[73]: setting aside the systematic and dogmatic paradigms and looking for historically and anthropologically founded meanings. Both schools are pretending no involvement in political discussion about the opportunity of the different solutions[74].

Although criticized, Gunter Teubner and his "Autopoiesis School", within its affinity to Sociology, is one of the few European legal authors trying to provide a critical contribution, open to different scientific domains, analyzing legal institutions from the point of new of the modern society[75].

European Academia too keen on the normative analysis loose ground in favor of the American Academia. In general the result is a wider and wider distance between the two sides of the Atlantic Ocean and chances for new one way legal transplants, which, probably, have already started. In Italy, for example, we take part in a syncretic experiment, conducted by some authors, who are using comparative methodology, law and economics and critical arguments in order to launch innovative perspective within national legal doctrine[76].

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[1] J. KOSTRITSKY, *Reshaping the Precontractual Liability Debate: beyond Short Run Economics*, 58 U. Pitts. L. Rev. 325 (1997); R. CRASWELL, *Offer, Acceptance, and Efficient Reliance*, 48 Stan. L. R. 481 (1996); A. KATZ, *When Should An Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 Yale L. J. 1249 (1996) and W. WILS, *Who Should Bear the Costs of Failed Negotiations? A Functional Inquiry into Precontractual Liability*, 4 Journal des Economistes et des Etudes Humaines 93 (1993).

[2] O. LANDO and H. BEALE (eds.) *Lando Group's Principle of European Contract Law*, Nijmegen, 1995.

[13] *UNIDROIT Principles for International Commercial Contracts*, UNIDROIT, Rome, 1994.

[4] KESSLER F. and FINE E., *Culpa in Contrahendo*, 77 Harv. L. Rev. 401 (1964) have already used a comparative law approach to investigate the pre-contractual liability problems; as general reporter of the XIII Congress of the International Association of Comparative Law, Montreal, 1990, E.H. HONDIUS, *Precontractual liability*, Deventer 1991, gave a broader comparative prospective about culpa in contrahendo.

[5] I am using the word "declamatory" according to the Sacco distinction between "declamatory rule" (rule enunciated by statutes and not enforced or used in practice) and "operational rule" (rules that are operating in practice), see R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, (pt.1), 39 Am. J. Comp. L. 1 (1991).

[6] J. SCHMIDT, *La période précontractuelle en droit français*, 544; G. VINEY, *Traité de droit civil* (sous la direction de J. GHESTIN), IV, *Les obligations. La responsabilité: conditions*, 1982, p. 191; MARTY-RAYNAUD, *Traité de droit civil*, 2, *Les obbligations*, 1, *Les sources*, 2ª ed., 1988, p. 214; H. e L.

MAZEAUD- TUNC, *Traité théorique et pratique de la responsabilité civile*, 1, 6ª ed., 1965, p.116; J. HUET, *Responsabilitè contractuelle et responsabilité délictuelle: essai de délimitation des deux ordres de responsabilité*, (Thèse, Paris II), 1978, p.260; nel senso di una riconduzione della responsabilità contrattuale a quella extracontrattuale vedi Ph. REMY, *La "responsabilité contractuelle": histoire d'un faux concept*, Rev. Trim. Dr. Civ., 1997, p.323.

See Cass.20.3.1972, *Bull.*, IV, n°93; Cass. 11.1.1984, *Bull.*, IV, n°16; Cass.15.2.1984, *Bull.*, II, n°29.

[7] TERRE F, SIMLER R., LAQUETTE Y., *Droit Civil – Les obligations*, 6e éd., Paris, 1996, p.347.

[8] Those duties first have been legitimated by Cassation case law, Cass., 8.4.1987, *Bull.*, III, n°88, p. 53, *RTD civ.* 1988, 122 noted by J. MESTRE; Cass., 5.6.1968, *D.*, 1970, 453, noted by Ph. JESTAZ; then several statutes implemented the doctrine, specially in favor of consumer: art.1244-1, réd. L.9.7.1991 (cooling off-period), L. 31.12.1989, art.331-1 (consumer protection).

[9] Duties of cooperation are specially related to certain contracts, similarly to common law "utmost good faith contracts" see Y. PICOD, *L'obligation de coopération dans l'exécution du contract*, *JCP* 1988, I, 3318; TERRÉ F, SIMLER R., LAQUETTE Y., *Droit Civil – Les obligations*, 6e éd., Paris, 1996, 416, p.350.

[10] GHESTIN J., *La formation du contrat*, 3e éd., Paris, 1993, p.232, n.255.

[11] GHESTIN J., *La formation*, 3e éd., Paris, 1993, p.576, n.593 ff.; FABRE-MAGNAN M., *De l'obligation d'information dans les contrats. Essai d'une théorie*, L.G.D.J., 1992.

[12] HEDEMAN J.W., Die Flucht in die Generalklauseln, Tübingen, 1933, p.9-10, referred to it as the "flight into the general clauses", whose risks of producing judicial decision unpredictable, exuberant and politically motivated became real during Nazi's regime.

[13] DAWSON J.P., *The Oracles of the Law*, Ann Arbor, 1968, p. 432 ff..

[14] LARENZ, *Culpa in contrahendo, Verkehrssicherungspflicht und "sozialer Kontackt"*, *MDR*, 1954, is one of the most well known scholar contribution to development of new doctrines based on §242 BGB.

[15] The line of decisions was opened by the now famous linoleum roll cas: *Entscheindungen des Rechtsgericht* (RGZ) vol.78 at 239, (1911). This discussion has been followed by other courts ever since.

[16] ZIMMERMANM R. and WHITTAKER S., Memorandum about Good Faith, proceedings of the first "Common core of European Private Law", Trento, 1995 and ZIMMERMANM R. and WHITTAKER S., *Good Faith in European Contract Law*, Cambridge, 2000.

[17] Beside the criticism raised by DAWSON J.P., *The Oracles of the Law*, Ann Arbor, 1968, p. 432 ff. see for an account of the German reaction WIEACKER F., *Privatrechtsgeschichte der Neuzeit*, 2nd ed., 1967, p.517.

[18] WIEACKER F., *Privatrechtsgeschichte der Neuzeit*, 2nd ed., 1967, p.517.

[19] JHERING R., *Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, in *Jh. Jahr*, 4, 1861, p.1 ff..

[20] STOLL, 19 *Haftung für das Verhalten während der Vertragsverhandlungen*, *JZ*, 1923, 534, was the first author to highlight the importance of the obligation springing from negotiation and he exercised a strong influence on German case law: *RGZ* 665, 17, 19.

[21] LORENZ, *Das Problem der Haftung für primäre Vermögenschäden bel der Erteilung einer unrichtger Auskunft*, in *Festschrift für Karl Larenz*, München, 1973, p. 575 and p.618.

[22] SACCO R., *Introduzione al diritto comparato*, Torino, 1990,p.259.

[23] GORLA G. in SCHLESINGER R.(ed.), *Formation of contracts*, 2 vol., 1968,B6 and B5, p.1272-1292 and 1176-1193; SACCO R., *Contratto e negozio a formazione unilaterale*, *Studi Greco*, 1965; ALPA G. and BESSONE M., *I contratti in generale*, 4 vol., 6 tomi, 1992, Torino; D'ANGELO, *Promessa e ragione del vincolo*, I, *Profilo storico e comparativo*, 1992.

[24] SACCO R. – DE NOVA G., *Il contratto*, vol.I, Torino, 1993, p. 97 and p.167.

[25] Signals of this attitude can be derived by case law on "mistake about the value of the thing sold": Cass. 2.2.1998, n.985, *Contratti* 1998, p.437; Cass. 24.7.1993, n.8290, *Mass. FI*, 1993, entry "Vendita"; and case law on "sale of company shares" see Cass.,24.1.1996, n.3001, *GI*, I, 1, 802; Cass., 28.10.1993, n.10718, *CG* 1994, 351.

[26] This line of case law is still sound and alive: Cass., 30.3.1998, n.3343 FI, Rep. 1998, entry "Lavoro (rapporto)", n. 962; Cass., 26.8.1997, n. 8014 in Mass. *FI*, 1998, Rep. FI, 1998, entry "Opere pubbliche", n. 244; and *Arch. giur. oo. pp.*, 1997, 898; *Rass. avv. Stato*, 1997, I, 169; *Appalti urbanistica edilizia*, 1998, 425. For the application of the new rule see: Cass., 24.3. 1999, n.2788, *Com. Catanzaro v. Gagliardi*, in Mass.FI, 1999.

[27] Italian authors were strictly interpreting the Italian civil liability provision (art.2043 c.c.) as if it was like the German BGB §§ 823 ff. that protects individuals against damages to life, body, health, property.

[28] RODOTÀ S., *Appunti sul principio di buona fede*, *FP*, 1964, I, 1283 started a new interpretation of civil code general clauses, see DI MAJO A., *Clausole generali e diritto delle obbligazioni*, *RCDP*, 1984, 539.

[29] BIGLIAZZI GERI L., *Buona fede nel diritto civile*, Dig. IV, Priv., vol. II, p.175; BENATTI F., *Doveri di protezione*, Dig. IV, Priv., vol. IV, p.221; CASTRONOVO C., *Obblighi di Protezione*, Enciclopedia Giur. Treccani.

[30] See A. Milano, 14.1.1975, *Arch. Civ.*, 1975, p.894 followed by T. Roma, 21.1.1989, *Corr. Giur.*, 1989, p.860 note by P. CARBONE about the sale of two De Chirico's paintings.

[31] NATOLI U., *L'attuazione del rapporto obbligatorio*, II, *Il comportamento del debitore*, in Tratt. Cicu - Messineo e Mengoni, Milano, 1984; BIGLIAZZI GERI L., *Buona fede nel diritto civile*, Dig. IV, Priv., vol. II, p.175; BESSONE M., *Rapporto precontrattuale e doveri di correttezza*, Annali Fac. Giur. Univ. Genova, 1971, p.232.

[32] NANNI F., *La buona fede contrattuale*, Padova, 1988, p. 7.

[33] SACCO R., *Introduzione cit.*, p.254.

[34] MUSY A.M., *Responsabilità precontrattuale (Culpa in contrahendo)*, Dig. IV, vol. XVII, p.354.

[35] POWELL R., *Good faith in contracts*, Current Leg. Problems, 38 (1956).

[36] BAKER J..H., *An Introduction to English Legal History*, 3rd, London, 1990.

[37] GOODE R., *Commercial Law*, 2nd, Harmondsworth, 1995, p.101.

[38] See the famous Lord Denning opinion in *Central London Property v. High Trees House Ltd.* [1947] KB 130,

[39] ATIYAH P.S., *An introduction to the law of contract*, 5th ed., 1995, Oxford, p.15.

[40] STAPLETON J., *Good faith in private law*, Current Leg. Problems, 52 (1999), p.26.

[41] *Esso Petroleum v. Mardon* [1976] QB 801; *English v. Dedham Vale* [1978] 1 WLR 93.

[42] GOODE R., *The concept of Good Faith in English Law*, Centro di Studi e ricerche in diritto straniero (1992), Roma, p.3; BRIDGE M.G., *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 *Canadian Business Law Journal* (1984), 385, 426.

[43] ATIYAH P.S., *An introduction to the law of contract*, 5th ed., 1995, Oxford, p. 212.

[44] STAPLETON J., *Good faith in private law*, Current Leg. Problems, 52 (1999), p.27, Such unconscionable conduct may be constituted either by: a) the person being dishonest; b) the person conducting himself contrary to his word; c) the person exploiting a position of dominance or power over a person who is vulnerable relative to him.

[45] M. HESSELINK, *Towards and European Civil Code*, 2 ed. revised, Nijmegen, 1998, p. 309.

[46] A more general research on the *common principles* of private law is going on in Trento and Turin under the direction of U. MATTEI and M. BUSSANI (see H.KÖTZ, *The common core of European Private Law: Third General Meeting, Trento 17-19 July 1997*, Eur. Rev. Priv. Law, 1997, p.549); U. MATTEI and M. BUSSANI *The Common Core Approach to European Private Law*, 3 Columbia J. European L., 339 (1997).

[47] See the full results of the research in MUSY A.M., *Il dovere di informazione. Saggio di diritto comparato*, Trento, 1999.

[48] CICERO , *De Officiis* III, 319.

[49] TOMMASO d'AQUINO, *Summa teol.*, II, ii, lxxvii, *Fraus.*

[50] *Laidlaw v. Organ* 15 U.S. (2 Wheat.) 178 (1817).

[51] *Swinton v. Whitinsville Savings Bank*, 311 Mass. 677, 42 N.E.2d. 808 (1942).

[52] *Hoffmann v. Red Owl Stores Inc.* 26 Wis. 2d 683; 133 N.W. 2d 267.

[53] *Grumman Allied Ind. Inc. v. Rohr Industries Inc.* 748 F.2d 729 (2nd Circ. 1984).

[54] M. DE JUGLART, *L'obligation de renseignements dans les contrats*, RTD Civ., 1951, p.1; B. GROSS, *La notion d'obligation de garantie dans le droit des contrats*, LGDJ, 1962, nn. 203 e segg.; D. NGUYEN-THANH, *Techniques juridique de protection des consommateurs*, 1969, Etudes ING, p. 217 e segg.; P. BOUZAT, *L'obligation d'informer le consommateur*, RTD Civ., 1973, p.630; L. BIHL, *Vers un droit de la consommation*, Gaz.Pal., 1974, 2, doctr., p.754; A. POPOVICI, *Le contrat d'adhésion, un problème dépassé? Melanges Badouin*, p.198 e segg.; R. SAVATIER, *Le contrats de conseil professionnel en droit privé*, D., 1972, p.137; D. NGUYEN-THANH e J. REVEL, *La responsabilité du fabricant en cas de violation de l'obligation de renseigner le consommateur sur les dangers de la chose vendue*, JCP, 1975, I, 2679; F. CHABAS, *Informer les utilisateurs*, Revue du CNPF, févr. 1975, p.41 e segg.; J. ALISSE, *L'obligation de renseignements dans les contrats*, th. Paris II, 1975; Y. BOYER, *L'obligation de renseignements de la formation du contrat*, th. Aix-en-Provence, 1977; J. GHESTIN, *La formation du contrat*, 3ª ed., Parigi, 1993, n.593 e segg.; Ph. DELEBECQUE, *Les clauses allégeant les obligations dans les contrats*, th. Aix-Marseille, 1981, nn.331-342; *L'information en droit privé*, Travaux de la Conférence d'agrégation, sous la direction de Y. LOUSSOUARN e P. LAGARDE, LGDJ, 1978, in modo particolare gli articoli di B.

BONJEAN, *Le droit à l'information des consommateurs*, p.345 e di C. LUCAS DE LEYSSAC, *L'obligation de renseignements dans les contrats*, p.305; P. JOURDAIN, *L'obligation de "se" renseigner (contribution à l'étude de l'obligation de renseignement)*, D., 1983, p.139; B. RUDDEN, *Le juste et l'inefficace, pour un non-devoir de renseignement*, RTD Civ., 1985, p.91; Ph. LE TOURNEAU, *De l'allègement de l'obligation de renseignement ou de conseil*, D., 1987, p.101; A. ABOUKORIN, *L'obligation de renseignement et de conseil dans la l'exécution des contrats*, th. Dijon, 1989; Y. PICOD, *L'obligation de coopération dans l'exécution du contrat*, JCP, 1988.I.3318; *Le devoir de loyauté dans l'exécution du contrat*, LGDJ, prefazione di G. COUTRIER, 1989; J. ALEXANDRE, *La prestation de conseil juridique en droit français*, th. Aix, 1990; L. PANHALEUX, *Le devoir d'information juridique*, Rev. Jur. de l'Ouest, 1990, n.2, p.125; M. FABRE-MAGNAN, *De l'obligation d'information dans les contrats. Essay d'une théorie*, LGDJ, 1992, prefazione di J. GHESTIN; X. PERRON, *L'obligation de conseil*, th. Rennes, 1992; J. BERNARD DE SAINT-AFRIQUE, *Du devoir de conseil, Defrénois*, 1995, p.913.

[55] Within the first line of decisions see Cass. Civ. 1ª sez., 24 nov. 1976, *Bull.civ.*, I, n.370, D., 1977, IR, p.88; Cass. Civ., 1ª sez., 15 apr. 1975, D., 1976, p.514; in the last years the most relevant cases are Cass. com. 23 maggio 1989, JCP, 1989, éd. E, I, 18761; Cass. com., 4 dic. 1990, *Contrats, Concurrence, Consommation*, febbraio 1991, n.28, p.4; Cass.com., 18 ott. 1994, D. 1995, p.180 noted by Ch. ATIAS.

[56] R. SACCO – G. DE NOVA, *Il contratto*, in trattato Sacco, Torino, 1993, vol. I, p. 243; R. SACCO – G. DE NOVA, *Obbligazioni e contratti*, II, *Trattato* a cura di P. Rescigno, Torino, 1982, pag. 165.

[57] G. VISINTINI, *La reticenza nella formazione dei contratti*, Padova, 1972.

[58] Cass. 29.8.1991, n.9227, *CG* 1993, 306; Cass. 28.10.1993, n. 10718, *CG* 1994, 351; T. Milano, 27.2.1992, *GI* 1993, I, 2, 601 and T. Milano, 5.7.1990, *GI* 1991, I, 2, 396.

[59] See the cases offered by STAPLETON J., *Good faith in private law*, Current Leg. Problems, 52 (1999), p.27.

[60] TOEBNER G., *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *Modern Law Rev.* (1998), 11.

[61] Further insight will be derived from the Trento Common Core Questionnaire on *Mistake, Misrepresentation and Duty to Disclose* edited by H. MUIR WOOD - R. SEFTON GREEN (Cambridge, forthcoming).

[62] See S. RIESENFELD, *German Legal Ideas and Legal Thought in the United States* in *The Reception of Continental Ideas in the Common Law World, 1820-1920* (cur. Mathias Reinmann), Berlin, 1993, pp. 90-97; vedi anche *Der Einfluss deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (cur. Marcus Lutter, Ernst C. Stiefel e Michael H. Hoeflich), Tubingen, 1993, p. 28; U. MATTEI, *Why the Wind Changed: intellectual leadership in Western Law*, 42 Am. Jo. Comparative L. 195, 203-209 (1994).

[63] KESSLER F. – FINE E., *Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study*, 77 Harv. L. Rev., 401 (1964), p.424; FARNSWORTH E.A., *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217 (1987), p.263-264; HENDERSON, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L. J. 343, 357-365

(1969); SUMMERS, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 220-232 (1968); Note, 37 U. Chi. L. Rev., 559, 583-585 (1970).

[64] A. KRONMAN, *The lost lawyer*, Cambridge Mass., 1993, p.264-270

[65] M. A. GLENDON, *A nation under lawyers. How the crisis in the legal profession is transforming American society*, Cambridge Mass., 1999, p. 199.

[66] R. POSNER, *The decline of law as an autonomous discipline*, 100 Harv. L. Rev. 761-780 (1987).

[67] R. UNGER, *The critical legal studies movement*, Cambridge Mass., 1983; D. KENNEDY, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev., 1685 (1976).

[68] D. KENNEDY, *A critique of adjudication (fin de siècle)*, Cambridge Mass., 1997, p. 73.

[69] We learn it straight from the way J. STAPLETON, in *Good faith in private law*, Current Leg. Problems, 52 (1999) is dealing with the subject through a standard prudentialist approach.

[70] The recent efforts towards a European Civil Code are a clear symptom of the said attitude; the Neetherlands government institutions, during their EU six months term Presidency, set a reunion of experts in the Hague 28th February, 1997. The reports of the colloquium are published in *Eur. Rev.Priv. Law*, vol.5, 1997, n.4, p.455 ss.

Some of those contributions can be seen in the volume edited by A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron, *Towards a European Civil Code*, 2nd Ed., Nijmegen, 1998.

[71] See for instance R. SACCO *Formation of Contract* in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron (eds.), *Towards a European Civil Code*, 2nd Ed., Nijmegen, 1998, p. 191.

[72] N. ROULAND, *Anthropologie juridique*, Paris, 1988, p. 173.

[73] This definition is used by P.G. MONATERI, *All this and so much more*, (forthcoming) and now circulating in Cardozo Electronic Law Bulletin, www.gelso.unitn.it/card-adm, where the author wants to reappraise the current debate about criticism, and the distinction between interpretation and use-of-the-texts.

[74] See the 1987 Tesi di Trento as reported by R. SACCO, *Introduzione al diritto privato comparato*, Torino, 1992, p.16 note 32.

[75] G. TEUBNER, *"Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital* in R. in t'Velt *et al.* (eds.), *Autopoiesis and Configuration Theory*, Dordrecht, 1991 and ID., *The Two Faces of Janus: Rethinking Legal Pluralism* (1992), 13 Cardozo L. Rev. 1443.

[76] See the use of typical critical argumentation by P.G. MONATERI, *Black Gaius: A Quest for the Multicultural Origin of the Western Legal Tradition*, 3 Hasting L. Jo. (2000) and ID. *All this and so much more*, (forthcoming), now circulating in Cardozo Electronic Law Bulletin, www.gelso.unitn.it/card-adm; and the use of comparative law and economics by U. MATTEI.