

**GOOD-FAITH:  
CONTEMPORARY CONTEXTUALIZATION AND FUNCTIONS**

**BOA-FÉ:  
CONTEXTUALIZAÇÃO CONTEMPORÂNEA E FUNÇÕES**

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**RESUMO:** O trabalho aborda aspectos mais recentes sobre o princípio da boa-fé, tanto na sua vertente objetiva quanto subjetiva, enfrentando, em seu núcleo, as funções da boa-fé. Ademais, investiga as possibilidades de interpretação do conceito de probidade contratual, em conjunto com a boa-fé.

**PALAVRAS-CHAVE:** Princípio da boa-fé. Boa-fé objetiva. Boa-fé subjetiva. Funções do princípio da boa-fé. Probidade negocial.

**ABSTRACT:** The article covers more recent aspects of the principle of good-faith, both in its objective and subjective perspectives, particularly analyzing the functions of good-faith. Moreover, it investigates the interpretation possibilities of the concept of contractual probity, in conjunction with good-faith.

**KEYWORDS:** Principle of good-faith. Objective good-faith. Subjective good-faith. Functions of the principle of good-faith. Contractual probity.

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## INTRODUCTION

To approach good-faith means envisaging the principle with the highest repercussion to the private law of Roman-Germanic families, of which the Brazilian legal system is a legatee, throughout the 20<sup>th</sup> century and the beginning of the 21<sup>st</sup> century. There is even more emphasis on the approach of the principle of good-faith in its objective aspect, as it reflects the various functions that are aggregated to it, besides its particular conceptual structure.

Without any chance of error, it is possible to affirm that objective good-faith is the most emblematic principle of negotiation law, especially after the hermeneutical *Standards* established by the Germanic law as a consequence of the German civil codification (BGB) of 1900 and its influent evolution throughout the 20<sup>th</sup> century. Such studies have caused an immense impact in various sectors of private law, and not only in contractual law, in the continental European and Latin American scenery, reason for which the simple attempt to approach the countless nuances of the principle concerned would exceed the limits of these brief notes.

Therefore, it is more appropriate for the occasion to study the contemporary functions of good-faith and its moments of direct incidence in the contractual relationship, based upon the actual Brazilian civil codification. Consequently, some of the mediate effects of good-faith in the systematization of the Brazilian civil law, such as fault *in contrahendo*, malfeasance, complexity of duty, restraint of the quantification of property damage due to the lesser degree of guilt of the offender, among others, may not be contemplated in this abbreviated analysis.

Therefore, the present approach shall take into account: (i) a brief historical summary; (ii) a concise investigation of the subjective and objective aspects of good-faith; (iii) the functions of good-faith; (iii.a) the negotiation interpretation; (iii.b) the integration of contract; (iii.c) the limitation to the exercise of contractual autonomies; (iii.d) the establishment of legal duties; (iv) the contractual probity.

## BRIEF HISTORICAL SUMMARY

Good-faith could be found in the archaic Roman period, with varied applications from its semantic and ordinary context, therefore being: **sacred**, in the religious rites to the goddess Fides; **factual**, in personal guarantees rendered by protectors to protégées; and **ethical**, expressed in the moral qualities of those same guarantees. This design, very little or no scientific at all, left an open field to the legal innovations of the following centuries, despite the minor expression of the principle itself along modernity. It is important mentioning at this point the French codification (1804), which was particularly relevant to the Brazilian codified civil system. In the Napoleonic codification, good-faith was expressed and covered by its subjective aspect; however, despite the textual reference

to the principle, it did not reach any practical repercussion, and ended up falling in disuse. Such fact had negative repercussions, for instance, on the first Portuguese civil codification of 1865 (the Seabra Code), which did not even mention good-faith. Identical repercussion occurred with the Brazilian Commercial Code of 1850, which, in spite of mentioning good-faith, did not bring any progress to the use of the principle in commercial practices. On the other hand, the Brazilian Civil Code of 1916, a result of long legislative debates which featured the 19<sup>th</sup> century, incorporated the principle of good-faith in many provisions, yet in a sparse and non-systematic way, what revealed, among other aspects, the immateriality of legal principles in a universe ruled by centralizing codes, totalizing of the legal experience, that is, of the dogmatic positivism, what could not be different in that moment of legal rationalism.

Succinctly, these are the reasons which allow us to conclude that, at least in Brazil, the principle of good-faith has gained legislative space and more legitimacy among judges only after the Consumer's Code came into force (Statutory Law n. 8.078, September 11<sup>th</sup>, 1990), what established a new contractual logic, based on the principle of objective good-faith.

## **SUBJECTIVE GOOD-FAITH AND OBJECTIVE GOOD-FAITH**

Once the historical summary is finished, it is convenient to briefly distinguish objective good-faith from subjective good-faith. The terminological specificity derives from the German semantic interpretation found in the BGB, which was concealed in our system, due to limitations of the national language, practically throughout the entire 20<sup>th</sup> century, under the singular and prevailing conception of subjective good-faith and the influence of the French codification.<sup>1</sup> When commenting paragraphs 157 and 242 of the BGB, Carlos Melon Infante makes the following distinction, in a translator's note to the German civil code (ENNECERUS, KIPP, WOLF, 1994, nota 114. *Apud* NALIN1998, p. 196):

[...] quanto ao § 157, que seria a 'Treu und Glauben'. Es una fórmula que también puede traducirse simplemente por 'Buena fe'; es la buena fé que podríamos llamar 'buena fe de comportamiento'. En el ámbito de los derechos reales 'estar en buena fe' es 'in guten Glauben sein'; ésta más que de comportamiento, es una 'buena fé de creencia': creencia por ejemplo, en la titularidad de quien transmite una cosa o derecho.

Accordingly, we call subjective the good-faith 'belief', state of ignorance, intention and psychological state of the person who states his/her intent (declarant) before a certain

<sup>1</sup> Saliente-se que o direito civil codificado francês conheceu a boa-fé objetiva, entretanto, pouco uso dela fez, tanto que do texto legal extrai-se, tanto quanto o vigente Código Civil brasileiro, aplicar-se ela na conclusão e na execução dos contratos. (MENEZES CORDEIRO, 2001, p. 265 e 267).

state of things or legal interests. The declarant acts as if he/she believed and sensed intuitively that his/her acts are law-oriented or in respect of someone else's right.

More precisely, Menezes Cordeiro (2005, p. 405-406) clarifies that subjective good-faith can be considered in two senses: a first purely **psychological** sense and a second essentially **ethical** sense. The psychological sense comprises good-faith related to the ignorance of a certain fact or state of things, however obvious it might be; in the ethical sense, only the person that ignored a fact or state of things in a non-unjustifiable way would be acting in good-faith, so that, on the other hand, the person that unjustifiably ignored what he/she should know would be acting in bad-faith.

Certainly, the subjective good-faith, in its ethical aspect, demands more from the contracting party, as it imposes him/her the duty of caution and self-questioning in regard of the fact about which a judgment is made. Conversely, although the ethical aspect of subjective good-faith prevails in the doctrine, one should not previously choose between one or other concept, for the application of the principle demands the analysis of the factual case and the cultural comprehension of the historical and jurisprudential evolution of good-faith.

On the other hand, the objective perspective considers good-faith from an external viewpoint from the declarant, in which it does not matter the good or bad intentions, prevailing the acts and manifestations, according to the ethical and legal patterns in force, correspondent to loyalty, the behavior of honest people, opposite to *dolus* and fraud (MENEZES CORDEIRO, 2001, p. 265) and in respect of the legitimate interests and reasonable expectations of the contractual partners. (LEWICKI, TEPEDINO, 2000, p. 57) Or, in Luis Díez-Picazo's (1983, p. 263) synthetic diction, "*La buena fe es según sabemos un standard de conducta arreglada a los imperativos éticos exigibles de acuerdo con la conciencia social imperante*".

The conceptual distinction is important to reaffirm the coexistence of both aspects of good-faith in the Brazilian civil codification. Although the application of subjective good-faith is more visible in the context of *in rem* rights, it is equally incident in the field of negotiation law, once the new general rule of negotiation hermeneutics – article 113 do the Civil Code<sup>2</sup> – does not make any distinction between subjective and objective good-faith when using the principle in a hermeneutical function. Notice, for instance, the strong subjectivity that prevails in testamentary legal matters, which shall be interpreted considering the intent of the testator (article 1.899 of the Civil Code<sup>3</sup>), being such intent based on his/her perception of reality (*belief = subjective good-faith*).

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<sup>2</sup> Art. 113. Os negócios jurídicos devem ser interpretados conforme a boa-fé e os usos do lugar de sua celebração.

<sup>3</sup> Art. 1.899. Quando a cláusula testamentária for suscetível de interpretações diferentes, prevalecerá a quem melhor assegure a observância da vontade do testador.

The institute of fraud, for example, in the Brazilian system, makes use of subjective good-faith to feature one of its conceptual variations by qualifying the inexperience of the contracting party as one of its hypothesis of applicability, according to article 157 of the Civil Code<sup>4</sup>. The inexperience of the contracting party is nothing but a state of ignorance, i.e. a subjective judgment, the belief (subjective good-faith) in the economical equivalence between offer and consideration and the contracting party's erroneous perception of the market value of the subject matter of the contract.

Notwithstanding the maintenance of subjective good-faith in the context of the current civil codification, it is the objective good-faith that, undoubtedly, prevails, changed from abstract general principle to concrete general principle of civil law, especially with reference to articles 113 and 422<sup>5</sup> of the Civil Code, which, generally speaking, materialize the principle from the viewpoint of negotiation ethics (AMARAL NETO, 2003, p. 81).

Besides the positive transformation of the principle of good-faith, the behavioral meaning of the contracting parties stands out, in such a way that the negotiation confidence represents the finest and most current expression of objective good-faith (FACHIN, 1998, p. 116)<sup>6</sup>, with emphasis on the field of pre-negotiation relationships or the "non-contract space", in which there is no contractual link between the parties, but only the intent to contract (MARTINS-COSTA, 2007, p. 317) and legitimate expectations, which, once breached, imply frustration and civil liability (POPP, 2002, p. 123). It is merely the reflex of the transition from a subjectivist civil law to an objectivist one (NOVAES, 2000, p. 22), in which behaviors are more valued than intentions.

## THE FUNCTIONS OF GOOD-FAITH

As to the functions of good-faith, they are multiple and related to the legal systems that adopt the principle and the opinions of the doctrine on the matter are unsettled. There is general agreement only about the lack of consensus on the functions of good-faith. The same thing happens in the Courts, which apply the principle without worrying

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<sup>4</sup> Art. 157. Ocorre a lesão quando uma pessoa, sob premente necessidade, ou por inexperiência, se obriga a prestação manifestamente desproporcional ao valor da prestação oposta.

<sup>5</sup> Art. 422. Os contratantes são obrigados a guardar, assim na conclusão do contrato, como em sua execução, os princípios da probidade e da boa-fé.

<sup>6</sup> Mesmo antes da vigente codificação, mas ancorado na experiência jurisprudencial do TJPR, sobre a confiança negocial, anotava Luiz Edson FACHIN: "Expressando o abrigo jurídico de intenções e negociações tendentes à formação de um contrato, a confiança pode mostrar-se numa configuração jurídica de dupla possibilidade. De um lado, a conclusão de contrato por comportamento concludente, cujo rompimento unilateral afeta o interesse contratual positivo ou de adimplemento mediante a quebra de dever jurídico. De outra parte, ainda mais importante, a violação da confiança pode atingir o interesse negativo ou da boa-fé, gerando ambas as hipóteses efeitos jurídicos, especialmente indenização, compreendendo danos emergentes e lucros cessantes." (O "aggiornamento" do direito civil brasileiro e a confiança negocial).

about concepts, as Teresa Negreiros (1998, p. 224-225) points out, and functional definitions. Nevertheless, it is possible to recall at least four functions directly extracted from the principle of objective good-faith, without prejudice to others being listed: *i*) interpretative function; *ii*) integrative function and (*ii.a*) the adjustment of the economic basis of the contract; *iii*) the function of restricting the exercise of subjective rights; *iv*) the function of originating duties to the contracting parties. All those functions are committed to the optimization of contractual behaviors (MARTINS-COSTA, 2002, p. 199).

## GOOD-FAITH AND NEGOTIATION INTERPRETATION

The interpretative function derives from article 113 of the Civil Code, as it is the general precept of interpretation for all legal matters, not exclusive for contractual matters. Countless are the rules of interpretation based on good-faith in the Civil Code and spread out in its Books. However, article 113 is particularly important, as it materializes, as a universal precept, located in the General Part of the Civil Code, the principle of good-faith. From a practical-procedural point of view, to judge a dispute that involves the interpretation of a contract without taking good-faith (subjective and objective, remember!) into account is to rule *contra legem* and not only (!?) against a principle.

Nevertheless, the difficulty of ruling according to good-faith, mainly the objective one, still remains, as it is not defined by an opposite or excluding judgment, i.e. bad-faith, and neither can be described *a priori* from the factual case.

Having said that, good-faith applied as interpretation demands a thorough investigation of the factual case, as well as the assessment of the circumstances of the business and the uses of the place of its execution. The mere reference to the breach of good-faith, as the grounding of a judicial decision, in my opinion, is abusively discretionary, once good-faith is a finalizing judgment in view of the other persuasion elements that instruct the case and make the judge conclude that the principle has been breached.

The interpretation by means of good-faith intends to reveal the meaning and the scope of the contractual intentions. Therefore, it investigates the parties' contractual intent, so treasured by the legislator, according to article 112<sup>7</sup> of the Civil Code, disclosing the meaning of the provisions and the contractual intentions. When it comes to interpreting the contractual business, the investigation is conducted in accordance with articles 112 and 113 of the Civil Code, without prejudice to the application of other more specific articles, in pursuit of the intention represented by the joint contractual declaration (in the volitive convergence from which the contract results and is formed) and not by the singular intention of one of the contracting parties.

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<sup>7</sup> Art. 112. Nas declarações de vontade se atenderá mais à intenção nelas consubstanciada do que no sentido literal da linguagem.

On the other hand, the advisable interpretation should not deviate from the socioeconomic program of the contract, at the risk of being contrary to the parties' negotiation interest and, ultimately, of the undesirable substitution of the contracting parties' private autonomy by the "judge's" discretionary "autonomy".<sup>8</sup> Hence, the interpretation shall not lead to a new contract or new obligations, for the contractual hermeneutics is guided by what is already in the contract, even if not very conspicuous and, maybe, doubtful. Concisely, to interpret means to clarify the existing wording of the contract.

One of the most relevant consequences regarding the interpretation of the contract is the one inserted in article 423 of the Civil Code, which incorporates the *interpretatio contra stipulatores*, i.e. the interpretation of provisions in a contract against the party who stipulates its wording.

## THE INTEGRATION OF CONTRACT

By other ways, we are led to the integration of contract, a function that is equally extracted from the aforesaid article 113 of the Civil Code, sharing the general rule an interpretative-integrative meaning, as Francisco Amaral (2003, p. 81) remarks.

Integration occurs in the absence of a contract provision, not foreseen by the parties, to meet the peculiarities of the execution of the same contract. The integrative performance happens in the spaces left by the contracting parties who, due to lack of prevision, lack of caution or the simple alteration of the current circumstances that come into contact with the contractual relationship, whether economic or not, disagree about the effects of the contractual relationship.

The integration of contract, therefore, suggests a more pronounced intervention by the judge in the context of obligations, for he will be the one to fill in the gaps left by the parties. It is evident that such intervention shall always be compatible with the reality of the contract and the parties' patrimonial and existential interests, bearing in mind the conservation of the business, if possible, and the coherence with the other legal effects desired by the parties.

In a coherent alignment perspective between the interpretative and integrative functions, D'Angelo, Monateri e Somma (2005, p. 19) make the following considerations:

Queste precisazione, in consonanza con le indicazioni espresse precedentemente, già delineano il confine e i rapporti dell'operazione di integrazione secondo buona fede rispetto a quella interpretativa: la seconda è volta a identificare il significato dell'enunciato delle convenzioni,

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<sup>8</sup> Lembre-se, de outro vértice, que o Código Civil autoriza ao juiz converter o negócio nulo em outro negócio válido, segundo os estritos ditames do seu art. 170, incorporando a conversão substancial do negócio jurídico, em homenagem ao princípio da conservação do negócio jurídico, mas que não se confunde com a interpretação, na medida em que esta pressupõe seja o contrato válido.

delle singole clausole, e il complessivo assetto di interessi che esso esprime; la prima assume come dato tale significato ed è volta a determinare, per la soluzione di conflitti non risolti della convenzione, regole che questa non ha disposto ma che siano coerenti, o quantomeno compatibile, con il contenuto della medesima, risultando in tal modo la relazione di continuità e complementarità tra le due operazioni;

Furthermore, integration can refer to the adjustment of the economic basis of the contract due to the supervenience of unforeseen facts, along its execution, which can cause the rupture of equity between offer and consideration. In Brazil, in accordance with the Italian guidance, and apropos of this function of good-faith, the hypotheses of price review, found in article 317<sup>9</sup>, and termination of contract, based on article 478<sup>10</sup>, have been incorporated to the Civil Code.

Objective good-faith occurs in both hypotheses, even though the aforesaid legal rules do not mention it, for the principle of contractual justice, according to which the relationship of equivalence between offer and consideration must be preserved alongside the entire contractual program, derives from it. In turn, although contractual fraud is treated as a hypothesis of defense to contract formation (defect of the legal affair – article 157 of the Civil Code), what leads to its invalidity, the magistrate's judgment about the inadequacy between offer and consideration is also based on the contractual balance and, therefore, derives from objective good-faith and its integrative-corrective function.

The legal provisions concerned have different purposes, for article 317 of the Civil Code aims at the rebalance of price, more specifically to the act of payment, and finds its function in the conservation of the contract. Article 478, in turn, sets forth the termination of contract upon request of obligor, being its review admissible upon request of obligee by means of counterclaim (article 479), being such interpretation appropriate according to the Italian jurisprudential guidance. Both articles, however, share two premises: the rupture of the economic basis of the price (article 317) or of the contract itself (article 478) and the unpredictability of the contracting parties as to the circumstances that follow the contract formation.

Nevertheless, invoking the lack of prevision, based on the subjective stress laid on it by the Unpredictability Theory, reveals to be absolutely unreasonable in view of the undeniable disruption between Civil Law and subjectivism. The word unpredictability, in the objective context that prevails in the negotiation relationships, can only be

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<sup>9</sup> Art. 317. Quando, por motivos imprevisíveis, sobrevier desproporção manifesta entre o valor da prestação devida e o do momento da execução, poderá o juiz corrigi-lo, a pedido da parte, de modo que assegure, quanto possível, o valor real da prestação.

<sup>10</sup> Art. 478. Nos contratos de execução continuada ou diferida, se a prestação de uma das partes se tornar excessivamente onerosa, com extrema vantagem para a outra, em virtude de acontecimentos extraordinários e imprevisíveis, poderá o devedor pedir a resolução do contrato. Os efeitos da sentença que a decretar retroagirão à data da citação.



understood in view of the contracting parties' lack of prevision about the sharing of the risks of the business, and not anymore about the psychological elements not acknowledged by the declarant.

The parties can actually contract about hypothesis of supervening risk, in the scope of what is called, in Italy, *clausula in bianco* (white clause) and, in its absence, the judge performs the contractual integration so that to ensure the compatibility between the contractual balance and the actual and current reality of the legal relationship (D'ANGELO, MONATERI, SOMMA, 2005, p. 22 e 23).

### **THE LIMITATION TO THE EXERCISE OF CONTRACTUAL AUTONOMIES**

The function of limitation to the exercise of contractual autonomies or of subjective rights finds repercussion in the writing of contractual provisions and also in the termination of the business by the obligee. Although the Civil Code does not refer, systematically, to abusive contractual provisions, as the Consumer Code does, notice that, apropos the first hypothesis above mentioned, the contracting parties of civil or commercial adhesion relationship and, I believe, of private contracts, too, are not allowed to estipulate “[...] the anticipated waiver, by the adherent party, of rights resulting from the nature of the business” (article 423 of the Civil Code).

The wording of the provision could suggest a contradiction the cause (economic or social) of the contract itself, as well as a certain difficulty in verification in everyday life. However, such type of clause is present in the overwhelming majority of insurance contracts (life, property, health etc.), full of liability exclusion clauses, under hypothetical and abstract excuses of all kinds, in such a way that it is almost unattainable for the policyholder to obtain the benefit of the insurance, in view of the countless anticipated contractual waivers, of which the he/she only learns on the late receipt of the general conditions of the policy and the payment of the premium.

Also from the field of insurance contracts it is possible to extract the second hypothesis of limitation to the exercise of the contracting parties' subjective rights, now in view of the termination of the contract, for the insurance company, not rarely, refuses to pay the benefit on the grounds that part of the premium is outstanding. The theory of substantial performance of the contract states that if the substantiality of the obligation has been fulfilled by one of the contracting parties, the counterparty cannot fail to perform his/her part of the obligations, not even proportionally, once the contractual commutability is preserved (NEGREIROS, 1998, p. 250-251).

### **THE ESTABLISHMENT OF LEGAL DUTIES**

The last function of objective good-faith mentioned herein is the establishment of legal duties. Indeed, objective good-faith, more than in the aforementioned functions, is

related to a standard of conduct, whereas subjective good-faith refers to a state of perception or confidence to be acting according to the law (ALMEIDA COSTA, 2000, p. 78).

Such function derives from the perception that contracts are not comprised, exclusively, of main and secondary obligations, but also of lateral or instrumental duties or accessory duties of conduct, duties of protection or duties of custody, and correlated duties, expressions that derive from the German civil doctrine and the theses about the matter (MARTINS-COSTA, ..., p. 438).

The lateral duties were strongly highlighted in the new civil codification, even though national considerations about them were made much earlier, as shown by Clóvis V. do Couto e Silva's<sup>11</sup> remarkable and ground-breaking work, *A Obrigação Como Processo*, launched in 1976, in which he stated about objective good-faith (1976, p. 29):

Concerning contract law, it manifests itself as an objective maxim that determines the increase of duties, beyond those that the covenant explicitly constitutes. It is addressed to all participants of the link and it can also establish duties to the obligee, who was traditionally considered only a right holder.

Due to the exiguous exposition space dedicated to the concerning matter, it is not feasible to analyze in detail all aspects of the lateral duties, but it is important, on the other hand, to at least mention them. In this succinct order of ideas, Judith Martins-Costa (p. 439), in detail, list the lateral duties in the following way: *a) duties of care, welfare and security; b) duties of warning and clarification; c) duties of information; d) duties of rendering of accounts; e) duties of collaboration and cooperation; f) duties of protection and care for the counterparty's person and patrimony; g) duties of omission and secrecy.*

It is definitely relevant, in such context of multiple duties, different from the main and secondary duties, to recognize that they do not necessarily derive from the contract signed by the parties, but they may arise in the scenery of the contractual relationship from a legal provision or from the application of the principle of objective good-faith, once it is a rule.

As they are legal duties, resulting from contract, law or directly from the principle of good-faith, they can be disobeyed, what can be recognized by means of the positive breach of contract (NALIN, 1996, p. 159) or credit and, as long as they produce their own effects, by the inexact performance (CATALAN, 2005, p. 163-164). It is necessary to reaffirm that in any context, whether in the positive breach of contract or in the inexact performance, the execution of the (main) obligation, however, in concurrence with an offense to a lateral duty, does not have the prerogative to disencumber the obligor from the eventual civil liability for breach of contract, without prejudice to

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<sup>11</sup> Para uma leitura contextualizada do livro em questão, em perspectiva histórica, diante do novo Código Civil e da constitucionalização do Direito Civil *vide* XAVIER, L.; XAVIER, M.; NALIN In: TEPEDINO e FACHIN, 2008, p. 299-322.

other consequences being verified, once article 422 of the Civil Code is inserted in the context of general clauses.

## THE CONTRACTUAL PROBITY

It would not be appropriate to finish this part of the exposition, especially dedicated to objective good-faith, without going all the way through the extent that the Civil Code of 2002 gives to article 422<sup>12,13</sup>, for it is a general clause and provides multiple means of application, compatible to the contemporary contractual complexity, and in various moments of incidence in the contractual relationship.

For that reason, besides good-faith itself, in the wording of the legal provision (art.422 of the Civil Code), probity is added to the principle and it is identified as loyalty and correct behaviors, in the appearance and in the conduct of the contractual execution (AMARAL NETO, 2003, p. 81), and even after the strict performance of the main obligation.

Loyalty and correct behavior find their inspiration in the Italian civil codification, in which they are named *correttezza*, identified in pre-contractual relationship in the following way: In the pre-contractual conduct, the duty of probity, as correct behavior, comprises the duty not to disloyally and unjustifiably interrupt negotiations in course (a); admits the duties of loyalty, in proper sense (b); and encloses the duties of assistance and care for the counterparty's person and patrimony in the negotiations and conclusion of the contract (c).

Even though some investigations have been carried out in the Italian doctrinaire scenery, in comparison with the Germanic codification, seeking to distinguish objective good-faith from *correttezza*<sup>14</sup>, once the Italian Civil Code places those principles in distinct legal provisions (*corretteza* – articles 1175, 2598 n.3, and objective good-faith – articles 1337, 1358, 1366,1375, 1460 2<sup>nd</sup> co), the prevailing conclusion is that objective good-faith and *correttezza*, i.e. probity in the Brazilian codified diction, represent the same concept, even if by means of different terminology. Such uniform

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<sup>12</sup> Art. 422. Os contratantes são obrigados a guardar, assim na conclusão do contrato, como na sua execução, os princípios de probidade e boa-fé.

<sup>13</sup> “No sistema jurídico pátrio (nacional) e positivado, a boa-fé surge pela primeira vez no Código Comercial de 1850, ao tratar, o antigo *codex* aos usos de tráfico. Contudo, diferente do princípio da boa-fé, que pode ser aplicado ainda que não previsto em lei, os usos de tráfico são elemento meramente auxiliar na interpretação da vontade dos contratantes” (XAVIER, L.; XAVIER, M.; NALIN, 2008, p. 316). Ou seja, a dimensão complexa emprestada pelo novo Código Civil ao princípio da boa-fé não encontra equivalente em diplomas legais brasileiros anteriores, revogados ou não.

<sup>14</sup> A distinção se pautava por um exercício de abstração, no sentido de se sustentar que a boa-fé objetiva seria um princípio de aplicação ao caso concreto, diante da pré-existência de uma relação jurídica obrigatória. Ao seu turno, a *correttezza* seria um princípio de valoração em abstrato, dispensada a relação jurídica concreta.

concept is translated as a situation of need or obligation, that is, as a duty or obligation of correct, loyal, positive (cooperation) or negative (abstention) behavior (GERI, 1989, p. 169-170). I believe that the Italian doctrine's lesson is perfectly applicable to the current Brazilian scenery, and a precise conceptual distinction between objective good-faith and probity is not visible, although the latter represents and imposes a significant ethical content to the conduct of the contracting parties. Ultimately, probity explains why the contemporary contract is seen as a cooperation business, rejecting the exploitation of a person by other.

Such ethical requirement is applicable, for instance, in the clear wording of contractual instruments, in accordance with the posture of honest people, without seeking subterfuges and deliberate confusions or obscurities (DÍEZ-PICAZO, 1983, p. 263). Those who do not behave that way are considered dishonest and breach objective good-faith. In such context, in consumer relationships, censorship is exercised through the nullity of the maliciously written clause (article 51, *caput*, item IV). In the Brazilian civil codification, disapproval derives from the analysis of the factual case, therefore being flexible and contextualized, once it is framed in a model of general clause, as said above.

## CONCLUSION

The configurations and possibilities of good-faith are countless. Every time we try to delimit the concerning principle, we realize that so many other nuances may and must be investigated.

But it is exactly this complex state of things, which combines innovation and distress, that makes the continuous evolution of Private Law possible and confirms the current reality of Law, not as data or a post, but as a science under construction. More than ever, in the segment of legal principles, the question is worth more than the answer!

As a matter of fact, it is appropriate to go on asking: what is good-faith? What are its functions?

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