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**General Clauses and Practice : the Use of the Principle of Good Faith in the Decisions of Chinese Courts**

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# “General Clauses and Practice: the Use of the Principle of Good Faith in the Decisions of Chinese Courts”

## 1. Introduction

The principle of good faith occupies a prominent role within the context of general clauses already present in Chinese legislation. Although the principle was first introduced into the Chinese legal matrix by means of Article 4 of the 1986 General Principles of Civil Law, its use was rather limited, due to the strictly positivistic mindset which characterized the early years of post-Maoist reforms. From the 1990's onwards, however, good faith began to enjoy such an increasing degree of success, both in case law and scholarly writings, that the principle became known as “King Clause” among Chinese scholars (帝王条款, *diwang tiaokuan*)<sup>1</sup>.

The importance of such a principle on the declamatory plane is widely known as, at present, virtually every law concerning civil or commercial matters refers to the so-called “objective good faith”<sup>2</sup>, while “honesty and credibility” has become almost a slogan, and is extensively cited by Chinese leaders as one of the prerequisites for the establishment of the rule of law in China<sup>3</sup>.

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<sup>1</sup> See: LIANG HUIXING, “Minfa”, (Civil Law), Sichuan Renmin Chubanshe, 1989, p. 323; ; JIANG PING, “Zhonghuarenmingongheguo Hetongfa. Jingjie (fu falü tiaowen)” (Comment to The Contract Law), Beijing, Zhongguo Zhengfa Daxue Chubanshe, 1999, p. 6; DENG JIACHENG - HUANG ZHIPING: “Lun chengshi xinyong yuanze de shiyong” (“Applications of the Principle of Good Faith), Guangxi Zhengfa guanli ganbu Xueyuan bao, vol. 19, n. 1, January 2004, p. 32; XIA HANMING: “Chengshi xinyong yuanze qianxi” (Analysis of the principle of good faith), Wuhan shi jingji guanli ganbu Xueyuan xuebao, vol. 17, n. 4, December 2003, p. 55; JIAO FUMIN: “Lun chengshi xinyong yuanze yu Woguo riandai hetongfa de chongsu” (The principle of good faith and the remodeling of current Chinese contract law), Hebei Faxue, vol. 20, n. 4, July 2002, p. 35; LI MAOJUN: “Jiedu chengxin yuanze: guanyu chengshi xinyong yuanze de falü sikao” (Deciphering the principle of good faith: a legislative reflection), Hebei Faxue, vol. 20, n. 6, November 2002, p. 141. The definition is so common that it is included in a number of schoolbooks. See, for example, the bilingual manual ZHU YIKUN, “Zhongguo Minfa – China’s Civil Law”, Falü Chubanshe, 2003. p. 8.

<sup>2</sup> We can recall, in addition to the General Principles of Civil Law (art. 4) and the “1999 Contract Law” (*Zhonghua renmin gongheguo hetong fa*, 中华人民共和国合同法), articles 6, 42, 60, 92 e 125, which we will closely analyze, the following provisions: the 1993 “Law of the PRC on Protection of Consumer Rights and Interests” (中华人民共和国消费者权益保护法, *Zhonghua renmin gongheguo xiaofeizhe quanyi baohufu*), article 4; the 1993 “Anti-Unfair Competition Law”, (反不正当竞争法, *fan buzhengdang jingzhengfa*), article 2; the 1995 “Insurance Law” (“中华人民共和国保险法, *Zhonghua renmin gongheguo baoxian fa*), article 5; the 1997 “Price Law” (中华人民共和国价格法, *Zhonghua renmin gongheguo jiagefa*), article 7; the 1997 “Auction Law” (中华人民共和国拍卖法, *Zhonghua renmin gongheguo paimaifa*), article 4; the 1996 “Security Law” (中华人民共和国担保法, *Zhonghua renmin gongheguo danbaofa*), article 3; the 2006 *Partnership Enterprise Law* 中华人民共和国合伙企业法 *Zhonghua renmin gongheguo hehuo qiyefa*), article 5; the 2005 Securities Law (中华人民共和国证券法 *Zhonghua renmin gongheguo zhengquan fa*) article 4, and, finally, the recent Labor Contract Law 中华人民共和国劳动合同法, *Zhonghua renmin gongheguo laodong hetongfa*), which entered into force on 1 January 2008, article 3. Since 2005, references to objective good faith (诚信 *chengxin*) can be found in the Arbitration Rules of China International Economic and Trade Arbitration Commission (“CIETAC”) (中国国际经济贸易仲裁委员会仲裁规则, *Zhongguo guoji jingji maoyi zhongcai weiyuanhui zhongcai guice*), article 7.

<sup>3</sup> See the address by Wen Jiabao during his 2004 NPC press conference, cited by D. Cao: “Chinese Law. A Language Perspective”, 2004, note 52, p. 182. To be precise, according to reports available online, Wen Jiabao used the expression *chengshi shouxin* (诚实守信) and not the term under scrutiny in our study, *chengshi xinyong* 诚实信用. *Shouxin* 守信 is simply the concise version of *shou xinyong* 守信用 = to fulfill one’s promises,

There are, however, aspects which are not as well known. For example, there is considerable uncertainty surrounding the principle in the context of judicial practice, and it is difficult to identify the value system triggered by the Mandarin term *chengshi xinyong*<sup>4</sup> (诚实信用) in the minds of judges or other native Chinese speakers.

Yet, such inquiries are vital in order to achieve a thorough understanding of Chinese law and the mechanisms which transcend merely formal aspects, and are all the more topical when placed against the extensive use of good faith and other vague notions by Chinese judges. The latter investigations are further significant in light of the concerns raised by international observers and Chinese jurists – albeit from different perspectives – that the extension of the use of general clauses may lead to arbitrary judicial decisions and generate uncertainty in the law.

The present paper seeks to lay out the provisional conclusions of a research project which is still in progress and to investigate how Chinese courts utilize the principle of good faith.

To this end, we will analyze several cases which contain the term “*chengshi xinyong*” (诚实信用), decided by the People’s Courts (at grassroots and intermediate level) between October 1999 and October 2006<sup>5</sup>. Particular emphasis will be placed on the good faith provisions contained in the 1986 General principles of Civil Law (art. 4) and 1999 Contract Law (articles 42, 60, 92 and 125).

In tune with Austin’s assertion that “*a word never – well, hardly never – shakes off its etymology and formation. In spite of all changes in and extensions of and additions to its meaning, and indeed rather pervading and governing these there will persist the old idea*”<sup>6</sup>, our discussion will begin with a brief analysis of the characters which constitute the expression *chengshi xinyong* (诚实信用), alongside an overview of the related principles deriving from traditional Confucian ethical theory.

## 2. Translation of the concept of good faith in Chinese

As we have already stated, the concept of objective good faith is translated by means of a compound: *chengshi xinyong* (诚实信用). The latter expression is rather recent, having entered the Chinese legal fabric via the 1931 Republican Civil Code<sup>7</sup>, at the height of the modernization and Westernization process which began at the end of the nineteenth century.

Before we embark upon our analysis of the principle of good faith in Chinese judicial practice, it is necessary to bear in mind that traditional Chinese law does not envisage the expression “*chengshi xinyong*”, at least insofar as its contemporary significance is concerned.

*Chengshi xinyong*, similarly to other terms which have been completely absorbed in modern Chinese, is an example of those neologisms created between the end of the nineteenth

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meaning that the two expressions can be considered semantically equivalent (D. Cao, *ibid.*). On the literal meaning of *chengshi xinyong* (诚实信用) see *infra*, paragraph 2.

<sup>4</sup> For the transcription of Chinese terms we will use *pinyin* system, while for the transcription of Japanese terms we will use the Hepburn system; in particular, we will use the Chinese and Japanese style whereby last names precede first names.

<sup>5</sup> Source: database of the *Zhongguo Fayuan Wang* (中国法院网) website sponsored by the Supreme Court: <http://www.chinacourt.org>.

<sup>6</sup> J. L. Austin, “Philosophical Papers”, Oxford, Clarendon Press, 1979, p. 201:

<sup>7</sup> See art. 129 of the Republican Civil Code, in FOO PING SHEUNG, “Introduction, Code Civil de la République de Chine. Livre I, II, III”. Shanghai-Paris, 1930, and *infra*, paragraph 3.1.

and the beginning of the twentieth century, during the legal modernization phase, which was characterized by the introduction of legal concepts belonging to the Western legal tradition.

The legal model chosen by Chinese reformers is the German system, filtered by the Japanese experience. Considering the translation of the term in question, such a choice appears rather evident.

It must be pointed out that in French, as in Italian good faith in the context of property acquisition and good faith in the contractual setting are expressed by using the same term. An adjective to qualify the term, namely, the addition of “subjective” in the first case, and “objective” in the second, is only inserted when strictly necessary.

Such an approach can be reconnected to the Code Napoléon, where the two concepts are not linguistically distinct, and becomes apparent when one compares Articles 1147 and 1366 of the Italian Civil Code.

On the other hand, German legislators, following Savigny’s teachings, attached different names to the two concepts. “Subjective” Good Faith is translated as “*guter Glaube*”, which is the literal translation of the latin *bona fides*. Objective Good Faith is expressed by the locution “*Treu und Glauben*”, “*Treu*” indicating “loyalty, trust” and “*Glauben*” indicating “faith, belief”, or “loyalty”, which in English could be translated as fair dealing.

The Japanese drafters, operating under German influence, followed the same distinction and opted for a literal translation. Thus, the meaning of the characters is almost identical to the corresponding German terms. Subjective good faith is translated as “*zen-i*” (善義, once again, the literal translation of “good faith”), while the expression “*shingi seijitsu no gensoku*” (信義誠実の原則) is used to describe objective good faith (literally “the duty to fulfill one’s promise and to be honest”).

It must be highlighted that the distinction between French law on the one hand, and German and Japanese law on the other hand, is not merely linguistic. The first legal scenario conceives the principle of good faith as a dual acception, while the second draws a divide between two conceptually distinct notions: “good faith” and “fair dealing”.

The latter configuration is the one preferred by Chinese scholars, who use the same characters as the Japanese ones, with some negligible differences, thus yielding the terms “*shanyi*” (善意) and “*chengshi xinyong de yuanze*” (诚实信用的原则). In the latter context, the phrase describing subjective good faith connotes “good intention”, while objective good faith is composed by “*chengshi*” (诚实), “to be honest” and “*xinyong*” (信用), “being worthy of trust”, shaping an expression reflecting its Japanese equivalent.

Given the characteristics of the Chinese language, “good faith” is a new expression woven into the legal vocabulary by means of characters which had previously been used to identify different concepts, as well as principles unfamiliar to Western thought. By adopting the latter strategy the values represented by the characters were not cast aside but somehow blended into the imported notion. In light of Deborah Cao’s statement that “*translation is a complex decodification and re-codification process of semiosis*”, whereby “*the source code provides the essential information to be recodified, and the target code provides the parameters for the re-rendering of that information*”, we can infer that the redefinition of the concept of good faith in China stems from the characters chosen to represent it.

The latter statement will be thoroughly assessed in the section devoted to the analysis of case law.

For the time being it is sufficient to point out that Chinese authors identify a link between the ancient meaning and the modern significance of the term under scrutiny. In a large number of studies published in China on the topic (particularly in sections focusing on the Romanist, “foreign” origin of good faith), references to Confucian, mohist, and legist

writings exalting the virtues of *cheng* 诚 and *xin* 信<sup>8</sup> are quite common. This highlights the concepts' fundamental role in Chinese philosophical and legal thinking. The expression “chengxin” 诚信, which is the modern concise version of *chengshi xinyong* 诚实信用, has ancient roots: Chinese legal scholars<sup>9</sup> often quote a well known passage from the Book of Lord Shang (商君子书, *Shang jun shu*, IV century B.C.), which considers the phrase, among other Confucian virtues, as one of the “6 lice” leading to the weakening of the State<sup>10</sup>. There is further evidence of the use of such terms in other works, such as the Classic of Rites<sup>11</sup>, the Mencius<sup>12</sup> or the Xunzi<sup>13</sup>.

Indeed, “*Cheng* 诚” and “*xin* 信” have always been considered almost synonymous: during the Han period, in the renowned *Shuowen jiezi* (说文解字, I century A.D), the most ancient Chinese dictionaries, one term is used to illustrate the significance of the other<sup>14</sup>.

The connection is evident from an etymological point of view as well.

*Cheng* 诚 is composed by the radical 言 (currently simplified as 讠) yan, “word”, and the character 成 cheng, “to accomplish”, with phonetic value<sup>15</sup>, “marking it as the wholeness or completeness of the person, displayed in the authenticity of his words”<sup>16</sup> and is translated as “sincerity, honesty”<sup>17</sup>. *Xin* 信 also displays the radical “word”, 言, yan, though preceded by “man” 人 (ren): “the word of a man”, portraying the meaning of “truth, faith”, as well as the one of “letter, message”.

If we return to the meaning of *cheng* 诚, we can further state that it is a nominalized verb, utilized in the text of the Four Confucian Books (四书, *sishu*) primarily for the purpose of identifying the human virtue of honesty, or integrity<sup>18</sup>.

As quoted in *Zhongyong* 中庸 (III or II Century B.C.):<sup>19</sup>

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<sup>8</sup> See, for example: ZHANG ZHONGQIU - CHEN XUECAO - WANG XIAODAN - WUJINHE: “Chengshi xinyong yu fa de yibanlilun chudan” (First General Theoretical Inquiry on law and good faith), *Jiangsu Jingguan Xueyuan bao*, vol. 18, n. 3, May 2003, p. 100; XIA HANMING: “Chengshi xinyong yuanze qianxi” (Analysis of the principle of good faith), *Wuhanshi jingji guanli ganbu Xueyuan xuebao*, vol. 17, n. 4, December 2003, p. 55; HE WANGXIANG “Dui Woguo chengshi xinyong yuanze yanjiu xianzhuangde pingui” (The current status of research on the principle of good faith in China), in [http://www.law-lib.com/lw/lw\\_view.asp?no=3382](http://www.law-lib.com/lw/lw_view.asp?no=3382), p. 4; FANG LIJUAN – ZHENG TAO: “Zhongxi chengxin lunli de zhuyao chayi” (Key ethical differences between the concept of good faith in China and in the West), *Tianshui Xinzheng Xueyuan xuebao*, vol. 27, n. 3, 2004, p. 27.

<sup>9</sup> See, XU GUODONG, “Minfa jiben yuanze jieshi” (Explanation of the fundamental principles of civil law), Beijing, *Zhongguo Zhengfa Daxue chubanshe*, 2001, p. 77.

<sup>10</sup> J.J.L. Duyvendak (a cura di), “Il Libro del Signore di Shang”, Milano, Adelphi, 1989, p. 166 and p. 254.

<sup>11</sup> Classic of Rites (礼记, *Li Ji*): *Jitong* 祭统, 1. An English translation is available online at: <http://chinese.dsturgeon.net/text.pl?node=9479&if=en>

<sup>12</sup> Mencius (孟子, *Mengzi*): Wan Zhang shang 万章上, 2. An English translation is available online at <http://chinese.dsturgeon.net/text.pl?node=1602&if=en>

<sup>13</sup> Xunzi (荀子, *Xunzi*): Xiushen 修身, 6; Bugou 不苟, 12; Wangba 王霸, 7; Zhishi 致士, 3; Qiangguo 疆国, 6. An English translation is available online at <http://chinese.dsturgeon.net/text.pl?node=12245&if=en>.

<sup>14</sup> As it surfaces when we compare the following definitions: 信: 誠也。从人从言。會意。; 誠: 信也。从言成聲。 See, *sub vocem*, *Shuowen jiezi* 说文解字 (comment on simple characters and analysis of complex characters), available online at: <http://chinese.dsturgeon.net/text.pl?node=26160&if=en&searchu=%E8%AF%9A>.

<sup>15</sup> See, *contra* A. C. GRAHAM, “Disputers of the Tao. Philosophical Argument in Ancient China”, Open Court, La Salle Illinois, 1989, pages.133-134.

<sup>16</sup> *Ibid.*, p.133.

<sup>17</sup> See, *sub vocem* WU GUANGHUA (zhubian): “Chinese- English Dictionary - Hanying da cidian”, Shanghai Jiaotongdaxue chubanshe, 1995.

<sup>18</sup> A. C. GRAHAM, *op. cit.* 135.

“Integrity (诚, *cheng*) is the Way of Heaven, integrating is the Way of man. [...] The man who integrates is one who chooses the good and holds on to it firmly”.<sup>20</sup>

“Integrity (诚, *cheng*) is being spontaneously whole, the Way is spontaneously on course. [...] Integrity is not only spontaneously making oneself whole, it is the means of making other things whole. Making oneself whole is by humanity (仁, *ren*), making other things whole is by knowledge [...]”<sup>21</sup>

We have concentrated on the previous excerpts in order to unearth the link existing between the concept of “*cheng* 诚” and “*ren* 仁”= “humanity, benevolence”.

The interrelatedness of the two concepts is extremely significant in our discussion, as it allows us to move smoothly between the philosophical and legal planes, revealing the manner in which the (ethical) principles were concretely applied in the legal practice of Imperial China.

Indeed, *ren* 仁 (used to indicate the duty of solidarity towards individuals as well as the rulers’ duty to “feed the people” - *yangmin* 养民)<sup>22</sup> did not merely constitute one of the duties wise men had to comply with in accordance with the *Rujia* (儒家)<sup>23</sup>. The same concept, several centuries later captured by a number of provisions of the Qing Code, (大清律例, *Da Qing Lü Li*) in the context of contractual matters (such as loan agreements)<sup>24</sup>, further embodies one of the principles guiding the conduct of Imperial magistrates, who used the principle to restore the balance between contractual parties and their respective claims.

In addition to the latter case, the *Da Qing Lü Li* 大清律例 regulated the relationship between the parties to an agreement (契约 *qiyue*)<sup>25</sup> by relying on yet another principle which, as pointed out by Marina Timoteo, can be considered as part of “the general rules which shaped the history of contract law in the Western Legal Tradition”<sup>26</sup>: the duty to fulfill a promise, and to comply with one’s commitments.

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<sup>19</sup> A. C. GRAHAM, op. cit. pages. 178-184

<sup>20</sup> *Zhongyong*, 21, translated by Graham in A. C. GRAHAM, op. cit., p. 135. The original text is available online at: <http://chinese.dsturgeon.net/text.pl?node=10262&if=gb>.

<sup>21</sup> *Zhongyong*, 23, translated by Graham in A. C. GRAHAM, op. cit., p. 136. The original text is available online at: <http://chinese.dsturgeon.net/text.pl?node=10262&if=gb>.

<sup>22</sup> M. TIMOTEO, “Il Contratto in Cina e Giappone nello specchio dei diritti occidentali”, CEDAM, 2004, p. 46, Chinese characters added.

<sup>23</sup> On the meaning of *ren* 仁 in classical Chinese philosophy see A. C. GRAHAM, op. cit., pages. 16-18, 20-21, 26, 146, 151, 315, 350.

<sup>24</sup> For a complete translation of the *lü* 149, see JING JUNTIAN, “Legislation Related to Civil Economy in the Qing Dynasty”, in K. BERNHARDT- P. HUANG, “Civil Law in Qing and Republican China”, Stanford University Press, 1994, pp. 72-73

<sup>25</sup> The term used as a translation up to 1950’s - when it was substituted with *hetong*, 合同 - to identify the general notion of contract which entered Chinese territory only following the first contracts with the West. Up to that moment, and for the entire Imperial period, *qiyue* identified formal and binding promises, or “contracts”, although not always in a technical sense. On the need to avoid excessively restrictive and culturally dependent interpretations see H. T. SCOGIN Jr., “Traditional Chinese Contracts and Related Documents from the Tian Collection (1408-1969)”, Zhonghua Book Company, Beijing, 2001 vol. 3, pages XII-XIII; for a more detailed analysis on the impact of comparative law barriers on the evaluation of Chinese judicial practice see, by the same author, “Civil “Law” in Traditional China: History and Theory”, in K. BERNHARDT and P. HUANG ed. “Civil Law in Qing and Republican China, Stanford University Press, 1994, pp. 32 e ss.; on the issue of the transposition of legal concepts in different cultural and linguistic settings, with particular emphasis on the translation from/to Chinese, see J. E. AINSWORTH, “Categories and Cultures: on the “Rectification of Names” in Comparative Law”, 82 Cornell L. Rev., 19 1996-1997.

<sup>26</sup> M. TIMOTEO, op. cit., p. 45.

In this context we can return to the second set of characters, as the duty to fulfill a promise was considered

“a reflection of the *xin* 信 virtue, entailing truthfulness and coherence in the fulfillment of one’s promises. Such a virtue had been linked to the fulfillment of contractual obligations since the Han period, identifying the idea of respect for parties’ reliance in contractual promises, in tune with the duty to respect the obligations imposed by one’s social status [...]”<sup>27</sup>.

The close connection between the moral value represented by *xin* 信 and contracts further surfaces when analyzing the etymology of the character. In addition to “trust, faith”, in modern Chinese the term may also be used to indicate “letter, missive, message”<sup>28</sup>, bearing in mind that both usages preceded the Han dynasty.<sup>29</sup> In the text of the Fa Yan (法言, “Words to live by”) *xin* 信 is defined as *fu* 符, or receipt, to identify a written document exchanged between the parties for evidence purposes<sup>30</sup>, which was “*similar in format to the written contract documents of the time*”<sup>31</sup>.

Oftentimes, in the Classical period, *xin* 信 was used to identify agreements, or contracts, broadly speaking, thus merging the term’s documentary and moral significance<sup>32</sup>. An often cited example of such usage can be found in Confucius’ *Lunyu* (论语, Analects), in the following extract translated by James Legge:

*“The philosopher Yu said, ‘When agreements (信 *xin*) are made according to what is right (义 *yi*), what is spoken can be made good. When respect is shown according to what is proper, one keeps far from shame and disgrace. When the parties upon whom a man leans are proper persons to be intimate with, he can make them his guides and masters.”*(Xue er 学而, 13)<sup>33</sup>

In this context the allusion to *yi* 义 is interesting, as the term indicates justice, one of the virtues which is closely intertwined with *xin* 信. The latter statement extends to legal practice as well, as Imperial magistrates faced with “contractual” disputes did not merely assess compliance with reciprocal promises with regard to the parties’ status (or the parties’ “name”: father or son, ruler or government minister, to cite but a few “fundamental relationships” in Confucian thought). Rather, the duty to fulfill a promise, as far as agreements are concerned, could be cast aside in favor of a further assessment based on the

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<sup>27</sup>M. TIMOTEO, op. cit., p. 45.

<sup>28</sup> See, for example, *sub vocem*: ZHAO XIUYING, F. GATTI: "Dizionario compatto cinese-italiano italiano cinese e conversazioni", Zanichelli, 1996; or the more complete WU GUANGHUA (zhubian): "Chinese- English Dictionary - Hanying da cidian", Shanghai Jiaotongdaxue chubanshe, 1995

<sup>29</sup> See H.T. SCOGIN jr, "Between Heaven and Man: Contract and the State in Han Dynasty China", 63 Cal. R. Rev. 1325, \*1379. On *xin* as a fundamental Confucian virtue see A. C.GRAHAM: *Disputers of the Tao*, Open Court Publishing Company, 1989, p. 381. As is well known, the Han dynasty was founded in 206 B.C., and kept the “mandate of heaven” until 220 A.D.

<sup>30</sup> H.T. SCOGIN jr., op. cit. \*1379.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> J. LEGGE, “The Chinese Classics”, vol. I: “Confucian Analects, The Great Learning, and the Doctrine of the Mean”, Oxford, 1893, p. 139-40, my emphasis and characters, available online at: <http://www.gutenberg.org/dirs/etext03/cfnfnl10u.txt>. *Contra* see the translation Tiziana Lippiello, which translated *xin* 信 as “sincerity”, in CONFUCIUS, “I Dialoghi”, Einaudi, Torino, 2003, p. 7.

agreement's compliance with morality<sup>34</sup>, in order to deliver a judgment considered “*heli heqing hefa* 合情合理合法”, “in accordance with human feelings, reason and law”<sup>35</sup>.

On a final note, in order to complete our discussion on the translation of “objective good faith”, we must highlight that term *xin* 信, understood as “compliance with obligations undertaken by the ruler vis à vis his subjects”, played a crucial role in the legist school of thought, characterized by its hostility to Confucianism from almost every angle. In the previously cited Book of Lord Shang (商君书, *Shang jun shu*, IV Century B.C.), one of the most prominent legist texts, it is stated that:

“In a State, orderly government is achieved through three things: law, good faith (信), and correct rules”<sup>36</sup>.

Towards the end of the nineteenth century the value system described above underwent a gradual erosion, and was replaced by the onset of Western ideas, with a more radical turn from the end of the nineteenth century with the Guomindang's seizure of power and the Communist Revolution.

The imported notions, shaped by a completely different context, had the potential to disrupt the set of balances upon which the Confucian state had been grounded for centuries. It is through the emergence of such notions - and their translation process - that general clauses became part of the Chinese setting.

In the following paragraphs we will investigate the process of inclusion of the good faith clause into the fabric of Chinese law, with particular emphasis on contract law.

### 3. Good faith in Chinese codified law: from Article 219 of the Republican Civil Code to the Contract Law

#### 3.1 The introduction of the notion of good faith in China: Article 219 of the Republican Civil Code

While it is difficult to pinpoint the exact moment the notion of “good faith-loyalty” entered Chinese borders, we can state with certainty that the notion did not appear in the draft civil code formulated during the last period of the Qing empire. On a formal level, its appearance within the principles of Chinese law can be traced Article 219 of the Republican Civil Code (中华民国民法 *Zhonghua minguo minfa*.)

The article reads as follows:

“*Chacun est tenu d'exécuter ses obligations et d'exercer ses droit selon les règles de la loyauté et de la confiance réciproque* (诚实信用, *chengshi xingyong*)”<sup>37</sup>.

The influence of paragraph 242 of the BGB is easily discernible. A quick glance at the contractual provisions of the nationalist Civil Code will suffice to detect an unmistakably German mark. This ought not to strike the reader, as the *Bürgerliches Gesetzbuch's* status as one of the most advanced codes of the time made it an exemplary model for the nationalist drafters.

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<sup>34</sup> On the topic, and on Han judicial practice, see H.T. SCOGIN jr., op. cit. \*1379.

<sup>35</sup> Translation by Marina Timoteo. For a more detailed analysis see M. TIMOTEO, op. cit., pages. 48-49.

<sup>36</sup> See J.J.L. DUYVENDAK (ed.), “Il libro del Signore di Shang”, Milano, Adelphi, 1989, p. 216. In general, on good faith in Chinese public law see DONG CHANGCHUN: “Chengxin – Zhongguo chuantong gongfa wenhua de guannian” (The concept of “good faith” in traditional Chinese public law), *Xuexi yu tansuo*, vol. 148, n. 5, 2003

<sup>37</sup> HO TCHUNG-CHAN (trad.), “Code Civil de la République de Chine. Livre I, II, III”, Imprimerie de l'Orphelinat de T'ou-Sé-Wè, ZI-KA-WEI prés Shanghai, 1930, art. 219 (the Chinese part is my addition).



As opposed to their predecessors, the Guomindang legislators did not merely aim at the Westernization of the law: the ultimate objective was an overall modernization of the rules, achievable through a choice of laws which could strike a balance between modernity and traditional Chinese values, as embodied by the “Three Principles of the People”.

Though the foregoing themes will be discussed in greater depth in the section on case law, it is important to touch upon the instrumental use of foreign techniques only to the extent that they are compatible with - and functional for - the perpetuation of traditional Chinese values. Such an approach, which characterized Chinese attitudes towards foreign “things” for quite a long time, was not a novel technique: it merely constituted a revisitation of a motto coined during the second half of the nineteenth century by the Yangwu Movement (洋物运动, *Yangwu yundong*). The latter movement was characterized by a group of intellectuals who firmly believed that the motto “Chinese learning for substance; Western learning for application” (中学为体, 西学为用 *zhong xue wei ti, xi xue wei yong*), constituted the only way to solve the country’s problems and shelter it from the aggression of the Great Powers.

The concept of “good faith-loyalty” as elaborated in the BGB could be smoothly inserted in the context just described. On the one hand, the rule in question was firmly rooted in one of the most prestigious codes at the time while, on the other hand, the rule complied with the principle of social justice, considered one of the Three Principles of the People (三民主义, *San min zhuyi*). This ensured greater flexibility as far as the notion’s introduction in the Chinese legal system is concerned, and further allowed for the - albeit theoretical - possibility to trump the will of the parties in favor of collective considerations<sup>38</sup>.

The latter consideration is especially pertinent in the examination of the principle of good faith’s “collective” quality, present since its inception. By collectivity we identify a principle of cooperation, targeted at striking a balance between the parties to an agreement (or “civil activities” in general<sup>39</sup>), and between the parties and society in order to achieve fairness.

Notwithstanding a radical ideological shift, the notion of objective good faith currently accepted by Chinese continental scholars reflects the foregoing considerations.

### 3.2 The current legal scenario: good faith in the General Principles of Civil Law and Contract Law

As is widely known, contractual good faith, exiting the realm of formal law in 1949 alongside the Code which first recognized its existence, only reappeared forty years later, with the introduction the General Principles of Civil Law.

Article 4 reads:

“In civil activities, the principle of voluntariness (自愿原则, *ziyuan yuanze*), fairness (公平原则, *gongping yuanze*), making compensation for equal value (等价有偿的原则, *deng jia you chang de yuanze*), good faith (诚实信用原则, *chengshi xinyong yuanze*) shall (应当, *yingdang*) be observed”<sup>40</sup>.

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<sup>38</sup> A part of Japanese scholarly opinion moved in such a direction in the same years, following German scholarship. On the issue see B. JALUZOT, op. cit. p. 50 e ss.

<sup>39</sup> See Article 4 of the General Principles of Civil Law (中华人民共和国民法通则, *Zhonghua renmin gongheguo minfa tongze*), 1986.

<sup>40</sup> General Principles of Civil Law of the People’s Republic of China, cap. I, art. 4, my translation. The text of the provision reads: 第四条 民事活动应当遵循自愿、公平、等价有偿、诚实信用的原则.

Good faith has thus become one of the fundamental principles (基本原则, *jiben yuanze*) of civil law. To quote one of the most prominent Chinese civil law scholars<sup>41</sup>, such principles “are the starting point and basis for the formulation, explanation, implementation, and research of our civil law norms”<sup>42</sup>, as well as “the concentrated manifestation in the General Principles of China’s socialist essence”<sup>43</sup>. In the same work the author proceeds to clarify the significance of “good faith”:

“Honesty and good faith mean that in civil activities the subjects of civil rights ought to say what they mean, be particular about reputation, scrupulously abide by promises, not practice trickery, not pass off second-rate goods as first quality, not damage the lawful interests of the state, collectives, or individuals and, according to the provisions of the law of contract, fulfil their civil duties. The principle of honesty and good faith also demands that at the time they carry out civil activities, parties respects habits and customs and society’s public good, not evade the law, not deliberately misinterpret contracts, not misuse rights, and not engage in improper competition. Upholding the principle of honesty and good faith is both the embodiment and requirement of our socialist spiritual civilization in civil activities”<sup>44</sup>.

The principle of good faith as expressed by the General Principles of Civil Law, therefore, is not merely aimed at regulating the relationship among the parties to an agreement, but, rather, seeks to weigh the interests of the subjects involved in the legal relationship in question against the interests of the state and society. Such a definition can be reconnected to our previous comments on the Guomindang legislation’s “*chengshi xinyong*”, a theme which surfaced once again in scholarly writings at the beginning of the 1990’s<sup>45</sup>. Following the coming into force of the General Principles, Chinese scholars began to cast their attention on the notion, elaborating theories on its significance and role, although, due to ideological reasons, in complete disregard of the fact that the principle had existed for twenty years.

As far as legislation is concerned, from 1986 onwards the key civil law instruments refer to the concept only within the sections concerning *zongze* (总则), or general principles.

In spite of the emphasis placed on “*chengshi xinyong yuanze*” on the formal plane, and because of the vagueness enveloping the laws containing the term, there is little evidence of its practical usage before the late 1990’s.

In the opinion of one scholar<sup>46</sup>, in the thirteen year gap between the General Principles of Civil Law and the 1999 Contract law, such a principle only surfaced in 14

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<sup>41</sup> TONG ROU, “The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role, translated by Jonathan K. Ocko, in *Law and Contemporary Problems*, Spring 1989, p. 160.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> TONG ROU, *op. cit.*, p. 162.

<sup>45</sup> On the topic, see the XU GUODONG: “Minfa jiben yuanze jieshi” (Fundamental principles of civil law), Beijing, Zhongguo zhengfadaxue chubanshe, 1992, pages. 75-76, and: LIANG HUIXING, “Chengshi xinyong yuanze yu loudong buchong”, in *Faxue yanjiu*, n°2, 1994, p. 22; XIA ANMING; “Chengshixinyong yuanze qianxi” (Brief analysis of the concept of good faith), in *Wuhanshi jingji guanli ganbu xueyuanbao - Journal of Wuhan Economic Administration Cadre’s College*, vol. 17, n°4, December 2003, p. 55 onwards; <sup>45</sup> DENG JIACHENG; HUANG ZHIPING, “Lun chengxin yuanze de shiyong” (The application of the principle of good faith), on “Guangxi Zhengfa guanli ganbu xueyuan bao”, Vol 19, n°1, January 2004, p. 32; also see H. PIQUET: “La Chine au Carrefour des traditions juridiques, Bruxelles, Bruylant, 2005, p. 239 onwards.

<sup>46</sup> See CUI GUANGPING, “Hetongfa chengshixinyong yuanze bijiao yanjiu” (Comparative study on the principle of good faith in the Contract Law), in *Chongqing Sanxia Xueyuan xuebao*, n. 1 2002, vol. 18, pages.84-89.

cases. Specifically, four cases ruled on between 1 January 1987 and April 1992<sup>47</sup>, seven cases decided from the latter date up to 1998 and three more cases in which the principle was applied without an explicit reference to relevant article<sup>48</sup>.

Among the latter cases we must certainly mention the *pifu* (批复)<sup>49</sup> n. 27/1992 of the People's Supreme Court, which paved the way for subsequent developments of the principle of good faith in the law of contract.<sup>50</sup>

In the latter decision, as is well known, the People's Supreme Court first used the principle of good faith to fill legislative gaps, thus establishing a link between the principle of "change of circumstances" (情势变更, *qingshi biangeng*). The relationship between the two principles was further elaborated by a number of notable Chinese scholars in the following years, yielding the conclusion that "change of circumstances" constitutes the primary example of the judicial application of the principle of good faith<sup>51</sup>.

The link between the two concepts is currently so strong that it exerts an influence on the legislator as well. A number of commentators assert that the prominent and far-reaching role of the principle of good faith in the Contract Law (合同法, *Hetong fa*) made the additional inclusion of hardship provisions within the law simply superfluous<sup>52</sup>.

The following section will focus on the Contract Law. It must be noted that the ample space afforded to the notion of good faith in the latter instrument is not merely the result of judicial attention and development of the principle in the cited cases.

The new Contract Law, though primarily aimed at the uniformation of a fragmented and intricate body of law<sup>53</sup>, further had to reconcile a set of ambitious and at times conflicting requirements. In particular, according to the drafters' intentions, the instrument "[...]was to

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<sup>47</sup> Source: ZUIGAORENMINFAYUAN GONGBAO BIANJIBU – EDITORIAL DEPARTMENT OF THE GAZETTE OF THE SUPREME PEOPLE'S COURT, "Zuigaorenminfayuan gongbao dianxinganli quanti (1985.1-1992.1) – Complete collection of typical cases in the Gazette of the Supreme People's Court, Beijing: jingguanjiayou chubanshe, 1999), cited by CUI GUANGPING, "Hetongfa chengshixinyong yuanze bijiaoyanjiu" (Comparative study on the principle of good faith in the Contract Law), in Chongqing Sanxia Xueyuan xuebao, n. 1 2002, vol. 18, p. 87.

<sup>48</sup> Source: Guojia fagui shujuku – Database of national laws and regulations, Beijing, Guojia xinxi zhongxin chubanshe, 1999, cited by CUI GUANGPING, "Hetongfa chengshixinyong yuanze bijiaoyanjiu" (Comparative study on the principle of good faith in the Contract Law), in Chongqing Sanxia Xueyuan xuebao, n. 1 2002, vol. 18, p. 87.,

<sup>49</sup> An official and written reply to a subordinate body. See, *sub vocem*, "Hanyin Fazi Cidian – A New Chinese-English Law Dictionary", Beijing, Falü Chubanshe, 2000.

<sup>50</sup> The case concerned an agreement for the supply of components for gas meters, entered into when the price of the essential components, aluminum ingots, set by the State ranged between 4.400 and 4.600 RMB per ton. During the performance of the contract, following market liberalization, the price of aluminum quadrupled, amounting up to 16.000 RMB per ton. This meant that the price of the gasmeters' external tanks increased from 23,085 RMB to 41 RMB per component. This was evidently a hardship case. In Chinese law, however, there was no provision regulating such a scenario. The Chinese Supreme Court, due to the lack of specific provisions, found a "change in circumstances" (情势变更, *qingshi biangeng*) which was "inevitable, unforeseeable, and caused by a third party". For this reason, the Supreme Court ruled that requiring the supplier Company to sell the gas meters at the initially agreed price, would have led to an unfair result in violation of the principle of good faith. For an analysis of the case see CUI GUANGPING, *op. cit.*, pages. 84-89.

<sup>51</sup> See ZHENG QIANG "A Comparative Study on the Good Faith Principle of Contract Law", <http://www.iolaw.org.cn/en1/art2.asp>, p. 2 and 4; WANG LIMING, "Hetongfa anli jiaocheng" (The Study of contract law through case law), Beijing, 1999, cited by M. TIMOTEO, *op. cit.*, p. 352.

<sup>52</sup> Article 77 of the 1998 Draft, which regulated the issue was removed from the Contract Law's final version. On the topic see M. TIMOTEO, *op. cit.*, p. 338.

<sup>53</sup> See M. TIMOTEO, "Note sul processo di riforma del diritto contrattuale in Cina", in *Mondo cinese* n. 98, 1998, p. 12.

reflect common principles of the objective law of the current market economy, as well as international treaties and agreements; [...] to give adequate attention to the autonomy of the parties; [...] to suit the needs of the socialist market economy while also meeting the circumstances of the transition from the planned economy; [...] to attend to needs of economic efficiency and public well-being and the facility and security of transactions”<sup>54</sup>.

The good faith clause contained in the legislative texts used as a model by the legislators sought to strike the correct balance among such - at times discordant – needs by incorporating moral values into issues of contractual justice.

In light of the foregoing considerations it is not difficult to infer why the principle gained such an important role in the field of contract law and, similarly, why the “*chengshi xinyong yuanze*” received the title “King Clause”.

### 3.3 Good Faith in the Contract Law

As is well known, the coming into force of the Contract Law marked a turning point for the usage of the concept of good faith in China, simultaneously raising international uneasiness over the possible uses of the principle by Chinese courts.<sup>55</sup> The latter concerns are somewhat perplexing, given that “*chengshi xinyong*” had been one of the fundamental principles of Chinese civil law for at least 10 years, and had been consistently cited in the vast majority of civil laws<sup>56</sup>.

Moreover, it is evident that no other law in the People’s Republic of China had placed such prominence on the principle. The Contract Law incorporates the phrase in 5 articles, while in two other articles we can detect the term used to indicate subjective good faith (善意, *shanyi*)<sup>57</sup>, and the term “bad faith” (恶意, *e’yi*) is referred to in three other articles<sup>58</sup>.

Indeed, during the drafting phase, two different schools of thought emerged in connection with the issue of general clauses<sup>59</sup>. As to the first school, its promoters endorsed the *Minfa Tongze* as a model for the new text, thus calling for the enumeration and definition of fundamental principles in one or more articles. The supporters of the second school, on the other hand, advocated a reflection of the basic principles “through” the law, in order to inject them with a degree of concreteness. As far as the principle of good faith is concerned, the latter approach appears to be the preferred one.

After all, such an approach is shared by one of the texts which greatly inspired Chinese legislators, namely the Unidroit Principles of International Commercial Contracts<sup>60</sup>. This provided two advantages: the possibility of harmonizing Chinese contract law with

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<sup>54</sup> “Zhonghua renmin gongheguo hetongfa lifa fang’an” 1995, cited by P. POTTER : “The Chinese Legal System: Globalisation and Local Legal Culture”, London & New York, Routledge Studies on China in Transition 2001, p. 40.

<sup>55</sup> See, for example, R. PEEREMBOOM, “A Missed Opportunity? China’s New Contract Law Fails to Address Foreign Technology Providers’ Concerns”, in *China Law & Practice*, May 1999, vol. 13, n° 4. The same concerns are expressed by Potter, in P. POTTER., op. cit., p.43.

<sup>56</sup> For example, “Law on Technology Transfer Contracts” Articles 4 and 14.

<sup>57</sup> Articles 47 and 48. The articles are outside the scope of the present study, which focuses on objective good faith.

<sup>58</sup> Articles 42,(1), 52(2) and 59. The issue will not be explored in the current discussion.

<sup>59</sup> The data is reported in “An Insider’s Guide to the RPC Contract Law”, *Asia Law and Practice*, 1999.

<sup>60</sup> On the influence of the UNIDROIT Principles on the drafting of the Contract Law see ZHANG YUQING, HUANG DANHAN, “The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison”, in [www.unidroit.org/english/publications/review/contents/2000.htm](http://www.unidroit.org/english/publications/review/contents/2000.htm).

international commercial customs, while at the same time granting ample space to a clause deemed fundamental in order to guarantee justice and fairness in contractual relationships<sup>61</sup>.

Thus, the articles dedicated to good faith in the Contract Law call to mind similar provisions contained in the Principles, at least insofar as the ‘spirit’ of the text is concerned, rather than the actual formulation<sup>62</sup>. In tune with the Unidroit model, the drafters inserted reference to “honesty and credibility” in almost every Chapter of the section devoted to “General Principles”, and in particular:

- 1) Chapter I, “General Provisions”, article 6, previously cited<sup>63</sup>;
- 2) Chapter II, “Formation of Contracts”, article 42, point 3<sup>64</sup>;
- 3) Chapter IV, “Performance of Contracts”, article 60, second paragraph<sup>65</sup>;
- 4) Chapter VI, “Discharge of Contractual Rights and Obligations”, article 92<sup>66</sup>;
- 5) Chapter VIII, “Other Provisions”, article 125, first paragraph<sup>67</sup>.

The principle of good faith thus warrants application in every stage of contractual activity, from formation to termination, via performance and interpretation.

At the time of the law’s entry into force, such provisions did not merely enter new territory with regard to their reference to the principle of good faith, but sought to regulate legal scenarios which had been previously disregarded by Chinese law. For example, previous contract laws did not provide for the concept of *culpa in contrahendo*<sup>68</sup>. In the same vein, the People’s Republic had never witnessed the existence of laws regulating the interpretation of contracts. The incorporation of such provisions in the new law can thus be considered “a great leap forward for Chinese contract law”<sup>69</sup>.

Through the *Hetong fa*, good faith is no longer merely envisaged as a useful tool for the adaptation or termination of a contract in the event of unforeseeable and inevitable circumstances, but the key to unraveling the entire contractual system.

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<sup>61</sup> WANG LIMING, “Tongyi Hetongfa zhidingzhong de ruogan yinan wenti de tantao” (Investigation on the difficulties encountered while drafting the Contract Law), Shang, in Zhengfa luntan, n° 4, 1996.

<sup>62</sup> See ZHANG YUQING, HUANG DANHAN, *op. cit.*

<sup>63</sup> “The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.”.

<sup>64</sup> “Where in the course of concluding a contract, a party engaged in any of the following conducts, thereby causing loss to the other party, it shall be liable for damages: (i) negotiating in bad faith under the pretext of concluding a contract; (ii) intentionally concealing a material fact relating to the conclusion of the contract or supplying false information; (iii) any other conduct which violates the principle of good faith.”.

<sup>65</sup> “The parties shall fully perform their respective obligations in accordance with the contract. The parties shall abide by the principle of good faith, and perform obligations such as notification, assistance, and confidentiality, etc. in light of the nature and purpose of the contract and in accordance with the relevant usage”.

<sup>66</sup> “Upon discharge of the rights and obligations under a contract, the parties shall abide by the principle of good faith and perform obligations such as notification, assistance and confidentiality, etc. in accordance with the relevant usage.”.

<sup>67</sup> “In case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith.”.

<sup>68</sup> ZHANG YUQING, HUANG DANHAN, “The New Contract Law in the People’s Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison” , in [www.unidroit.org/english/publications/review/contents/2000.htm](http://www.unidroit.org/english/publications/review/contents/2000.htm).

<sup>69</sup> On the point, see ZHANG YUQING, HUANG DANHAN, *op. cit.*

The notion of good faith has therefore become, as defined by Chinese scholars, the “King Clause”<sup>70</sup>. We will now proceed to assess the principle’s practical significance through the analysis of a number of cases deemed emblematic by the People’s Supreme Court.

#### 4. Application of the principle of good faith in case law (1999 – 2006)

During the 1990’s the principle of good faith underwent a progressive expansion and, in tune with the growing attention by scholars and legislators, the application of “*chengshi xinyong*” in legal practice increased considerably.

During a first phase urban courts, generally associated with the highest professional level, turned their attention to the possibilities provided by the principle. Currently, the usage of the good faith clause is rather generalized, and often appears in the context of cases decided by the Local People’s Court at every level, not merely in the contractual arena.

The analysis which follows focuses on documents which raise the principle of good faith present in the “Collected Cases” section (案件库, *anjian ku*) of the Supreme Court’s website *Zhongguo fayuan wang* (中国法院网, Chinacourt net)<sup>71</sup>.

The material under scrutiny is rather heterogeneous as to form and content: the cases grouped under the heading “*chengshi xinyong*” amounted to 350 by the end of 2006, and covered a vast array of issues. In our investigation we will primarily address cases concerning contract law.

We will begin by analyzing a number of examples of *culpa in contrahendo*, highlighting the fact that the application of the principle of good faith in this context is rather frequent in China, covering approximately half of the cases in the contractual remit.

#### 4.2 Application of the principle of good faith in case law: contract - *culpa in contrahendo* (art. 42 Contract Law)

As is widely known, legal systems which extend the notion of good faith to the precontractual phase normally give effect to the principle when withdrawal from negotiations arises under particular circumstances which had generated legitimate expectations as to the conclusion of the contract<sup>72</sup>. In order to assess whether or not a certain issue falls within the scope of Article 42 of the Contract Law<sup>73</sup>, Chinese judges adopt a similar approach, as we will see in the case which follows<sup>74</sup>.

Having decided to open a pharmacy, a company signed a letter of intent for the employment of Mr. Liu, defining the latter’s role and tasks to be performed in the pharmacy.

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<sup>70</sup> See *supra*, note 1.

<sup>71</sup> <http://www.chinacourt.org>. The website incorporates information which is otherwise rather hard to obtain, such as the recent documents published by the Supreme Court or the full text of judgments of certain typical cases decided by Chinese courts. In addition, the website includes opinions by Supreme Justices, information on the courts, and judicial clarifications. An English version of the website can be found at <http://en.chinacourt.org>, but it is not as complete and updated.

<sup>72</sup> See P. VAN OMMESLAGE, I. La bonne foi dans le relation entre particuliers – A. – dans la formation du contrat – Rapport general, in TRAVAUX DE L’ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE (Journées louisianaises), Tome XLIII, Paris, Librairie de la Cour de Cassation, 1992, p. 33.

<sup>73</sup> On this article, see in detail *supra*, paragraph 3.3.

<sup>74</sup> See 从本案谈违反诚信原则的司法判断 (Cong ben’an tang weifan chengxin yuanze de sifa panduan), source : Zhongguo Fayuan Wang ([www.chinacourt.org/ajdq/](http://www.chinacourt.org/ajdq/)), visited on 05/04/2007

The letter, however, failed to specify details such as remuneration and starting date, details which were left to be identified in the employment contract.

Following the signature of the letter of intent, the company identified the premises for the pharmacy and obtained the necessary licenses while Liu, as agreed, set out to obtain his certification as a pharmacist. However, following a number of attempts and mediation by competent authorities, the negotiating parties failed to agree on the issues left undefined, particularly the remuneration aspect and the duration of the employment. Asserting bad faith on the part of the company, Liu withdrew from the negotiations, forcing the company to find another pharmacist, thus delaying the pharmacy's opening. The company sued Liu, seeking the reimbursement of incurred expenditures (Liu's training, certification fees, and medical expenses) as well as for the losses associated with the delayed opening.

The Nantong Intermediate Court (Jiangsu), ruled against the plaintiff. The Court held that the letter of intent did not constitute a valid employment contract, and thus did not produce contractual obligations, as it lacked the essential elements for the creation of an employment relationship, such as duration and remuneration. The defendant merely exercised his freedom to contract, formulated "reasonable requests" (合理, *heli*), and withdrew from negotiations following the failure to reach an agreement. The defendant's conduct was not found to be in violation of the principle of good faith and did not give rise to precontractual liability.

It is interesting to follow the Court's reasoning, as it discloses an approach which resembles our perspective. Indeed, in Italy, withdrawal from transactions, regulated by Article 1337 of the Italian Civil Code is not legitimate when 1) there is a "reasonable" expectation by the plaintiff that the contract will be concluded and 2) it is impossible for the defendant to "reasonably" justify his behavior<sup>75</sup>.

The Chinese judge adopted an analogous test, with one further addition: in the assessment of the reasonableness of the parties' claims, the yardstick was not merely the balancing of interests between the negotiating parties, but the potential impact on society at large.

As previously underlined<sup>76</sup>, Chinese legal scholarship defines the principle of good faith as a duty to strike a balance between individual interests and the interests of society. The judges assessed Liu's behavior in light of such a definition, yielding the following conclusion: Liu was entitled to withdraw from negotiations as he was simply exercising his right to choose his occupation and receive remuneration. The losses incurred by the company can be considered a normal business risk, and requiring Liu to fulfill the other party's expectations would entail not only a violation of the defendant's rights, but would "harm the interests of society". On these bases the Court dismissed the plaintiff's claim.

Another duty which is typically associated with good faith during negotiation is the duty of information. Pursuant to Article 42 of the Contract Law, a negotiating party cannot deliberately conceal important facts concerning the conclusion of the contract or intentionally provide false information. The latter instance constitutes a rather typical field of application of the principle of good faith in China. This is especially true in the field of consumer contracts.

Generally, in the event of misrepresentation or concealed information by a seller towards and uninformed or inexperienced buyer, a contract cannot be considered valid, and

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<sup>75</sup>R. SACCO, "I. La bonne foi dans le relation entre particuliers – A. – dans la formation du contrat – Rapport italien", in TRAVAUX DE L'ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE (Journées louisianaises), Tome XLIII, Paris, Librairie de la Cour de Cassation, 1992, pag. 137.

<sup>76</sup> See *supra*, note 47.

the normal form of redress is the restitution of the goods to the seller at the price paid by the buyer<sup>77</sup>. However, Chinese judges occasionally take one step further and do not merely compensate the victim for the so-called “negative interests”, or losses incurred<sup>78</sup>, but take into account “positive” interests as well, namely the benefits the victim would have enjoyed had the contract been considered valid.

In this regard, let us consider a case decided by the People’s Court of Xiling district, city of Yichang (Hubei), case number 497/2004<sup>79</sup>.

On 23 November 2001 Wang Kenian entered into a life insurance contract on behalf of her husband Qu Haiqing, with the Yichang branch of the “Tai Kang Life Insurance Company”, designating her son Qu Yuhua as the beneficiary. The same day Wang Kenian paid the stipulated premium (1480,20 RMB), and on November 29 the policy was issued by the Company. On 4 October 2002 the husband died, and on October 29 Wang Kenian requested the payment of the insured amount (30.000 RMB). On November 20 the insurance company replied that the contract could not be deemed valid, as the policy had not been underwritten by the insured, the policy owner being Wang Kenian.

Wang Kenian and Qu Yuhua initiate proceedings against the insurance Company, claiming that such a requirement had not been highlighted by the insurer during negotiations, and that in any event the Company accepted the payment of the premium. Thus, the plaintiffs sought the award of damages on the basis of the Company’s liability for *culpa in contrahendo*.

During the trial before the People’s Court of Xiling district, city of Yichang (Hubei), the Company expressed its intention to only compensate the premium. The trial court found that the insurance contract clearly stated that both the policy owner and the insured had to sign the policy, and that failure to comply with such a requirement would result in invalidity. It was therefore held that the insurance company had adequately fulfilled its duty to inform, and the plaintiffs’ claims were dismissed (case number 273, 2003).

The appellate court, Intermediate People’s Court of Yichang took a different angle on the facts. The court found that the insurance Company had been well aware of the invalidity of the agreement from the outset. Indeed, the insurer had filled out the policy forms on behalf of Wang Kenian, and could not have been unaware of the insured’s absence. The appeal was thus allowed, and the case was remanded to the Trial Court for reexamination.

On remand, the trial court ruled that the insurance company was liable for the invalidity of the contract. Although an insurance agent was present to oversee the signature process, the Company did not adequately fulfill its duty to inform, as it did not specify the consequences of the insured’s failure to underwrite the agreement. Pursuant to Article 61, section 1, of the General Principles, and Article 42, point 2, of the Contract Law, the Court enforced the life insurance contract, awarding damages of 30.000 RMB, a sum equal to the policy’s settlement in the event of death.

The ruling is extremely significant, especially from a Western perspective, and gained an exemplary status in China as well. In the Comment to the case published on *Zhongguo Fayuan Wang*, the judge clarified that one of the fundamental considerations underlying the ruling was the “common sense of social fairness”, as well as the need to halt such behavior by insurance companies, which was rather frequent at the time.

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<sup>77</sup> G. AJANI, A. SERAFINO, M. TIMOTEO, op. cit., p. 344.

<sup>78</sup> For the application in Italian law see R. SACCO, op. cit., p. 139

<sup>79</sup> See 此人身保险合同是否有效 (Ci renshenbaoxian hetong shifou youxiao), source: *Zhongguo Fayuan Wang* (www.chinacourt.org/ajdq/), visited on: 05/04/2007.



The application of the duty to inform in accordance with good faith has not, however, always yielded such clear cut results. The reasonableness criterion (合理, *heli*) - a vague term which is not incorporated within the realm of general clauses, and has always been part of the Chinese tradition<sup>80</sup> - is a useful tool to moderate excessive requests by victims of misrepresentation.

The Guangzhou Ribao (Guangzhou Daily) reported the case concerning Miss Zhou<sup>81</sup>, who applied for a loan with the Huangpu branch of a bank to purchase real estate for the purposes of setting up a business. To this end, in December 1998 Miss Zhou entered into a ten year mortgage agreement for an amount of 4.540.000 yuan, agreeing to repay the loan capital and interest via fixed rate monthly installments. In 2003, while reading a newspaper, Miss Zhou learned about a different repayment arrangement involving an adjustable rate, or "progressive reduction of the payment" (递减还款法, *dijian huankuan fa*), which according to her calculations would save her 10.000 in interest.

Arguing that, at the moment of the conclusion of the contract, the Bank had acted in bad faith in failing to mention the other payment option, Miss Zhou initiated proceedings. The plaintiff sought the recalculation of her mortgage in accordance with the second option, and called for the refund of interest accrued up to that point (August 2003), amounting to 7.000 RMB.

The trial court rejected the plaintiff's claims, due to insufficient factual and legal groundings. The decision was reversed on appeal. The appellate Court ruled that the Bank was bound by "additional obligations" of good faith and reasonable (合理, *heli*) information and, due to the Bank's "privileged position vis à vis the client", information on possible alternatives had to be provided. Yet, Miss Zhou's position was deemed "*bu heli*" (不合理), not very reasonable, as it only took into account the higher interest rates of the "fixed rate" payment scheme, while ignoring the fact that the installments paid in accordance with the first method were lower than the installments initially required by the adjustable rate.

The case has not yet obtained a final ruling, and Miss Zhou requested that the People's Procuratorate of Guangzhou reconsider her case through the *zai shen* procedure (再审, literally: judge again)<sup>82</sup>.

#### 4.3 Application of the principle of good faith in case law: contracts - Performance and Interpretation (Articles 60 and 125 of the Contract Law)

Among the various definitions used to describe the expression "good faith" the most common one is certainly the idea of "loyalty". In the Chinese setting, the latter implication is made obvious by the choice of characters used to translate it: *xin* (信), as we have seen, identified the duty to fulfill a promise<sup>83</sup>. Perhaps this helps explain why Chinese judges often turn to the principle of good faith in the context of performance of contracts, when one of the parties fails to comply with his or her contractual obligations.

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<sup>80</sup> See M. TIMOTEO, "Vague Notions in Chinese Contract Law: The Heli Standard in Court Practice", forthcoming.

<sup>81</sup> See 银行隐瞒按揭还款方式成被告 法院判银行有过失 (Yinhan yinman' anzhaohuankuan fangshi cheng bei gao - Fayuan pan yinhang you guoshi), source: Zhongguo Fayuan Wang ([www.chinacourt.org/html/ajk](http://www.chinacourt.org/html/ajk)), visited on: 4/06/2008.

<sup>82</sup> Code of Civil Procedure of the People's Republic of China, Chapter XVI, Article 177 onwards.

<sup>83</sup> On the meaning of *xin* see *supra* paragraph 2

An emblematic illustration is the case involving Xin Wenguo and Su Guangjin<sup>84</sup>.

Xin and Su are old friends. On 20 May 2004, Su was arrested by order of the People's Court of Ningcheng County (Inner Mongolia), on the ground that he had failed to return a loan of 6000 RMB. Not knowing whom to contact, Su asked his family to request Xin Wenguo's help. Xin collected the required amount and delivered it to the Court. Upon his release, Su drafted a "*qiantiao*" 欠条<sup>85</sup>, promising to return the amount within one month. After that, he disappeared.

The Court, having confirmed the existence of the loan and the failed payment, ruled that Su Guanjin acted in a manner contrary to good faith in violation of Article 60 of the Law of Contract and ordered the repayment of the 6000 yuan.

The solution offered by the first paragraph of Article 60<sup>86</sup>, as relied on in the ruling, is certainly not innovative. The second paragraph of the same article, as we have previously discussed<sup>87</sup>, uses the principle of good faith as the yardstick to identify the reciprocal duties among the parties, thus allowing for the introduction of the so-called "additional obligations" (附随义务, *fusui yiwu*), paving the way for new interpretative avenues<sup>88</sup>.

The application of this provision is currently rather frequent and is used, for example, to regulate the conduct of parties who, deceptively, merely perform what is strictly provided by a literal reading of the contract.

The two cases which follow aptly summarize the foregoing considerations.

Mr. Shen<sup>89</sup> purchased an apartment and hired a well-known company to renovate the premises, by means of a "*baogong baoliao*" contract (包工包料, literally: "work and materials included"). Half way through the renovation Shen ordered a centralized air conditioning system made up of five appliances which were installed by the manufacturer. Due to poor coordination between the air conditioning company and the renovator, the air conditioner's exhaust pipe installed under the apartment's floor was not integrated with the building's plumbing system. The Summer of 2006 was particularly hot and the air conditioner was permanently in use. For this reason the air conditioner's pipe was insufficient to drain the large amounts of water which ultimately flooded the apartment. The renovating company argued that the contract did not explicitly mention air conditioning systems, and thus refused to compensate Shen, who promptly initiated proceedings against the company. The People's Court of Qingpu district (Shanghai), ruled that, by virtue of the principle of good faith, the defendant was not merely bound to perform the services explicitly provided for by the agreement, but related services as well. In the present case, the defendant Company ought to have coordinated its efforts with the air conditioning company in order to connect the drainage pipe to the bathroom drain. The Court found the renovating Company liable for 50% of the damage caused to the property and ordered compensation amounting to 10,000 yuan.

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<sup>84</sup> See 危急时刻得帮助 获得自由不认账 (Weiji shike de bangzhu huode ziyou bu renzhang), source: Zhongguo Fayuan Wang (<http://www.chinacourt.org/html/ajk>), visited on 04/06/2008.

<sup>85</sup> A signed document recognizing the existence of a debt. See, *sub vocem*, *Xin hanying fazhi zidian* – A New Chinese-English Dictionary, Beijing, Falü Chubanshe, 1998 (reprinted in 2000)

<sup>86</sup> See *supra*, note 99.

<sup>87</sup> *Ibid.*

<sup>88</sup> Before the Law on Contract it was not clear whether parties were bound only by obligations explicitly provided for in the contract.

<sup>89</sup> See 新房地板喷水 装修公司违反附随义务赔偿 (Xinfang diban penshui zhuangxiu gongsi weifan fusui yiwu peichang), source: Zhongguo Fayuan Wang (<http://www.chinacourt.org/html/ajk>), visited on: 04/06/08.

The duty to act in good faith also implies that a party not disclose to third parties the counterpart's commercial secrets learned during the performance of the contract.

In recent years disputes between companies and former employees on the basis of violations of commercial secrets have increased considerably. A recent case<sup>90</sup> on this matter, alongside other 9 *leading cases*<sup>91</sup> has been recently published by the Law and Regulation Section of the Intellectual Property Department of the Guangdong Province.

On 14 April 2000 Mr. Lu was hired by the Huashen Dashi Company as a sales manager. At the moment of his employment Lu signed a “confidentiality agreement” undertaking, for the duration of his employment, not to perform his services for other companies manufacturing the same goods or providing similar services, further agreeing not to perform such activities independently. On 26 December 2003 Lu terminated his employment with the Company.

In the month of June the same year Lu set up a company called Saifei, which established a professional relationship with another company, Hong Fujin, performing services which had previously been provided by Huashen. This occurred in July, when Lu was still a Huashen employee. Thus, Huashen sued Lu's Company, seeking to halt the violation of commercial secrets and receive compensation for the losses incurred, further requesting a public apology.

The trial court found in favor of the plaintiff, and the ruling was subsequently upheld on appeal.

In the opinion of Liu Zaidong, head of the Law and Regulation Section of the Intellectual Property Department who compiled the cases for publication, the case just described raised the delicate question of balancing the interests of the company and the individual's freedom to seek employment. Lu set up his Company while still being employed by Huashen, consequently violating the confidentiality agreement and Article 10 of the Anti-Unfair Competition Law. In the commentary to the case, Liu Zaidong further commented that “[...] in employment relationship every person must comply with the principle of good faith, take into account the Company's rights as well as individual rights, and enjoy the right to choose an occupation within the limits prescribed by law, without causing harm to other individuals”.

#### 4.4 Application of the principle of good faith in case law: contracts – post-contractual liability (Contract Law, article 92).

As stated in the previous section, pursuant to Article 92 of the Contract Law, the principle of good faith is binding upon the parties even after the termination of the contractual relationship, prescribing “obligations such as notification, assistance and confidentiality, etc. in accordance with the relevant usage.”<sup>92</sup>

The cases concerning the issue reveal little propensity by Chinese judges to apply such a provision. In the website used there is only one case raising post-contractual liability issues using the “*chengshi xinyong*” formula. Moreover, the case is incorporated in a document aimed at explaining the meaning of “post-contractual liability” (后合同义务,

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<sup>90</sup> See 员工“跳槽”侵犯商业秘密 被列入广东十大知识产权案件 (Yuangong “tiaocao” qinfan shangyemimi bei yeru Guangdong Shida zhishi changyuan anjian), source: Zhongguo Fayuan Wang (<http://www.chinacourt.org/html/ajk>), visited on 04/06/08.

<sup>91</sup> The 10 leading cases have been published on 24 April 2006.

<sup>92</sup> Article 92, Contract Law. For the complete text see *supra*, note 100.

*houhetong yiwu*) to Chinese judges<sup>93</sup>, drafted by a member of the Political Department of the People's Supreme Court.

The same author explains the need for a clarification of the issue in the following terms: “the Principles do not mention the expression “post-contractual obligations”, and scholarly writings do not place much emphasis on it, meaning that there is no single, coherent definition or application by the judges”. In order to shed light on this situation the author analyzes the following case on post-contractual liability.

In January 2000 Liu accepted the position as South East Asia Manager with the import-export company Xinya, owned by Lugang. The duration of the contract was agreed to be 3 years, during the course of which Liu was expected to manage marketing channels for South East Asia, client portfolios, and other important information. After three years Liu set up a clothing company in the same city using the marketing channels, client portfolios, and information obtained at Xinya. In May 2003 Xinya initiated proceedings against Liu, who argued that, following its termination, the contract no longer has binding force.

The foregoing analysis does not merely touch upon theoretical aspects, such as the characteristics of “post-contractual obligations” or their content. Rather, the case is instructive because of its practical ramifications: it lists the necessary elements a judge will have to bear in mind when assessing the existence of post-contractual liability, and provides a guide for the quantification of damages. In finding in favor of the plaintiff, the judge in the case under scrutiny held that Liu unequivocally violated his duty of confidentiality, which survives the termination of the contract.

#### 4.5 Application of the principle of good faith in case law: burden of proof

The vague content of the good faith formula entails great flexibility, and the concept is often shaped in accordance with different factual requirements and legislative gaps which must be filled.

It is for this reason that Chinese judges often turn to the principle of good faith in order to interpret the intentions of the legislator when the latter is silent on a specific issue. An emblematic example involves the use of the principle to determine the burden of proof in the event of uncertainty.

Scholarly opinion appears to favor such an approach: Zhang Junyan, of the Renmin Daxue (People's University), explained in a 2002 article<sup>94</sup> that in the evaluation of the burden of proof,

“in the event of explicit provisions the judges must follow the law; if such provisions are lacking the so-called “rules of experience” apply; in the absence of both, the burden of proof must be determined on the basis of the principles of equity and good faith, in order to avoid arbitrary results”<sup>95</sup>.

The possibility by a judge to shift the burden of proof in accordance with the principle of good faith is explicitly provided for by article 7 of the “Regulations on Evidence in Civil Proceedings” (关于民事诉讼证据的若干规定, *Guanyu minfa susong zhengjude ruogan guiding*) issued by the Supreme People's Court on 9 November 2003.

The article reads as follows:

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<sup>93</sup> See 由一起典型案例论后合同义务理论 (You yiqi dianxing angli lun houhetong yiwu lilun), source: Zhongguo Fayuan Wang ([www.chinacourt.org](http://www.chinacourt.org)), visited on 20/12/2007.

<sup>94</sup> ZHANG JUNYAN, “Chengshi xinyong yuanze yu juzheng zeren” (Principle of good faith and the burden of proof), in *Dianzikeji Daxue Xuebao* (Shekeban), March 2001, volume 3, n. 1 pages. 84-86.

<sup>95</sup> *Ibid.*, p. 85, my translation.

“In the event that the present Regulations, existing provisions, and judicial interpretations cannot be adapted to a given legal question in order to determine the burden of proof, the People’s Court ought to base the determination on the principles of good faith and fairness, as well as the parties’ evidentiary competence”<sup>96</sup>.

The People’s Court of Pengzhou applied the provision in a case involving a dispute between two companies, Henda (Pengzhou, Sichuan) and the Pengzhou (Sichuan) branch of the Salt industry in Sichuan<sup>97</sup>. The first company, a manufacturer of pickled goods, entered into a supply agreement with the Pengzhou branch of the Sichuan Salt Industry for the provision of salt to be used for pickling purposes. In November 2001, the plaintiff purchased 224,6 tons of plain salt from the defendant company. However, 135 tons of the said supply were actually iodized salt which had been in storage so long that the supplier company alleged all the iodine had volatilized. The plaintiff company used the latter supply to produce pickled vegetables, but the vegetables deteriorated, causing the plaintiff to suffer significant losses. The plaintiff company sought damages to compensate for the losses incurred. The defendant argued that there was no connection between the salt supply and the harm suffered by the counterpart. During the trial, the parties failed to establish a correlation between use of iodized salt and the deterioration of the vegetables. Thus, the burden of proof had to be placed on one of the parties.

Given the absence of specific provisions the People’s Court of Pengzhou, relied on article 7 of the Supreme Court’s “Regulations on Evidence in Civil Proceedings” and the principle of good faith to rule that the burden of proof rested on the plaintiff Company. As the evidence submitted by Henda was inconclusive as to the facts upon which the claim was founded, the Court dismissed the plaintiff’s claim, by virtue of Article 2 of the “Regulations on Evidence in Civil Proceedings”<sup>98</sup>.

Upon closer examination the judge’s rationale does not appear to be perfectly clear: one may wonder why, in the present situation, the judge felt the need to “strengthen” Article 2 of the Regulations (similar to Article 2697 of the Italian Civil Code) by adding a reference to good faith and fairness.

The judge’s explanation surfaces in the commentary to the case, which states that reliance on such principles was warranted by the numerous lacunae affecting Chinese law, due essentially to the absence of a civil code.

The significance of the role of good faith in the assignment of the burden of proof and the different solutions adopted by Chinese judges is illustrated by the following case<sup>99</sup>.

In the commentary to the case, the judge defined it as “a practical lesson on the determination of the burden of proof in cases involving the quality of commercial products”.

On 1 January 2004 Zhang Zhiqiang purchased a refrigerator from the Suning Company for a price of 1600 yuan. The refrigerator did not work correctly and Sunin’s technicians attempted to repair it twice, with no success. On 24 July 2004 the manufacturer

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<sup>96</sup> CORTE SUPREMA DEL POPOLO: “Regulations on Evidence in Civil Proceedings” article 7, my translation. The original texts reads: “在法律没有具体规定，依本规定及其他司法解释无法确定举证责任承担时，人民法院可以根据公平原则和诚实信用原则，综合当事人举证能力等因素确定举证责任的承担”。

<sup>97</sup> See 穷尽证明手段后案件事实仍然真伪不明时举证责任由谁承担 (Qiongjin zhengming shouduan hou anjian shishi regran zhenwei bu mingshi juzheng zeren you shei chengdan), source: Zhongguo Fayuan Wang (<http://www.chinacourt.org/ajdq/>), visited on: 04/05/2007.

<sup>98</sup> The article provides that “A party has the onus of proving the facts upon which his or her arguments are based or the opposition to the counterpart’s requests” SUPREME PEOPLE’S COURT “Regulations on Evidence in Civil Proceedings” article 2, my translation.

<sup>99</sup> 一波三折究竟何人承担商品品质的举证责任 (Yibosan zhe jiu jing heren chengdan shangpin pinzhi de juzheng zeren), source: Zhongguo Fayuan Wang (<http://www.chinacourt.org/ajdq/>), visited on 05/04/2007.

decided to replace the appliance. The employee in charge of transportation delivers the replacement refrigerator to Zhang's apartment, though Zhang is not present at the time of delivery. The fridge is delivered without its original packaging and with no instruction manual and without the "3 guarantees" (repair, replacement and refund in the event of defective products). Upon his return Zhang realizes that the refrigerator's surface is covered in mold and concludes that the appliance is not new. Despite numerous complaints lodged by Zhang no agreement is reached with the Company. On 16 September 2004 Zhang sued Suning for damages, requesting 3320 yuan (1600 yuan paid for the appliance, 1600 yuan as compensation and 120 yuan for legal fees).

The People's Court of Quanshan district (Xuzhou, Jiangsu) immediately faced the difficulty by the parties to provide evidence on whether or not the refrigerator was new. The court ruled that Suning's evidentiary competence was greater because, due to its specialization in the production of electrical appliances, the company was in a better position to demonstrate that the refrigerator was in fact a new appliance. Thus, the burden of proof was placed on Suning, also considering the principles of good faith and fairness towards the consumer. The Court found in favor of the plaintiff, with minor changes as to the quantification of damages.

On appeal, the Intermediate People's Court of Xuzhou also placed considerable emphasis on the allocation of the burden of proof. Yet, as the facts did not perfectly fit one of the eight scenarios envisaged by Article 4 of the "Regulations on Evidence in Civil Proceedings", the Court ruled that the burden of proof rested on the appellee (plaintiff at the trial stage). The appellate judgment, therefore, upheld the Quanshan Court's ruling as to the restitution of the goods at the paid price, but did not award Zhang Zhiqiang any damages.

Zhang Zhiqian applied for a *zaishen*, or new trial, arguing that the appellate court had erroneously allocated the burden of proof. Indeed, in light of the principle of good faith, as prescribed by Article 7 of the "Regulations on Evidence in Civil Proceedings"<sup>100</sup>, the onus should rest on the manufacturer and not on the consumer.

The Intermediate People's Court of Xuzhou ruled that the appellate court did not place the burden of proof on the correct party and consequently overturned its decision. The case just described is yet another example of the use of principle of good faith to restore the balance between the parties, in order to avoid that one party take advantage of its privileged position to the detriment of the weaker party. Reliance on such a principle is perfectly reflective of Socialist calls for "solidarity" while, at the same time, recalling principles of humanity and justice<sup>101</sup>.

The author of the comment asserted, perhaps with excessive emphasis, that the judicial solution "is not merely compatible with a common sense of justice, but reflects a refined judicial technique and strikes the perfect balance between law and society".

For our purposes it is relevant to note that the achievement of legal certainty, at least as far as the present legal field is concerned, still lies at quite a distance.

## 5. Conclusions.

At the present stage in our research it is not yet possible to provide specific data concerning the role of the principle of good faith in the judicial practice of the People's

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<sup>100</sup> See *supra*, in this paragraph.

<sup>101</sup> See *supra*, paragraph 2.

Republic of China. However, the cases analyzed in our discussion can help isolate themes for further reflection.

First of all, the cases allow us to reconsider a number of clichés in connection with the use of vague notions in Chinese legislation which permeate Western literature. We observed how foreign spectators look upon the use of general clauses by Chinese judges with a degree of suspicion, as they fear that the extension of the notions' scope and application range may lead to arbitrary judgments and uncertainty in the law.

In light of the cases analyzed thus far it is evident that such concerns can be placed into perspective. On the one hand the lack of foreseeability and stability may indeed raise some concerns with regard to the principle of good faith, as we have seen when discussing the burden of proof.<sup>102</sup> Yet, the use of the notion does not appear to leave much room for judicial arbitrariness or prompt unreasonable rulings. On the contrary, in various judicial opinions the Chinese term indicating “reasonableness” (合理 *heli*) often goes hand in hand with “good faith”.

Moreover, even Socialist interpretations of the good faith clause have not yielded particularly original solutions. This is the same conclusion reached in the past by illustrious Italian scholars in connection with the application of general clauses by Yugoslav judges or judges from other Socialist legal systems<sup>103</sup>.

What surfaces from a close reading of the *Zhongguo Fayuan Wang* (中国法院网) cases is a residual use of the good faith clause, in perfect harmony with legal scholarship and the Supreme Court's recommendations. Judges are advised to avail themselves of the principle of good faith only in the absence of legal provisions or “rules of experience” (经验法则, *jinyan faze*) explicitly governing the situation, and in any event in accordance with judicial interpretations of higher courts.

On this note we can point out that *Zhongguo Fayuan Wang* is a website sponsored by the Supreme Court itself, and clearly the Court has no interest in promoting opinions which clash with the “correct” usage of the principle, especially in light of the instructive role of case law brought by the publication of judgments in recent years.

One tendency we can detect is the propensity to use the good faith formula as a yardstick, and although the concept is rooted in the Western legal tradition, it is placed alongside traditional Chinese criteria, such as “reasonableness” (合理, *heli*), or “fairness” (公平, *gongping*).

If we consider the declamations of Chinese legal scholars and legislators we find that the usage of good faith ought to infuse civil relationships with “morality”, through the establishment of the “honest businessman criterion” (诚实商人的道德标准, *chengshi shangren de daode biao zhun*) and the “balancing” (平衡, *pingheng*) exercise among the interests of individuals and society. If we move beyond such declamations it surfaces that, in practice, the concept is frequently used to achieve the ends of “justice” in specific cases, generating solutions somehow evoking the Imperial Magistrates' decisions based on Confucian principles.

Indeed, Chinese scholars draw a link between the notion of good faith and the Confucian tradition, at least on an etymological level<sup>104</sup>.

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<sup>102</sup> See *supra.*, paragraph 4.5.

<sup>103</sup> See, in particular, G. CRESPI REGHIZZI, R. SACCO, “L'abuso del diritto nel sistema civilistico jugoslavo”, in *Est – Ovest*, 1977, fascicolo 2, p. 55 e ss.; G. AJANI, “Le fonti non scritte del diritto dei Paesi Socialisti”, Milano, Giuffrè, 1985, p. 155 e ss.

<sup>104</sup> See *supra.*, note 14.

As we have seen, such remarks are made almost fleetingly, and are usually immediately followed by allusions to the notion's Romanist origins and its development in Western legal systems. In the course of our discussion we emphasized how the principle's "legislative success" and its incorporation in the Contract Law have been influenced by the (Western) models adopted by Chinese legislator<sup>105</sup>, and the use of the notion in judicial contexts can be considered consistent with judicial practice in several countries belonging to the Western Legal Tradition.

It is still safe to state that, in several cases, the application of rules borrowed from Romano-Germanic legal culture almost seems to mirror solutions developed within the Chinese tradition. We have discussed several examples in the field of contracts, such as the establishment of the terms of an agreement (good faith as "*xin*" 信, to fulfill an agreement), or the modification of a contract on the basis of "honesty and credibility" (诚实信用 *chengshi xinyong*) in order to protect the interests of the weaker party, as in consumer cases, which bring to mind the application of the Confucian principle "*ren*" (仁, "humanity"). Ultimately, it is vital that the final solution be "fair" (公平, *gongping*) and "reasonable" (合理, *heli*).

The foregoing discussion echoes the ancient motto of the Yangwu Movement, "Chinese learning for substance; Western learning for application" (中学为体, 西学为用 *zhong xue wei ti, xi xue wei yong*). This aspect, while perhaps not warranting excessive emphasis, is certainly worthy of further consideration.

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<sup>105</sup> See *supra*, paragraph 3.3.