THE INTERPRETATION OF GOOD FAITH AND ACCORDING TO HUMAN RIGHTS, FUNDAMENTAL FREEDOMS AND CONSTITUTIONAL LAWS IN THE COMMON FRAME OF REFERENCE (ART. 1:102 DCFR)

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***SUMMARY:** 1. Interpretation and rights. - 2. Interpretation in accordance with good faith and fair dealing (8: 102 I lett. g, DCFR and art. 1366 Italian Civil Code). – 3. If one party has better rights than the other. 3.1 Interpretation in accordance with good faith in France. 3.2 The relevance of the text in common law. 3.3. Interpretation in accordance with good faith and sectoral regulation in Italy. 4. Art. 1:102 DCFR and interpretation according to human rights, fundamental freedoms and constitutional laws.*

1. Interpretation and rights.

Whenever there is an artistic, literary or legal objective expression, our interpretation comes into play. This has led some authoritative authors to search for a common element therein[1] - to reproduce someone else's thought and thus discover the spectacular, orchestral, literary and philosophic key to the work that is the object of exegesis. Within such a hypothetical *genus*, legal interpretations play a specific role dictated by the peculiarity of each text. They must lay down a principle so as to decide on or to take stands over a conflict of interests, over a demand for protection or over a relevant ascertainment.

The DCFR confirms well-known rules and lays down some new provisions. Art. 1:102 says that the rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws. Chapter 8 on the *Interpretation of contract*[2] includes a number of ambiguous

[1] E. BETTI, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)*, Milan 1949.

[2] Section I contains seven provisions: *General rules* (8:101), *Relevant matters* (8:102), *Interpretation against party supplying term* (8:103), *Preference for negotiated terms* (8:104), *Reference to contract as a whole* (8:105), *Preference for interpretation which gives terms effect* (8:106), *Linguistic*

provisions, some laborious compromises and some new provisions.

The fundamental principle is the need to reconstruct the common intention of the parties, even where this differs from the literal meaning of the words (8:101 I). Importance is attached (according to a common law rule, embodied in art. 8 1 CVIM) to awareness of the true intention of a party if, at the time of the conclusion of the contract, the other party was aware, or could reasonably be expected to have been aware, of such intention (8:101 2). An objective criterion is thus once again applied (8:101 3) as to the meaning a reasonable person would give to the contract, thus adding a further specification with respect to the Lando Principles. Such an application is allowed if the intention cannot be established under the previous criteria, and if the question arises with a person who is not a party to the contract or who, by law, has no wider rights than such a party, provided the former has relied on the contract's apparent meaning (8:101 3 a and b). Regard may be had, in particular (8:102 I), to the circumstances in which the contract was concluded (including preliminary negotiations), to the conduct of the parties (even subsequent to contractual conclusion), to similar terms and practices established between the parties, to the meaning commonly given to such terms, to the nature and purpose of the contract, to usages and good faith. We thus find another new provision with respect to the Lando principles. It is specified (8:102 2) that where an issue arises in relation to a person, first, who is not a party to the contract (or an assignee) or second, who, by law, has no better rights than such a party, but who has relied on the contract's apparent meaning, regard may be had to external circumstances only to the extent that those circumstances were known to, or could reasonably be expected to have been known to that party, subject to the general principle of good faith.

These criteria are followed by a provision on non-individually negotiated contract terms (8:103 - 8:104), by a reference to the contract as a whole (8:105), a principle on the preference for interpretation which gives terms effect (8:106), and a provision on linguistic discrepancies (8:107).

I will deal with one issue only: the role of good faith and the importance of such a criterion where one party, by law, has better rights than the other (8:101 3 lett. b; 8:102 DCFR).

discrepancies (8:107). Section 2 contains only one provision among *General rules* on the issue of interpretation of juridical acts and a provision on analogy.

2. Interpretation in accordance with good faith and fair dealing (8: 102 I lett. g, DCFR and art. 1366 Italian Civil Code).

The rule has always given rise to doubts and questions, especially when identifying which solutions are in line with good faith, and how such a criterion adds a further meaning to what is already envisaged in subjective and objective interpretative criteria (8:101, 8:102; art.s 1362 and 1367 Italian Civil Code)[3].

According to Italian law, interpretation in accordance with good faith is that which is in line with "the intentions of the parties and the purpose they pursue in their negotiations". Yet, it has been observed that respect for the parties' common intention is already requested by art. 1362. Hence, if an intention exists and is well-known, "there is no need for art. 1366 to give it further strength"[4].

Having abandoned the equivalence between good faith and intention, a more objective meaning has been upheld, whereby good faith underlines the importance of "mutual fair dealings between the parties"[5]. Yet, this definition adds nothing to the meaning of art.1366.

The idea of a link between good faith and the principle of reliance is very widespread. According to Cesare Grassetti, "[I]f a party is entitled to interpret a given statement in a given way (…), such a way shall be relevant for the law, and the person who has made the statement cannot claim a different meaning"[6]. According to this view, to interpret a statement in accordance with good faith means to put oneself in the position of the person who takes cognizance thereof. Yet, such an argument is not convincing, since "the contract is not the isolated statement of one person to another, rather a set of mutual statements: a unitary text endorsed by both parties. There is not a declarant and an addressee; rather, the two contractors assume

[3] See on this point and the following reasoning, R. SACCO, *L'interpretazione, in* R. Sacco and G. De Nova, *Il contratto, in Tratt. dir. civ.*, ed. by R. Sacco,Torino, 2004, p. 369 foll.*;* N. Irti, *Testo e contesto*, Padova, 1966, p. 25; but also C. GRASSETTI, *L'interpretazione del negozio giuridico con particolare riguardo ai contratti*, Padova, 1983, p. 108; M. CASELLA, *Il contratto e l'interpretazione. Contributo ad una ricerca di diritto positivo*, Milano, 1961, p. 143; V. RIZZO, *Interpretazione dei contratti e relatività delle sue regole*, Napoli, 1985, p. 163 foll.; C. SCOGNAMIGLIO, *Interpretazione dei contratti e interessi dei contraenti*, Padova, 1992, p. 273; see the essay by V. CALDERAI, *La teoria classica dell'interpretazione dei contratti. Origini, fortuna e crisi di un paradigma dogmatico*, in *Diritto Privato*, 2003, p. 344 foll.

[4] R. SACCO, *ibid.*, p. 375 foll.

[5] C. GRASSETTI, *ibid.*, p. 197.

[6] As above., *ibid.*

both roles"[7]. What is more, there is not only an intended and communicated plan, but rather a heteronomous content to be identified in practice.

The reliance theory has been enriched by two further ideas. On the one hand, priority is given to the meaning that both parties wanted the text to have - although this mirrors either "a code that is common to the parties or an objective meaning" which art. 1362[8] already implies. Hence, once more, art. 1366 amounts to a repetition. On the other hand, relevance is given to the predisposition of the contract, though this is already governed by articles 1341 and 1370 Italian Civil Code, and by special laws on consumers. This leads to the claim that art. 1366 has not been subject to interesting developments since "the applications which it gave rise to before 1942 are now converted into specific legal rules and have thus become autonomous with respect to the matrix that produced them"[9].

Not surprising, therefore, is that deeper meanings have been ascribed to art. 1366, which are not commonly upheld albeit they surely have a justifiable basis. Some argue that art. 1366 applies to the case of unforeseen (and thus unfair) damages, leading to contractual revision or repetition, without altering the risks and duties laid down by the parties. Art. 1366 is used "to rectify contractual details, cancelling what was included therein by claiming the abuse of the other party's weakness, ingenuity or shyness, or the temporary lack of said party's reason"[10]. In legitimacy judgements, it has been held that the general clause enlarges the parties' rights and obligations, so that the interpretative criterion that refers to it requires the interpreter to pay attention to that integration, to identify the actual content of the parties' rights and obligations, and to seek the meaning that is most consistent with the contractors' fair dealing[11]. Interpretative good faith is thus given a complete and useful meaning.

This has been confirmed by a recent judgement by the Italian Court of Cassation[12], which has held that, when a party claims bad faith dealing, and this is ignored by the judge when dealing with the merits, the infringement of the interpretative rule must be claimed in the appeal, or such a right is lost. Hence, there is a strong connection between ascertaining the unfairness of one's conduct and the interpretative rule.

This may appear to be in conflict with the DCFR, whose article III 1:103 is rather ambiguous and which introduces a new provision with respect to the Lando Principles. After confirming the role of the general clause in the *General provisions* (I 1:102) and its impact on *Obligations and corresponding rights*, its application is narrowed. Art. III 1:103 3 says that breach of the duty to act in accordance with good faith does not give rise directly to remedies for non-performance of an obligation, but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have had.

Such a specification is clearly meant to curb the idea that the clause is a general instrument for control[13], so limiting scope for the judge to draw new rights and obligations for the contractors from it[14]. Yet the text, precisely because of its ambiguity, is open to different interpretations. In contrast to the principle upheld by Italian case-law, it says that breach of good faith does not imply non-performance, though this does not mean that the duty of good faith cannot give rise to new

[7] R. SACCO, *ibid.*, p. 408.
[8] As above, *ibid.*
[9] As above, *ibid.*
[10] As above, *ibid.*, p. 410.
[11] The Court of Cassation has expressed doubts, in the ambit of contractual interpretation, as to the opportunity of using other criteria when the literal meaning of the words leads to a certain result. Yet, quite recently, reference has been made to the necessary hermeneutical criterion evoked by the many contractual clauses (1363 Italian Civil Code) (Cass. 11th June 1999 n. 5747, in *Giur. It*, 2000, p. 705) and grounded on a set of behavioural rules of loyalty and fairness (1366 Italian Civil Code) (Cass. 12th November 1992, n.12165, in *Giust. civ. Mass.* 1992, dossier 11) which can lead to identifying instrumental duties to the satisfaction of the contractors, even in the event of mere "conscious and voluntary inertia" (Cass. 17th February 2004 n. 2992, in *Dir. e giust.*, 2004, 13, p. 34).
[12] Cass. 11th August 2000, n. 10705, in *Giust. civ. Mass.*, 2000, 1778.
[13] H. BEALE, *General clauses and specific rules in The Principles of European Contract Law: the Good faith clause*, in S. Grundman and D. Mazeaud (eds.), *General Clauses and Standard in European Contract Law*, Kluwer Law International, 2006, p. 205-218, excludes the possibility that good faith may be an all-inclusive instrument of control and limits its content to a judgment of reasonableness. Conversely, see O. LANDO, *Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?*, in *European Review of Private Law*, 2007, 6, p. 841 foll.
[14] See M. HESSELINK, *Common Frame of Reference & Social Justice*, Centre for the Study of European Contract Law Working Paper Series No. 2008/04, in http://ssrn.com; and, by the same author, *The concept of Good Faith*, in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*, Kluwer Law International, 2004; and S. WHITTAKER & R. ZIMMERMAN, *Good Faith in European contract law: surveying the legal landscape*, in R. Zimmerman & S. Whittaker (eds.) *Good Faith in European Contract Law*, Cambridge, 2000, p. 7-62, 32.

obligations and rights. Indeed, the provision grants the person acting in good faith the right to prevent the other party in bad faith from exercising a right, remedy or defence. Such a broad formulation encompasses the integrating capacity of the clause, which concerns a procedural evaluation of the parties' conduct, enriching the contractors' rights and duties.

The wording of art. III 1:103 3 clearly epitomizes the different approach of common law and civil law jurists.[15] The Anglo-Saxon culture is naturally led to argue in terms of remedies and limits to remedies, while it has always feared the proliferation of rights, especially of unspecified origin. Continental jurists, instead, are used to constructing reasoning based on the definition of subjective positions; according to this approach, the autonomous role of good faith cannot but determine the rise of new rights and duties.

By going beyond both approaches, we may reach agreement on a key point. Good faith is the procedural instrument for the control of the parties' conduct. It is given a general value by art. 8:102 1 lett. g and 2, even where one party has stronger rights than another, and this may be important in outlining the limits of the content of good faith which can emerge *from the parties' common intention, but also from rights and duties to be reconstructed in the concrete regulation of the case, by applying special rules in the field and the principles of art. 1:102*. Let us examine both cases.

3. If one party has stronger rights than the other.

3.1 Interpretation in accordance with good faith in France.

The French *code civil* does not expressly refer to *bonne foi* as a criterion for interpretation. Its provisions on execution (1134)[16] and on contractual integration (1135)[17] contain a reference to the general clause. However, quite gradually, the idea of a "*procédé de forçage*" of contract and of an intervention on its content have gained ground[18].

Besides, the entire section of the *Code civil* dealing with interpretation (the current art. 1154[19]) is based on the idea of identifying the contractors' common intention ("*La règle des règles*" according to Demolombe) and the most recent doctrine specifies that, when construing such common intention, the interpreter must refer to other criteria, including good faith[20]. There follows the traditional separation between *interprétation subjective*, which is meant to "reveal" the contractual content, and *interprétation objective (ou constitutive*), which "determines it". It is precisely with respect to the last criterion that good faith acquires relevance, through articles 1134(3), 1135, and 1160.

The *Avant-projet de réforme* contains some important new provisions. It suggests including the section "*De l'interprétation et de la qualification*", immediately after the "*Dispositions Générales*", in Chapter III (*De l'effet des obligations*), numbered from 1136 onwards. The wording of art. 1135 is unaltered, while an extremely important new point is included in the provisions on interpretation. A new provision (art. 1139) is formulated, whereby "The contract shall be interpreted according to reasonableness and equity"[21]; the comment in the notes specifies that such criterion is viewed as a useful instrument for the "*contrôle de l'équilibre contractuel*," according to objective criteria of interpretation: *raison* and *équité*. Thanks to the latter, one must "first seek the grounds for the existence of the agreement, which are in themselves

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[15] See F. VIGLIONE, *L'interpretazione del contratto nella common Law inglese. Problemi e prospettive*, in *Riv. dir. civ.*, 2008, p.134 foll.

[16] According to art. 1134(3) « Elles doivent être exécutées de bonne foi » where reference is made to « conventions légalement formées ». These provisions remain unaltered in the Avant projet.

[17] The provision states: "les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature", where the notion of «equity» is interpreted more or less like that of good faith.

[18] V. L. MESTRE, A. LAUDE, *L'interprétation «active» du contrat par le juge*, in AA. VV., *Le juge et l'exécution du contrat*, Aix-Marseille, 1993. A relevant scope of application concerns information obligations, especially of professional figures, that have been extended by case-law through art. 1135. The same reference represents the basis for new developments in the case-law on surveillance obligations (e.g. of hoteliers for their clients' chattels Civ. Cass, 13th October 1987, Bull. civ., I, n. 262, p. 190).

[19] According to this provision «On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes». The wording remains unaltered in the *Avant projet*, just like the "position" of the article at the beginning of the section on interpretation. The numbering of articles changes, since the interpretation provisions are included immediately after the "General Provisions" relating to "Contractual Effects".

[20] J. GHESTIN, C. JAMIN, M. BILLIAU, *Traité de Droit Civil, Les effets du contrat*, 3rd ed., Paris, 2001, p.18.

[21] «Le contrat s'interprète en raison et en équité».

evidence of the parties' intention, their interests and will, which cannot however be *inéquitable*".

In this respect, art. 1140-1 is emblematic: derogating from art. 1140 ("in doubt, the contract is to be interpreted against the creditor and in favour of the debtor"), it says that, "when the contractual content results from the dominant influence of a party, the contract shall be interpreted in the other party's favour". This is defined as *contrôle de l'unilatéralisme licite,* and is frequently applied to consumer contracts as well as "business to business" relationships[22].

3.2 The relevance of the text in common law.

The essential criterion for the English Judge's interpretation is his strict endorsement of the literal meaning of the contract (*parol evidence rule*). It is this principle that case law has always referred to, ignoring all criticisms of the idea of language univocality. Hence, the judge's interpretation follows merely technical criteria that are intended to reconstruct the parties' will, as evidenced in the contract. Such an idea is in line with the classic conceptualization of the contract as the synthesis of two autonomous wills (individually identifiable), and an expression of the parties' natural contrast.

The goal that is thus pursued is that of guaranteeing the certainty of the contract's effects, since no judicial intervention can change them in a way that is not in line with the parties' express will. There follows the exclusive role of the contract, the irrelevance of the context and, in general, of any elements that are external to it. Hence, jurists are generally distrustful of flexible and apparently indefinite concepts such as good faith[23]. This clause, as has been said, implies "a systematic analysis or a subjective approach," and thus "unquestionable negative effects on the efficiency of decision-making processes",[24] as well as longer proceedings and a greater number of disputes between private individuals.

However, such basic considerations do not exhaust the issue of interpretation in the English legal system, since the common law tradition has been integrated with rules that in fact often overlap with those used in civil law systems[25], even without expressly resorting to the idea of good faith. Casebooks are certainly lacking in precedents on the use of good faith for interpretation purposes[26], in line with the general diffidence towards it as a criterion.[27] Still, since the late 1980s onwards, this situation has changed as the result of some important judgements[28] and, most of all, due to the European Union's regulations expressed through Directives. A lively doctrinal debate has ensued[29].

The lack of a general principle of good faith does not prevent judges from intervening in the contract (*construction*) and integrating it, through hermeneutical experiments of an objective kind, and affecting the traditional role given to the will expressed in the contract. This is occurring together with the emergence, in recent case-law, of a tendency to underline the contractors' duty of diligence even in the pre-contractual stage[30].

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[22] Equally significant is the formulation of art. 1141, which is not included in the current structure of the Code: "The interpretation of the contract is grounded on the analysis of all its elements. Failure to consider its essential elements entails misinterpretations (*dénaturation)*". The provision expresses the division of powers between judges deciding on the merits and legitimacy judges, in line with the theory of *dénaturation.* The latter gives rise to an evaluation under law, which may be censured before the *Cour de Cassation*, unlike the interpretation which is left to judges deciding on the merits of the case.

[23] TEUBNER, *Legal Irritants: Good Faith in British Law of How Unifying Law Ends up in New Divergences*, 61 (1988), MLR11; R. BROWNSWORD et al, *Good Faith in Contract: Concept and Context, in*; R. BROWNSWORD et al. (eds) *Good Faith in Contract: Concept and Context*, Darmouth Ashgate, 1999.

[24] F. VIGLIONE, *L'interpretazione del contratto nel Common Law inglese. Problemi e prospettive*, in *Riv. dir. civ.*, 2008, fasc. S1, p. 142

[25] F. VIGLIONE, n. 24 above, p. 157 foll.

[26] Recently, K. LEWINSON, *The interpretation of Contracts*, 3rd ed. , London, 2004.

[27] The sole relevant exception is, R. POWELL, *Good Faith in Contracts*, (1956), 9, *Current legal Problems*, 16.

[28] *Banque Financiere de la Cite SA v Estgate Insurance Co. Ltd* (1987) 2 All ER, 923 ; *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* (1989) QB, 433.

[29] Cfr. R. BROWNSWORD, *Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law*, in *Good Faith in Contract, Concept and Context*, Ashgate, Darmouth, 1999 ; ID., *Contract Law. Themes for the Twenty-First Century*, *Oxford*, 2006; ID., *Good Faith in Contracts. Revisited*, (1996) 49, *Current Legal Problems*, 111. The author reconstructs three doctrinal approaches to the idea of good faith as a general principle: a negative one, a neutral one and a positive one, and evidences the reasons underpinning them. We first need to clearly identify the idea of good faith. In this respect, the said doctrine mentions three models: *good faith requirement*, which is applied to the idea of fair dealings, already recognized in given fields; *good faith regime*, which concerns the standards for fair dealings resulting from a cooperation principle. Lastly, the so-called *visceral justice*, a model however to be excluded (see in this respect BRIDGE, *Good Faith in Commercial Codes*, in *Good Faith in Contract, Concept and Context*, *ibid*, p. 140. See also J. F. O'CONNOR, *Good Faith in English Law*, Aldershot, Darmouth, 1991

[30] On the point, see R. GOODE, *Il diritto commerciale del terzo millennio*, Milano, 2003, p. 49 foll., 52 foll.

3.3 Interpretation in accordance with good faith and sectoral regulation in Italy.

The reference in the DCFR to interpretative criteria in the event of a disparity of power reflects a problem felt in every national system, whose general laws[31] must be re-assessed in light of special laws on consumer contracts and on business contracts.

Italian doctrine has delivered different interpretations on the matter. For some, a non-negotiated contract between a professional and a consumer should be interpreted by reconstruing the "parties' common intention" (meant as "the parties' intended result"[32]). Other authors believe that the criterion of subjective interpretation cannot be applied to non-negotiated contracts between professionals and consumers, giving various reasons for this[33].

However, while the criterion of the parties' common intention is not very useful if the contract is not individually negotiated, the good faith criterion remains useful nonetheless. Indeed, as indicated above, the criterion has a key role in fixing the contract's content and in underlining the parties' rights and obligations arising from the contract and from law. Such a role is very useful in the interpretation of contracts between professionals and consumers.

As regards business to business contracts, the two conclusions outlined above apply. The notion needs to be subdivided into a different number of negotiations, depending on whether we are dealing with unilaterally negotiated contracts (between professionals and consumers), where the considerations just outlined apply, or bilateral contracts, which in turn need to be separated into contracts between businesses, free from significant asymmetries (B to B) and contracts where the parties' positions differ substantially due to subjective or objective circumstances (B to b)[34]. Indeed, it is now increasingly obvious that the interpretative criteria must be diversified according to the specific way in which private autonomy is expressed[35].

The doctrine has supported different theories[36]. As already noted, we need to diversify the many contractual figures. In these contracts, we need to examine the special laws that are meant to protect the entrepreneur-contractor (against abuse of economic dependence, franchising and payment terms) and the juridical regulation of the market which each single negotiation is part of[37]. The relevant provisions can help us integrate the rights and duties prescribed by law or by the contract, and this cannot but affect interpretative criteria. Once more, then, good faith has a positive role, since it requires the interpreter to consider the parties' different power, which is made relevant by special laws, and to interpret the contract in line with relevant special criteria.

4. Art. 1:102 and interpretation according to human rights, fundamental freedoms and constitutional laws.

The interpretative rule on respect for fundamental rights and freedoms requires a premise. The Charter of Fundamental Rights confirms the distinction between rights and principles. The explanation of art. 52, referred to by the new art. 6 of the Treaty of Lisbon, is extremely clear. According to article 51, principles may be implemented through legislative or executive acts, so that they are relevant to judges only when the regulations concerned are construed or subject to control, without leading to direct claims against the European Union institutions or the authorities of Member States[38]. This is said to be in line with the

[31] The articles on contractual interpretation are affected, in each legal system, by these different positions. See, in particular, art.s 1362-1371 Italian Civil Code; art. 1140-1 of the French *Avant projet* whereby "*Toutefois, lorsque la loi contractuelle a été établie sous l'influence dominante d'une partie, on doit l'interpréter en faveur de l'autre"* ; and the articles of the DCFR 8:103 on *Interpretation against party supplying term* and 8 :104 *Preference for negotiated terms.*

[32] For a useful reconstruction of the different positions, see B. SIRGIOVANNI, *Interpretazione del contratto non negoziato con il consumatore*, in *Rass. dir. civ.*, 2006, p. 729 and note 28.

[33] A. GENOVESE, *Contratti standard e interpretazione oggettiva*, Milan, 2004, p. 26 foll.; G. STELLA RICHTER, *L'interpretazione dei contratti dei consumatori*, in *Riv. trim.*, 1997, p. 1027.

[34] See C. SCOGNAMIGLIO, *I contratti di impresa e la volontà delle parti contraenti*, in *Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato*, ed. by P. Sirena, Milano, 2006, p. 493 foll.; G. Vettori, *I contratti di distribuzione*, *ibid*, p. 482 foll..

[35] See A. RIZZI, *Interpretazione del contratto e dello statuto societario*, Milan, 2002.

[36] A. GENOVESE, *Contratti standard e interpretazione oggettiva*, *ibid.*, p. 70 foll.

[37] G. VETTORI, *Autonomia privata e contratto giusto*, in *Riv. dir. priv.*, 2000, 5, p. 21 foll.

[38] G. VETTORI, *La lunga marcia della Carta dei diritti fondamentali dell'Unione europea*, in *Riv. dir. priv.*, 2007, 4, p. 5 foll.; by the same author, *Il diritto dei contratti fra Costituzione,Codice civile e Codici di settore*, in *Riv. trim. dir. proc. civ.*, 2008, p. 784 foll.

European Court of Justice's case-law[39], and with the approach to «principles» taken by the constitutional systems of Member States, especially in the field of social laws. By way of example, we may refer to the principles recognized in articles 25, 26 and 37 of the Charter. Moreover, in some cases, an article of the Charter may contain elements of both a right and a principle, such as articles 23, 33 and 34[40].

Certainly[41], the distinction between rights and principles is an expedient way to limit creative interpretations. In truth, however, it only prompts a careful specification of the desirable relationship between the contract, the Charter and case-law, which is now meaningfully dealt with by art. 1:102, whereby all provisions of the DCFR are to be read in the light of any applicable instruments guaranteeing human rights, fundamental freedoms and any applicable constitutional laws.

Such a provision gains importance if we specify how an interpretative criterion, grounded on a principle, should apply. In order for the criterion in question to apply, a rule must be laid down by the legislator or created by the judge through an act of interpretation, i.e. without creating a new right, since the case falls within his juridical scope if there exists a principle. Such a method uses a *canon for juridical construction* derived from the case through different kinds of interferences and deductions[42]. This creates the rule for the decision, though it may also be used as an exegetic canon of the contract, provided the points mentioned here are borne in mind.

The judge is subject only to the law[43], which governs also the relationship between citizens' equality and disparity of power (art. 3)[44]. The Constitution guarantees the equality of subjective situations (rights, obligations, powers, duties) before the law and the judge, since each right and interest is equally recognized (art. 24) and is assessed by an independent and impartial judge (art.111). This means that eventual disparities of power between contractors cannot be ascertained and decided on the level of subjective situations, which are equal for all. Equality needs to be guaranteed through the judicial ascertainment of disparity, which will be exclusively based on the implementation of a provision, on the proper use of general clauses, and on the juridical qualification of a fact which justifies a differential treatment[45].

Hence, the DCFR's reference to interpretative criteria in the event of a diversity between parties' rights, and to the general role of good faith is important. From it, and the legal criteria laid down by the Italian legislator, it can be inferred that the judge must (under art. 1366 Italian Civil Code and under DCFR, when the text has a binding value) construe the contract in line with the parties' common intention and ascertain the rights deriving from special laws. This must be done in accordance with fundamental freedoms which, through good faith, become exegetic criteria and conformity parameters for the legal meaning of the contract.

This does not conflict with the foundation of the provision that protects a party's reliance on the reasonable meaning and content of the parties' statements and conducts, and thus their conformity to the parties' common intention, integrated by fundamental rights and freedoms.

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[39] Cf., in particular, the case-law about the «precautionary principle» of article 174, paragraph 2 of the EC Treaty (replaced by article III-233 of the Constitution): TPG judgement of 11th September 2002, case T-13/99 Pfizer v. Council, with many references to case-law precedents and a number of judgments on article 33 (former 39) as to the principles of agricultural laws, e.g.: Court of Justice judgement, case C-265/85 Van den Berg, Racc. 1987, page 1155: analysis of the principle of stabilization of C 310/458 IT European Union Official Journal 16.12.2004 market and reasonable expectations.

[40] See G. VETTORI, *La lunga marcia della Carta dei diritti fondamentali*, *ibid*., p. 5 foll., from which I draw my remarks.

[41] In the European Council conclusion (Brussels, 21-22 June 2007), it is said that the Charter of Fundamental Rights has a juridical value, by referring to art. 6 of the Treaties, by recalling Chapter VII on interpretation and application (without prejudice to Poland's unilateral declaration and to the additional protocol requested by the United Kingdom).

[42] G. VETTORI, *Il diritto dei contratti fra Costituzione,Codice civile e codici di settore*, *ibid*, p. 787.

[43] Jurisdictional value is thus connected to popular sovereignty, and the idea of being subject to the law specifies such a connection. The judge's activity does not take the shape of political participation, rather it is an intellectual activity and any other power or judge cannot interfere with it. The judge is not even subject to Parliament, since he can raise a question of constitutionality with respect to an ordinary law. Therefore, the judge participates in enforcing the general will, often treading a subtle line reserved to politics which, together with law, is a social science after all.

[44] See A. ORSI BATTAGLINI, *Alla ricerca dello Stato di diritto. Per una Giustizia "non amministrativa"*, Milan, 2005, p.115, 116, 117-118, 121-122.

[45] A. ORSI BATTAGLINI, *ibid*., p. 117.