A Legal Chameleon -- An Examination of the Good Faith Doctrine in Chinese and U.S. Contract Laws

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I. Introduction

When China promulgated its first comprehensive contract law a decade ago, it ostensibly adopted the good faith doctrine as a basic contract law principle. The Contract Law of the People’s Republic of China (“Chinese Contract Law”) requires that parties observe good faith as a general principle. The U.S. contract law has also generally recognized the good faith doctrine as a “fundamental concept of modern contract jurisprudence.” Advocates on both sides of the Pacific praise the doctrine for its elasticity and adaptability which allow the courts to use the doctrine to fill in gaps where necessary. Detractors on both sides of the Pacific criticize the doctrine for those very qualities which they believe have the potential to be abused by courts or parties.

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3 This article relied extensively on original Chinese language materials. I translated all the Chinese language materials to English. I used the Chinese phonetic system pinyin for Chinese transliterations.


5 See Chinese Contract Law, supra note 4 at pp. 3 (Art. 6), 16 (Art. 42), 30 (Art. 60), 42 (Art. 92) and 55 (Art. 125).


8 Dubroff, supra note 6 at p. 616 (arguing that the addition of the covenant of good faith has not been helpful because it is not consistent with the principle of individual autonomy); Thomas A. Diamond and Howard Foss, Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing has been Violated: A Framework for Resolving the Mystery, 47 HASTINGS L. J. 585, 586 (March 1996) (criticizing the doctrine as one whose “application has been ad hoc, yielding inconsistent results and depriving parties of the ability to predict what conduct will violate...
With the same criticisms and praises being levied at the doctrine known essentially by the same name in both countries, one U.S. legal scholar suggested that Chinese doctrine of good faith is “identical to the American doctrine,” while noting generally “non-trivial differences” between the two countries in the doctrine’s application. Other scholars, when comparing the two bodies of contract law, have commented that the Chinese Contract Law requirement of the good faith performance standard “parallels the [Uniform Commercial Code’s] requirement of good faith.”

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9 One may question whether the English phrase “good faith” should necessarily have been used to translate the Chinese phrase “chengshi xinyong yuanze” which literally means “the principle of honesty, trustworthiness.” In Chinese legal scholarship, other English phrases have occasionally been used to translate “chengshi xinyong yuanze” such as the “bona fide doctrine” and the “principle of honesty and credit.” A New Chinese English Law Dictionary published by Law Press China 2007 edition offers two alternative translations for “chengshi xinyong yuanze”: bona fide doctrine; good faith doctrine. When two different languages are involved, the similarity in labels may be artificial. Chinese and American scholars that have discussed the issue generally accept “good faith” as proper translation of the Chinese phrase.


This article seeks to add to the current scholarship on the good faith doctrine in China and the United States by examining the doctrine in both countries from both theoretical and practical perspectives. This article concludes that the good faith doctrine in China is anything but “identical” to its counterpart in the United States.

A review of legal scholarship and case law in both countries reveals a striking attitude difference on this issue. China has embraced the good faith doctrine with enthusiasm. China has adopted the good faith doctrine as a general principle of civil law in general and contract law in particular. Chinese scholars have also generally welcomed the doctrine and Chinese courts have applied the doctrine without any apparent constraints. In contrast, United States’ recognition of the good faith doctrine as a contract law principle evolved slowly. Historically, United States was reluctant to recognize a general duty of good faith as a contract law principle. Even though United States has generally accepted the doctrine as a contract law principle, U.S. scholars and courts have viewed the good faith doctrine with skepticism and criticism. U.S. courts have typically applied the doctrine narrowly in resolving contract disputes.

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14 Yang, *supra* note 12 at p. 54. See also discussions and citations infra in Part IV(A).

15 Dubroff, *supra* note 6 at pp. 564-565.

16 See discussions and citations infra in Part III(A).

17 See discussions and citations infra in Part III (A) and III (B).

Not surprisingly, the scope of the good faith doctrine in both countries reflects the respective attitude differences. The Chinese Contract Law imposes a duty of good faith on parties during all phases of a potential contractual relationship including pre contract formation, performance and post termination. 19 Chinese courts use the good faith doctrine as a broad doctrine to resolve all types of contract disputes. They have used the doctrine to fill in legislative or doctrinal gaps, apparently without any discernible limiting principles. 20 Chinese courts have also relied on the doctrine to excuse contract performance. 21

The U.S. contract law, on the other hand, has generally only required good faith only with regard to contract performance or enforcement after a contract has been formed. 22 U.S. courts have steadfastly refrained from imposing precontractual liability on the basis of the good faith doctrine and have refused to rely on the doctrine to excuse performance required by explicit contract terms. 23 U.S. courts have also used the good faith doctrine as a gap filler, but the gap filling function is limited to situations where the contract did not spell out the parties’ obligations explicitly. 24

This article also attempts to explain such differences. This article suggests that the different approaches reflect the profound cultural, political and legal differences between the two countries. 25 The good faith doctrine is the legal equivalent of a chameleon – it takes on the characteristics of its environment. Because those differences challenge the core values of U.S.

19 See Chinese Contract Law, supra note 4.
20 See discussions and citations infra in Part IV(A).
21 See discussions and citations infra in Part IV (C)(1).
22 See discussions and citations infra in Part III(B) and IV(B)(2).
23 See discussions and citations infra in Part IV(B)(2) and (C)(2).
24 See discussions and citations infra in Part IV(A).
contract law, they render the Chinese good faith doctrine substantively different from its U.S. counterpart.\textsuperscript{26} Even though the Chinese doctrine may “walk, quack, and look like” the American doctrine, it is definitely not the American doctrine.\textsuperscript{27}

To provide a context for discussion, Parts II and III of this article summarize the current law and scholarship on the good faith doctrine in contractual relations in China and the United States. Part IV provides some examples of how Chinese and U.S. courts have applied the doctrine in resolving contract disputes. Part V attempts to explain the different approaches by identifying the cultural, political and legal differences which have helped the development of the good faith doctrine in both countries.

\section*{II. The Doctrine of Good Faith in Chinese contract law}

\subsection*{A. The Doctrine’s Origin and Definition in China}

China first recognized the good faith doctrine in 1987 as a legal doctrine when it promulgated General Principles of the Civil Law (“GPCL”).\textsuperscript{28} Article 4 of GPCL provides that “in civil activities, the principles of voluntariness, fairness, making compensation for equal value, and good faith shall be observed.” In 1999, the first comprehensive Chinese Contract Law explicitly

\begin{footnotesize}
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\item \textsuperscript{25} See discussions and citations \textit{infra} in Part V.
\item \textsuperscript{26} The moral of this doctrine cautions against assumption of universalism of legal doctrines across cultures. Brooke Overby, \textit{Symposium in Memory of David H. Vernon: Contract in the Age of Sustainable Consumption}, 27 IOWA J. COPR. L. 603, 605 (Summer 2002) (pointing out that “a great deal of American contract law and scholarship now seems to proceed from a perspective of universalism.”)
\item \textsuperscript{27} To paraphrase the saying attributed to James Whitcomb Riley; “When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.” available at \url{http://www.brainyquote.com/quotes/authors/j/james_whitcomb_riley.html}, last visited on September 9, 2009.
\item \textsuperscript{28} GPCL, \textit{supra} note 13 at p. ___ (Art.4).
\end{itemize}
\end{footnotesize}
adopted the good faith doctrine as a general principle of Chinese Contract Law. Article 6 of the Chinese Contract Law states that “parties should abide by the doctrine of good faith when exercising their rights or fulfilling their obligations.”

Chinese scholars and courts have generally embraced the good faith doctrine as a necessary part of the Chinese Contract Law. They describe the doctrine as the “highest guiding principle or the royal principle for the law of obligations.” Chinese legal scholars attribute the doctrine’s origin to Chinese traditional morality and the civil law countries. Chinese scholars interpret the doctrine to require that the parties act honestly and honorably, to perform their duties as promised, and to avoid breaching their promises.

According to Professor Xu, Guodong, one of the Chinese scholars advocating the doctrine’s adoption in China, the good faith doctrine is generally defined as legislators’ demand

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30 Chinese Contract Law, supra note 4 at p. 3 (Art. 6).

31 There are a few dissenting voices questioning the overly broad scope of the good faith doctrine in Chinese Contract Law. See e.g. Meng, supra note 8 at p. 138; Chen, supra note 8 at p. 24; Kang, supra note 8 at p. 41.

32 Wang and Xu, supra note 4 at p. 16.


34 Wang and Xu, supra note 4 at p. 16; Lin and Feng, supra note 7 at p. 62.

35 Chinese names follow a different convention from that in the United States. The family name appears first, followed by given names. This article uses the Chinese convention by putting the family name first and then the given name. A comma is inserted between the names as a reminder that the preceding name is the last name.
that civil actors maintain a balancing of the interests between the parties and between the parties and the society in their civil activities, so as to maintain social stability and harmonious development.”  

36  At the same time, Professor Xu acknowledged with apparent approval the doctrine’s vagueness. Professor Xu believed that, because of its vagueness, “the doctrine of good faith means an affirmation of the creativity and activism of judicial activities.”

B. The Scope and the Function of the Doctrine in China

The Chinese good faith doctrine has a broad scope. Chinese Contract Law requires parties to comply with the duty of good faith prior to the formation of a contract, during performance, and post termination. According to Professor Wang, Liming, one of the major drafters of Chinese Contract Law, the doctrine of good faith at the contract formation stage includes some “ancillary duties” such as the duty of loyalty, duty of mutual care and assistance, the duty of honesty and non-deception, the duty to keep promise and the duty of confidentiality.

The post contractual duty of good faith includes the duties of confidentiality and loyalty.

According to Chinese scholars, the good faith doctrine serves multiple functions in China’s contract law scheme. The doctrine recognizes and enforces China's traditional morality and business ethics. Chinese scholars overwhelmingly expect the good faith doctrine “to contribute

36 Xu, supra note 7 at pp. 74-75.
37 Id. at p. 75; Liang, supra note 33 at p. 24
38 See Chinese Contract Law, supra note 4.
39 Id.
40 Wang, Liming, HETONGFA YANJIU [CONTRACT LAW RESEARCH] (People’s University, 3rd Ed. 2006) at p. 177.
41 Wang & Xu, supra note 4 at p. 18-19.
42 Id. at p. 21.
43 Tong, Guangfa, Shilun Chengshi Xinyong Yuanze [On the Doctrine of Good Faith], p. 3 (available at http://vip.chinalawinfo.com last visited on July 22, 2009); Wang, Yang,
much to the establishment of a normal transactional order in China.” They believe that China needs the doctrine because too many unethical activities such as false advertising, forgery, and corruption have been going on in China’s emerging marketplace.

Another function of the good faith doctrine in China is to assist with interpretation of contract terms by parties or by Chinese courts when the contract language is ambiguous. Chinese legal scholars believe that the good faith doctrine ensures that contracts are respected and performed. Commentators suggest that the doctrine will guide people’s behavior even when the contract itself is lacking.

Some scholars suggest that the good faith doctrine can assist courts by filling in gaps where necessary. Because of the rapid social and economic changes in modern China, many laws and regulations are still in the process of being developed. In such circumstances, the doctrine of good faith provides a way to ensure that contracts are respected and performed.

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45 See Tong, supra note 43 at p. 1. One Chinese author provided the following anecdote which seems to support the Chinese scholars’ view that the doctrine of good faith is sorely needed in the marketplace. In the 1980s, there were many incidents of fake products including drugs being sold to consumers which occasionally caused serious injury. Entire villages were apparently involved in making fake products for sale. One reporter, when interviewing an official in one of those villages, asked: “Do you know that what you did was illegal and immoral?” Pointing to the rows of new farmers’ houses being built behind him, the official replied: “I think, that the most moral thing in the world is to allow my poverty stricken hometown get rich.” Wu, Xiaobo, *Ji DANG Sanshi Nian* [THIRTY YEARS OF TURBULENCE] p. 149 n.1 (Vol. 1, China Citic Press 2008).

46 Wang and Xu, supra note 4 at p. 22; Lin, and Feng, supra note 7 at p. 65; Chinese Contract Law, supra note 4 at p. 55 (Art. 125).

47 Wang and Xu, supra note 4 at pp. 16-17

48 Id. at p. 16.

49 Lin, and Feng, supra note 7 at p. 65.
regulations are quickly outdated or that legislative efforts are lagging behind.\textsuperscript{50} The good faith doctrine, because of its elasticity and vagueness, can be used as a gap filler.\textsuperscript{51}

Amid the apparent wide support for the doctrine, some Chinese commentators have reservations about the doctrine because of its vagueness and the resulting broad judicial discretion.\textsuperscript{52} Professor Meng from Wuhan University School of Law questioned how a party or a judge could ascertain whether someone had acted in good faith.\textsuperscript{53} He warned that broad application of the doctrine could lead to a situation where thousands of judges would rely on the good faith doctrine and freely interpret the laws and decide cases.\textsuperscript{54}

\textbf{III. The Good Faith Doctrine\textsuperscript{55} in U.S. Contract Law}

\textbf{A. The Origin and Definition of the Doctrine in the U.S.}

The doctrine of good faith with regard to contractual relations has a relatively recent history in the United States.\textsuperscript{56} Prior to the adoption of the Uniform Commercial Code ("UCC"), U.S.

\begin{itemize}
\item[\textsuperscript{51}] Wang & Xu, supra note 4 at p. 17.
\item[\textsuperscript{52}] Meng, supra note 8 at 138; Chen, supra note 8 at p. 24; Kang, supra note 8 at p. 41.
\item[\textsuperscript{53}] Meng, supra note 8 at p. 138.
\item[\textsuperscript{54}] Id.
\item[\textsuperscript{55}] The doctrine of good faith in the U.S. contract laws has mostly been mentioned together with the phrase "fair dealing." This article only focuses on the doctrine of good faith. In China, the doctrine of fairness is adopted in a separate article. GPCL, supra note 13 at p. __; Chinese Contract Law, supra note 4 at p. 2 (Art. 5).
\end{itemize}
courts were slow in recognizing the doctrine of good faith. In the early days of the doctrine, U.S. courts used the doctrine in cases where a contract granted discretion to one of the parties and the unrestrained exercise of the discretion could deny the other party the benefit of the bargain under the contract. Professor Robert S. Summers, an influential U.S. contract law scholar, noted that, by late 1960s, U.S. courts began invoking a general requirement of good faith to afford relief for various forms of bad faith in contractual relations.

The doctrine received a boost when the UCC officially adopted the concept in the 1950s. Professor Karl Llewellyn, the Chief Reporter for the UCC, advocated the doctrine’s inclusion in the Code. The UCC provides for a general obligation of good faith in contracts with regard to performance or enforcement. The Code defines good faith as "honesty in fact in the conduct or transaction concerned."

The doctrine finally came to age in the United States when, apparently influenced by the UCC, the drafters of the Restatement (Second) of Contracts (Restatement) adopted a provision declaring that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." That development encouraged the doctrine’s recognition in

57 E. Allan Farnsworth, Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Convention, and National Laws, 3 Tul. J. Int’l’l & Comp. L. 47, 52 (Spring 1995); Dubroff, supra note 6 p. 571
58 Dubroff, supra note 6 at p. 564.
59 Summers, supra note 18 at p. 812.
60 Farnsworth, supra note 57 at 51-52.
61 Id.
62 UCC, Sec. 1-102 (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”)
63 UCC, section 1-201(19).
64 Farnsworth, supra note 57 at pp. 51-2; Restatement (Second) of Contracts section 205 (1981)
U.S. general contract law outside of the UCC.\textsuperscript{65} Most states in the United States have now generally accepted the doctrine as part of their statutory and common law contract law.\textsuperscript{66}

Although its existence in the United States can no longer be questioned, U.S. courts and scholars have mixed, and often strong, opinions about the doctrine. As an initial matter, U.S. courts and scholars cannot agree on a precise definition of “good faith.”\textsuperscript{67} Some have lamented the difficulty of identifying the doctrine’s precise parameters.\textsuperscript{68} Other U.S. scholars have attributed the definitional difficulties to the doctrine’s context dependent nature.\textsuperscript{69}

Several U.S. scholars have attempted to define the doctrine by the functions it serves.\textsuperscript{70} Professor Summers argued that the term good faith “was not appropriately formulable in terms of some general positive meaning.”\textsuperscript{71} Instead, he defined good faith by the doctrine’s function to “exclude many heterogeneous forms of bad faith.”\textsuperscript{72} Professor Steven Burton also defined the term good faith by its function to limit “the exercise of discretion in performance conferred on one

\begin{footnotes}
\item Farnsworth, supra note 57 at pp. 52-53.
\item Diamond and Foss, supra note 8 at p.590 and the literature cited therein. Professors Diamond and Foss provided a comprehensive summary of the various attempts to define the doctrine of good faith and fair dealing. Farnsworth, supra note 57 at p. 59; Dobbins, supra note 8 at p. 228.
\item See Dobbins, supra note 8 at pp. 228-231 and the literature cited therein for a discussion of the attempts to define the doctrine. See also Michael Bridge, Doubting Good Faith, 11 New Z. Bus. L. Q. 426 (November 2005) (discussing the difficulty of defining the doctrine in English contract law.).
\item Farnsworth, supra note 57 at p. 60.
\item Id. at pp. 59-60.
\item Summers, supra note 18 at pp. 819-820.
\item Farnsworth, supra note 57 at p. 59.
\end{footnotes}
party by the contract." Therefore, according to Professor Burton, it is bad faith to use discretion "to recapture opportunities foregone on contracting," as determined by the other party's expectations or, in other words, to refuse "to pay the expected cost of performing." Others have attempted to define good faith in terms of its function to protect parties’ reasonable expectations.

B. The Scope and Function of the Doctrine in the U.S.

The precise scope of the good faith doctrine is subject to extensive scholarly debate in the United States. Some criticize the doctrine for being potentially too broad. Some argue that the doctrine is not broad enough. Leaving aside the debate, U.S. scholars and courts generally agree that the good faith doctrine only comes into play after a contract has been formed. Unlike the Chinese Contract Law, U.S. has not adopted a general, legal duty of good faith in contractual relations, absent any special relationship. U.S. courts and scholars have generally rejected such a duty in the negotiation phase of the parties’ relationship. A duty to negotiate in good faith is

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73 Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HArv. L. REV. 369, 373 (December 1980).
74 Id.
75 Dobbins, supra note 8 at p. 229.
76 Diamond and Foss, supra note 8 at pp. 590-600.
77 Some U.S. scholars have argued in favor of a more expansive role for the good faith doctrine in U.S. contract law, for example, to prohibit racial discrimination. Neil G. Williams, Offer, Acceptance, And Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process, 62 GEORGE WASH. L. R. 183, 214 (January 1994).
78 Dennis M. Patterson, A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith, 76 IOWA L. REV. 503, 522 (March 1991)
79 Robert S. Adler and Richard A. Mann, Good Faith: A New Look at an Old Doctrine, 28 AKRON L. REV. 31, 42 (Summer 1994).
80 Summers, supra note 18 at p. 814, fn. 24. However, under certain limited situation where parties have agreed to negotiate in good faith prior to the formation of an actual contract, some U.S. courts have entertained a cause of action for failure to negotiate in good faith during the negotiation phase. See Flight Systems, Inc. v. Electronic Data Systems Corp., 112 F.3d 124, 130
considered incompatible with the U.S. classic contract law’s assumption of arms’ length bargaining. Professor Braucher, who drafted the duty of good faith section of the Restatement Second, specifically pointed out that the good faith doctrine does not require “good faith in bargaining, good faith in offer and acceptance.” U.S. courts do not view it a function of the law to lead in matters of morality. In a recent law review article, Judge Richard Posner explained:

“If you offer a low price for some good to its owner, you are not obliged to tell him that you think the good is underpriced--that he does not realize its market value and you do. You are not required to be an altruist, to be candid, to be a good guy. You are permitted to profit from asymmetry of information. If you could not do that, the incentive to discover information about true values would be blunted. It is an example of the traditional economic paradox that private vice can be public virtue.”

The UCC takes the position that the good faith obligation is to protect the reasonable expectation of the parties. The UCC does not recognize an independent cause of action for failure to perform or enforce in good faith except in relation to a specific duty or obligation under the contract. The refusal to recognize a separate cause of action reflects the drafters’ intent to prevent the courts from using the doctrine as a tool to interfere with the parties’ bargain. Most U.S. courts have likewise refused to find an independent cause of action for breach of the good

(3rd Cir. 1997) (treating an agreement to negotiate in good faith as a contract); Howtek v. Relisys, 958 F. Supp. 46 (D. N.H. 1997) (applying New Hampshire law, the court found that an agreement to negotiate in good faith enforceable).

81 Summers, supra note 18 at p. 814, fn. 24.
83 Id. at 1357-58.
84 UCC Section 1-203, official comment (pre 2001 version).
85 Id.
faith duty absent a breach of a specific contract term. The doctrine’s lack of a precise definition injects a vague, moral standard in contractual relationships. Because of its amorphous nature, scholars are concerned about the doctrine’s capacity to disrupt contractual certainty and risk allocation.

In sum, the U.S. conceptualization of the good faith doctrine focuses on its role to ensure that the parties will get the benefit of the bargain under the contract that they negotiated between themselves. Therefore, the doctrine does not apply until after a contract has been formed. Even within the context of a contract, U.S. courts have generally applied the doctrine only with regard to contract performance and enforcement. Absent duress, fraud, misrepresentation, unconscionability, or other circumstances justifying the invocation of other equitable doctrines, U.S. courts have generally taken the position that parties are entitled to enforce the terms of their

89 Bridge, supra note 68 at p. 429.
90 Robert M. Phillips, Good Faith and Fair Dealing Under the Revised Uniform Partnership Act, 64 U. Colo. L. Rev. 1179, 1185 (1993); Some U.S. scholars have argued in favor of a more expansive role for the good faith doctrine in U.S. contract law, for example, to prohibit racial discrimination. Neil G. Williams, Offer, Acceptance, And Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process, 62 George Wash. L. Rev. 183, 214 (January 1994). However, Professor Williams did not argue for an expansive application of the good faith doctrine prior to the formation of a contract. Id. at p. 217.
91 Summers, supra note 18 at p. 814 fn. 24. Uno Rests., Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385 (Mass. 2004). Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471-472 (Mass. 1991) (The covenant reflects an implied condition that inheres in every contract “that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”)
agreement "to the letter, even to the great discomfort of their trading partners" without being accused of lack of good faith.\textsuperscript{92}

IV. Examples of the Doctrine’s Application in China\textsuperscript{93} and the United States.

To illustrate the different approaches, this section provides some examples of how the two countries have applied the good faith doctrine. First, this section will summarize some general differences between the two countries’ approaches. Then, this section will focus on some specific examples of different application in precontract liability and contract enforcement cases.

A. Examples of Some General Differences.

Courts in both countries have applied the doctrine in numerous factual situations. There are some general differences in approaches. For example, Chinese courts consider the doctrine a general contract law principle. They have not so far questioned the applicability of the doctrine to

\textsuperscript{92} Kham & Nate’s Shoes No. 2, Inc. v. First Bank Whiting, 908 F.2d 1351, 1357(7th Cir. 1990) (internal citations and quotations omitted).

\textsuperscript{93} To better understand how Chinese courts have applied the good faith doctrine to resolve contract disputes, the author reviewed the Chinese court decisions in Chinese collected under the relevant contract provisions (Articles 6, 42, 60, 92, 125) available at http://vip.chinalawinfo.com. China does not currently have a comprehensive case reporting system. Chinalawinfo.com, a Chinese electronic database maintained by Peking University School of Law Legal Information Center and several other companies, describes its database as the earliest and the most comprehensive collection of Chinese laws, regulations and cases. The Chinese case review conducted for the purpose of this article is by no means an exhaustive review of the Chinese case law on the good faith doctrine. The reliance on Chinese case is further limited by the fact that the Chinese cases do not have any precedential value because of China’s civil law system. The fact that one Chinese court applied the good faith doctrine in a certain manner does not mean that the interpretation is binding or that it reflects the status of the good faith doctrine in China. The lack of precedential value may also be the reason why often times, the Chinese cases appear conclusary and do not have a detailed or complete recitation of the facts supporting Chinese judges’ conclusions. A U.S. common law judge would typically lay out the facts that support his
any contract dispute. In the United States, substantial case law has been devoted to the question of whether the doctrine applied to the contract dispute at all as a threshold inquiry. U.S. courts generally agree that, absent any statutory or contractual requirements, the doctrine applies to only a narrow subset of contract disputes, mostly where the contract gave one party discretion over performance. Many U.S. courts have declared that the good faith doctrine did not apply where the contract in dispute had clearly spelled out the rights and obligations of the contractual parties. Even in cases where the courts have applied the doctrine, U.S. courts have construed the doctrine narrowly. They found breach only where the party with the discretion acted without any valid business reasons.

conclusions. Because of the limitations, the selection of the Chinese cases is only intended to offer a few examples of Chinese courts’ applications of the good faith doctrine.


95 For example, one line of cases where U.S. courts have applied the doctrine of good faith involves requirement contracts, contracts where the specific quantity term was not stated, but was left to the discretion of one of the parties. See Vulcan Materials Co. v. Atofina Chemicals Inc., 355 F.Supp.2d 1214, 1234-35 (D.Kan., 2005) for an example involving a requirements contract where the court applied the good faith doctrine and found a breach where, almost immediately after the contract was signed, and contemporaneous with a management reorganization among defendants’ entities, the defendants began to express concern about the price, and unsuccessfully tried to persuade plaintiff to either lower the price or accept a products swapping arrangement and where there was no evidence of a downturn in the product’s demand.) See Don King Productions, 742 F. Supp. at pp. 767-68 (finding a breach of the duty of good faith where the agreement granted an exclusive promotional right to the promoter. The court found that implied in the agreement was a promise that the promoter would use reasonable efforts to help promote the professional boxer.

96 See Empire Gas Corp v. American Bakeries Co., 840 F.2d 1333, 1338-39 (7th Cir. 1988), which involved a requirements contract the defendant agreed to buy converters from the plaintiff that enabled gas-powered vehicles to operate on propane. The U.S. court applied the doctrine, but construed the doctrine of good faith narrowly.

97 Id.

98 Id.
Chinese courts tend to use the good faith doctrine as a catchall theory to resolve any and all contract disputes. Some Chinese courts used the doctrine as a basis for its decision where there was a clear breach of contract. For example, in one case, the plaintiff signed a letter of intent whereby the plaintiff paid 2000 RMB for a priority option to purchase a store for an agreed upon price from the developer upon completion. The letter required the defendant to notify the plaintiff once the stores were ready for public sale. Upon completion of the development, the defendant sold all the stores without notifying the plaintiff. Relying on Article 6 of the Chinese Contract Law, the appellate court found that the defendant violated the duty of good faith and should be deemed to have breached the letter of intent. In this case, the defendant clearly breached the terms of the letter of intent; yet, the Chinese court nonetheless relied on the good faith doctrine to find the defendant liable. It is unlikely that a U.S. court would have invoked the good faith doctrine to find liability in this case. U.S. courts have generally refrained from relying on the good faith doctrine as a catchall theory for contract violations.

99 Zhong, Chongqing Su Jinxuandadi Fangdichan Xiangmu Kaifa Youxian Gongsu Hetong Jiufengan [Zhong, Chongqing v. Shanghai City Jin Xuan Da Di Real Estate Project Development Company Contract Dispute], Shanghai Shi Di Er Zhongji Renmin Fayuan [Shanghai City No. 2 Intermediate People’s Court] (Oct. 19, 2007), available at http://vip.chinalawinfo.com, last visited in April 2009. The electronic format of the Chinese cases limits the Chinese case citations in this article. Because the cases do not have their own page numbers, it is not possible to provide any jump cites.

100 See also Neimenggu Nongjia Le Wutai Jishu Yanjiusuo Su Zhongguo Yishu keji Yanjiusuo Jishu Zhuanrang Hetong Jiufengan [Inner Mongolia Happy Farmers Stage Design Research Institute v. China Art Technology Research Institute], Civil Verdict, Beijing No. 1 Intermediate People’s Court, 2003 Yi Zhong Min Chuzi No. 3625, available at http://vip.chinalawinfo.com last visited March 2009 (where the court relied on the good faith doctrine to impose pre contract liability even though the court found the defendant liable because the plaintiff had essentially accepted defendant’s offer by complying with its terms.)

101 Farnsworth, supra note 57 at pp. 60-61.
Consistent with the Chinese scholarly comments, some Chinese courts have used the doctrine to fill in legislative or doctrinal gaps. For example, in a line of breach of contract cases involving bank customers whose credit card numbers and access codes were stolen by criminals, one court relied on the good faith requirement in Article 60 of Contract Law to find the bank liable for the loss of money from the customer’s account due to the criminal activity.\textsuperscript{102} In the United States, that type of disputes between a bank and its customer is governed by the Electronic Funds Transfer Act of 1978 (“Act”).\textsuperscript{103} The Act spells out the extent of the customer’s liability depending on when the customer reported the theft.\textsuperscript{104}

**B. Examples of the Doctrine’s Application Prior to Contract Formation.**

Dramatic difference exists between the two countries’ approaches with regard to pre contract liability. Relying on the good faith doctrine, Chinese courts have imposed pre contract liability before a contract was formed or even when a defendant was not a party to the contract allegedly breached.\textsuperscript{105} U.S. courts have generally refused to rely on the good faith doctrine to impose pre contract liability.\textsuperscript{106}

**1. Chinese Courts Have Relied on the Doctrine to Hold Party Liable Prior to Contract Formation.**

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\textsuperscript{103} 15 U.S.C. 1693.

\textsuperscript{104} Id.

\textsuperscript{105} See discussions infra herein.

\textsuperscript{106} Id.
Relying on the good faith doctrine, Chinese courts have held a party liable prior to the formation of a contract. For example, in one case, plaintiff borrower wanted to borrow money from defendant bank. The bank decided that it was commercially risky to extend the loan because of the plaintiff’s prior loan history. The lower court found that the bank’s refusal did not violate its duty of good faith and the ancillary duties. In assessing whether the bank breached its duty, the lower court looked at several factors: 1. Whether defendant never intended to contract with plaintiff; 2. Whether defendant subjectively intended to injure plaintiff; and 3. Whether defendant objectively engaged in any conduct which has injured plaintiff’s interests. The lower court found that the bank refused to extend the loan because of its finding that the loan was too risky due to plaintiff’s delay in paying a previous loan. The lower court also found that the bank complied with the banking regulations and notified plaintiff of its decision within the time frame specified by the relevant banking regulations. As a result, the lower court denied plaintiff’s good faith claim.

On appeal, the appellate court reversed the lower court’s decision. The appellate court found that even though the bank responded within the time specified by the banking regulations, the bank’s failure to respond earlier constituted a breach of its precontractual good faith duty. In rendering the decision, the appellate court commented that “during the process of forming a loan contract, both parties to the potential contract owe each other a duty of care such as mutual

107 Chongqing City Chengkouxian Lan Tian Village Nursery v. China Agricultural Bank Cheng Kou County Branch Contract Formation Liability Compensation Case, Chong Qing City No. 2 Intermediate People’s Court.
assistance, mutual care, mutual protection, mutual notification that are consistent with the

principle of good faith.”

Another Chinese court found an insurer liable for precontract liability where the insurance company was not even a party to the contract allegedly breached. The individuals in that case purchased apartments from a real estate developer and subsequently sued for breach of the sales contract. The insurer had first entered into an insurance agreement with the developer. The agreement provided that the insurer would guarantee an apartment purchaser’s principal if the developer was unable to pay back the principal at the end of five years. The insurance agreement provided that all purchasers of the apartments sold by the developer had to participate in the insurance and the developer had to deposit 50 percent of the purchase price with the insurer to guarantee its creditworthiness. The insurer and the real estate developer jointly ran advertisements about the principal guarantee insurance. A month later, the insurer cancelled the insurance agreement with the developer. The termination agreement provided that the developer would publicize the insurance termination to the public.

Meanwhile, the purchasers bought apartments from the developer. The individual sales contracts with the developer did not contain any provisions regarding the principal guarantee insurance and the purchasers acknowledged that they never paid any insurance premiums for the

108 In this type of situation, a U.S. court would have likely applied the doctrine of promissory estoppel to impose liability, if any. The promissory estoppel doctrine in the United States requires proof of a definite promise and reasonable detrimental reliance. See, e.g. Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington, 944 A.2d 1, 19 (N.J. 2008).

109 Zhongguo Renmin Baoxian Gongsi Urmuqi Shi Fengongsi Su Li, huitong, Xu, Xin deng 120 Ming Goufanghu Deng Huanben Shoufanghetong Jiufengan [[China People’s Insurance Co. Urumqi Branch Office v. 120 Purchasers including Li, Huitong, Xu, Xin Principal
above insurance. When the developer’s business license was cancelled for some unspecified reason, the purchasers sued the developer and the insurer. Relying on the doctrine of good faith in Article 42 of the Chinese Contract Law, the court found the insurer 30 percent liable for the damages the purchasers suffered. The court found that the insurer breached its duty of good faith by failing to ensure that the developer publicize the cancellation of the termination of the insurance agreement. The court’s opinion did not inquire whether the purchasers knew about the insurance agreement or its termination or whether the purchasers relied on the insurance agreement. The court also did not ask why the purchasers could have reasonably expected the insurance when the sales contract never mentioned the insurance, especially since the purchasers never paid any insurance premium.

Because the insurer in this case was not a party to the contract allegedly breached, this Chinese court seems to have relied on the good faith doctrine to impose a general duty of care on the insurer. A U.S. court is unlikely to have imposed precontract liability in this case on the basis of the good faith doctrine.


As another example of an expansive reading of the duty of good faith, see Wu Weiming su Shanghai Huaqi Yinghang Chuxu Hetong Jiufengan [Wu, Weiming against Citibank Savings Contract Dispute], available at http://vip.chinalawinfo.com, last visited April 20, 2009. In that case, Citibank Shanghai Branch found itself the target of a lawsuit as well as the center of media attention for its decision to impose a charge of $6 for any savings account whose daily total deposit fell below $5,000. Mr. Wu went to Citibank to open a personal savings account on April 4, 2002. When he found out about the charge, he left without opening a savings account. He then sued Citibank in a Shanghai court, alleging breach of the duty of good faith based on Article 42 of Chinese Contract Law. Mr. Wu lost in court. The appellate court affirmed the lower court’s ruling against him, not because Mr. Wu failed to state a claim based on the good faith doctrine, but because Citibank complied with the Chinese banking regulations and widely publicized the charge.
2. U.S. Courts Have Generally Refused to Impose Liability Based on the Good Faith Doctrine Prior to Contract Formation.

U.S. courts have generally refused to impose a good faith duty prior to contract formation. For example, in one case, the potential borrowers sued the defendant bank for breaching the duty of good faith when the bank ultimately denied their loan application.\textsuperscript{111} The borrowers had discussed their loan applications with the bank many times prior to applying for the loan. The court declined to find that a contract was formed either expressly or implied-in-fact. Having found a lack of a contract, the court denied the good faith claim. The court noted that “without a contract, there is no basis for imposition of the implied covenant, whether in contract or in tort, because either cause of action arises out of the contractual relationship.”\textsuperscript{112}

In another case, a U.S. court dismissed a plaintiff’s claim for breach of the implied covenant of good faith where the plaintiffs alleged that a life insurance company had a duty to disclose to a prospective insured the additional costs of paying premiums in installments rather than annually, before the policy was issued. \textsuperscript{113} The court denied the plaintiff’s attempt to seek recovery under the good faith doctrine for omissions occurring before the contract was formed because “the implied covenant of good faith and fair dealing depends upon the existence of an underlying contractual relationship.”\textsuperscript{114}

C. Examples of the Doctrine’s Application to Contract Enforcement.

The court concluded that Citibank did not breach its duty of good faith during contract formation stage. The court did not question whether the duty of good faith applied to the dispute.  
\textsuperscript{111} Birt, 75 P.3d at 650.  
\textsuperscript{112} Id.  
\textsuperscript{113} Azar v. Prudential Ins. Co. of America, 68 P.3d 909, 925 (N.M. Ct.App.2003)  
\textsuperscript{114} Id..
Chinese and U.S. courts have also taken different approaches with regard to contract enforcement. Relying on the good faith doctrine, Chinese courts seem more willing to cancel a contract or excuse a party from performing under the contract.\textsuperscript{115} U.S. courts, in contrast, are adamant about enforcing the express contract terms.\textsuperscript{116} Although U.S. courts have excused contract performance or provided relief based on other contract theories, U.S. courts have not used the good faith doctrine to excuse contract performance or to relieve a party from an express contract term.\textsuperscript{117}


Relying on the good faith doctrine, some Chinese courts have excused parties from performances required by contracts. In one case, the Chinese court canceled a commercial store sales contract relying on the doctrine of good faith.\textsuperscript{118} Ms. Feng signed a contract with a real estate developer to buy a store in a shopping center located in Nanjing City’s downtown commercial area.\textsuperscript{119} The shopping center initially consisted of over 150 stores sold to individual proprietors including Ms. Feng. Ms. Feng complied with the terms of the sales contract and paid the purchase price. In late 1998, the developer delivered the premises to Ms. Feng.\textsuperscript{120}

Thereafter, the shopping center ran into financial difficulties and was unable to continue operating. The developer decided to change the business model of the shopping center and to buy

\textsuperscript{115} See discussions \textit{infra} herein.
\textsuperscript{116} See discussions \textit{infra} herein.
\textsuperscript{117} See discussions \textit{infra} herein.
\textsuperscript{118} Xinyu Gongsi Su Feng, Yumei Shangpu Maimaihetong Jiufengan [Xin Yu Company v. Feng, Yumei Store Sales Contract Dispute], Nan Jing Intermediate People’s Court (available at http://vip.chinalawinfo.com, last visited in March, 2009
\textsuperscript{119} Id.
\textsuperscript{120} Id.
back all the stores from the small proprietors including Ms. Feng. The developer succeeded in persuading most of the small proprietors to sell the stores back to the developer except for a couple individual proprietors including Ms. Feng. When the parties failed to reach an agreement, the developer sued Ms. Feng, asking the court to rescind the sales contract with Ms. Feng.

The court found that the sales contract between Ms. Feng and the developer was valid and Ms. Feng had complied with the terms of the contract. However, relying on the principle of fairness and the doctrine of good faith in Articles 5 and 6 of the Chinese Contract Law, the lower court rescinded the sales contract. The court ordered Ms. Feng to return the premises to the developer and the developer to refund the purchase price with additional compensation for the appreciation in value.

The Chinese court reasoned that because Ms. Feng’s store was only one of the over 150 stores in the shopping center, allowing her to continue the contract would have an adverse impact on the overall development of the shopping center. The court further found that because the shopping center was located in the city’s downtown area, it would result in substantial waste of social resources and interfere with the economic development of the society as well as damaging the interests of the parties if the shopping center remained vacant due to the dispute. The court

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120 Id.
121 Id.
122 Id.
123 Id.
124 The Chinese court’s reasoning in support of its decision to cancel the contract is strikingly similar to that used by the U.S. Supreme Court in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 484-84 (2005) in upholding the City of New London’s right to exercise the eminent domain power to force some private property owners to give up their property for the sake of the city’s economic development. However, in this Chinese case, it was the private developer, not the
found it necessary to cancel the sales contract after balancing the interests of the parties even though the contract was valid and that Ms. Feng complied with the terms of the contract.\textsuperscript{125}

Likewise, in another case, the court terminated a contract despite the express contract term that obligated the developer to provide heating for 70 years.\textsuperscript{126} In that case, Mr. Liu, the defendant, purchased a condo from Mr. Jiang in the complex developed by plaintiff Shandong Sheng Long (“Shandong”). When Mr. Jiang purchased the condo in 1994, he signed a sales contract with Shandong. The sales contract provided that Shandong would provide heating for 70 years to Mr. Jiang or any subsequent purchaser in exchange for a one time payment. At the end of 2004, the city government issued regulations providing that the heating for the development be provided by a third party heating company instead of the developer. Since then, the heating company began providing heat to the condo. Mr. Liu purchased the condo from Mr. Jiang in October 2005. Shandong sued to cancel the heating contract.

Relying on the doctrine of good faith, the court terminated the contract.\textsuperscript{127} The court commented that enforcing the contract would result in obvious lack of balance of interests between the parties. The court pointed out that the objective conditions had changed substantially from

\textsuperscript{125} On appeal, the Nanjing Intermediate Court affirmed the lower court’s decision and its reasoning.


\textsuperscript{127} The court also ordered Shandong to refund of the heating fee paid by the purchaser.
those at the time of the contract. The court concluded that those changes were caused by market economy and the macro policy adjustments by the government which could not have been foreseen by the parties. The court did not explain how it reached the conclusion that the parties could not have foreseen those changes.

2. U.S. Courts Have Generally Enforced the Express Terms of Contracts in Similar Situations.

A case law review has not identified any cases wherein a U.S. court has excused contract performance or terminated a contract relying on the good faith doctrine. In situations similar to that in Shandong, U.S. courts generally rely on doctrines such as impossibility, impracticability, or change of circumstances as excuses from contract performance. U.S. courts have typically construed those doctrines narrowly and refused to terminate contracts due to mere market changes. For example, in one case, the plaintiff, a farm equipment dealer, sued the defendant farm

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128 The court’s opinion discussed the doctrine of change of circumstances which Chinese Contract Law has not explicitly recognized. The court seems to have relied on the change of circumstances doctrine as the doctrinal basis for the application of the good faith doctrine. From this perspective, the good faith doctrine seems to have filled a doctrinal gap.

129 See also Wan Fangwu Yu 37 Wan Fangwu Huhuang Fayuan Panjue Chexiao Xiongdi Yueding [“1,270,000 Worth of Real Property for 370,000 RMB Worth of Property; Court Rescinds Brothers’ Agreement”] as reported in http://www.chinacourt.org/html/article/200811/12/330105.shtml which describes a contract dispute between Long Sheng and Long Lin (fictitious names of two brothers). The court in that dispute rescinded the contract for an exchange of real properties where the court found that there was a big difference in value between the two pieces of properties (real property valued at 1,270,000 RMB for real property valued at 370,000 RMB.)

130 In certain limited situations, U.S. courts have excused contract performance under doctrines such as the impossibility, frustration of purpose, change of circumstances, mutual mistake or unconscionability.

equipment manufacturer for terminating the dealership agreement. The defendant had terminated the dealership due to a drastic decline in the farm equipment market and its decision to go out of business. Rejecting the defendant’s assertion of the impracticality doctrine as a defense to its breach, the court commented that: “To hold otherwise would not fulfill the likely understanding of the parties as to the apportionment of risk under the contract.”

U.S. courts have also refused to rely on the good faith doctrine to relieve a party from an express contract term. For example, a U.S. court refused to find a defendant liable for breach of contract when it terminated the agreement as provided by the contract. The contract stated that either party could terminate by providing a thirty day notice. Plaintiff argued that Defendant breached the contract and violated the duty of good faith and fair dealing by terminating the agreement with a thirty day notice. The court found that the contract termination term was unambiguous and that the defendant could terminate the contract for any reason with thirty days’ notice.

To sum up, a U.S. court is unlikely to allow a party to use the good faith doctrine as a shield to excuse contract performance. Likewise, the good faith doctrine is also an unlikely choice to

132 Id.
133 Karl Wendt Farm Equipment Co., 931 F.2d at 1118. See also Harriscom Svenska, AB v. Harris Corp. 3 F.3d 576 (2nd Cir. 1993) for an example where a manufacturer established affirmative defense of “commercial impracticability” to distributor's breach of contract claim where the “manufacturer showed that it complied in good faith with government's informal requirements prohibiting all sales to Iran of goods it categorized as military equipment and there was overwhelming and uncontradicted evidence that the government would not allow manufacturer to continue sales to Iran.”
135 Id.
support relief from an express contract provision in a U.S. court. U.S. courts will more likely rely on other narrowly construed doctrines to resolve contract disputes.\textsuperscript{136}

\textbf{V. Possible Explanations for the Different Approaches Toward the Good Faith Doctrine.}

This section attempts to answer the question why the good faith doctrine gets such different treatment in the two countries. This article suggests that the doctrine has evolved in two countries differently because of the fundamental cultural and political differences between the two countries. Because the good faith doctrine is vague and transparent, it simply mirrors the values of the society in which it arises, like a chameleon which adapts its appearance to its environment.\textsuperscript{137} The doctrine essentially embodies the differences that have made up the two countries.

Multiple differences exist in China and the United States.\textsuperscript{138} The two countries have distinct cultural traditions. China is a strong collectivistic culture while the United States is a very individualistic society.\textsuperscript{139} The two countries also have different political systems.\textsuperscript{140} Although China has adopted certain market economy principles, it is still one of the remaining socialist communist countries with the Communist Party in firm control of all the government branches.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{136} Farnsworth, supra note 57 at pp. 60-61.
\item \textsuperscript{138} The differences between the two countries are many and well researched. See Chunlin Leonhard, Beyond the Four Corners of a Written Contract: a Global Challenge to U.S. Contract Law, 21 Pace Int’l L. R. 1, 7-14 (Winter 2009) and the citations therein. This article focuses only on those that may have helped shape the good faith doctrine in the two countries.
\item \textsuperscript{139} Pattison and Herron, supra note 11 at pp. 477-488 (providing an overview of major Chinese cultural influences.)
\item \textsuperscript{140} Chow, supra note 29 at pp. 80-81.
\item \textsuperscript{141} Id. at pp. 115-16.
\end{itemize}

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United States, on the hand, features a democratic government. It has a federal government with three separate, but equal branches. The political and cultural differences result in different contract jurisprudence which has shaped the good faith doctrine in China and the United States.

A. The Cultural and Political Differences Between China and United States Have Impacted the Good Faith Doctrine.

The different approaches reflect the fundamentally different cultural attitude toward individuals and the government’s role in people’s lives and the different political traditions. In China, individuals do not matter as much as the group. For thousands of years, Confucian ideology dominated the Chinese culture. Confucius advocated collectivism and a strong government. Professor Chow described the Confucian relationships within the society as “those of superior to inferior with a general duty of obedience owed by the inferior to the superior and a reciprocal duty of caring, support, and guidance owed by the superior to the inferior.” This same relationship model was extended to the nation as a whole with the Emperor as the patriarch.

The Communist Party’s takeover in 1949 did not change the cultural focus on collectivism. The Chinese Communist Party, with its focus on the collective good, continued the paternalistic government tradition in modern China.

Politically, China has never had a tradition of separation of powers with the built in checks and balances. The Emperor had all the governmental powers in him and his administrative officers

\[142\] See U.S. Constitution.
\[143\] Chow, supra note 29 at pp. 40-45.
\[144\] Id.
\[145\] Id. at p. 43.
\[146\] Id. at pp. 43-44.
\[147\] Id. at 44-45.
by extension.  The modern Chinese government still does not have separate, equal branches of
government.  The government officials (the judges in the court system) assume the parental role
in the Chinese society.

These cultural and political traditions explain the ease with which Chinese scholars and
courts have accepted the Chinese vision of the good faith doctrine with its broad discretion to the
courts – judges who are representatives of the government. Indeed, the ideal Chinese judge in
modern China tends to resolve disputes based on his or her instincts and emotions in disregard of
any legal principles.

In contrast, Americans have different attitudes toward individuals and the government’s
role in people’s lives. Culturally, the Anglo American society values individual autonomy. The
Anglo-American society has always been suspicious of unchecked governmental authority. This
cultural focus on individual autonomy and suspicion of governmental authority are reflected
in the founding fathers’ attempt to restrict broad governmental powers in the U.S. Constitution.

148 Id. at 49-50.
149 Id. at pp. 43-44.
150 Id.
151 One of the hot topics of the judicial reform in China in 2009 was a debate regarding the
revival of “Model Judge” MA Xiwu’s judging style. Judge Ma was held up as a “model judge” in
China in the 1940s in the Shan-Gan-Ning Region then under the control of the Chinese Communist
Party. Judge Ma resolved disputes by focusing on being accessible to the people and resolving the
disputes on the basis of feelings in disregard of legal principles. In 2009, Judge Ma’s deeds are
depicted in a major motion picture in an attempt to revive his judging style. See Southern
152 Liam Seamus O’Melinn, The Sanctity of Association: The Corporation and
culture is famous for its individualism.”)
153 Id. at pp. 118-119.
154 U.S. Constitution.
The Constitution sets up three separate, but equal branches of the government intended to provide the necessary checks and balances on the governmental power.¹⁵⁵

To sum up, China has had a cultural tradition of paternalistic government and focus on the collective as opposed to the individual. The Chinese culture is more comfortable with a paternalistic government. A broad doctrine of good faith which allows the judges (government officials) to intervene as they deem appropriate is consistent with the Chinese cultural and political traditions. After all, if one assumes that a government is benevolent -- one which would act in the best interest of its people and take care of them -- what is wrong with giving the government the discretion to do the right thing?

United States, on the other hand, has had a cultural and political tradition of distrusting the government and promoting individual autonomy and individual liberties. This difference explains American dislike of an amorphous doctrine without any checks and balances and the efforts devoted to setting appropriate limits on the doctrine. The good faith doctrine with its vagueness is considered a special threat to those cherished values.¹⁵⁶ Americans would loath giving judges (representatives of governmental authority) “a license for the exercise of ad hoc judicial intuition.”¹⁵⁷

B. The Two Countries’ Different Legal Traditions Have Shaped the Development of the Good Faith Doctrine.

¹⁵⁵ Id.
¹⁵⁶ See discussions supra at Part III(B).
¹⁵⁷ Summers, supra note 18 at p. 833.
China and the United States have adopted different legal systems, with China being primarily a civil law system\textsuperscript{158} while United States following the British common law tradition.\textsuperscript{159} Civil law countries in generally have taken a more expansive approach with regard to the good faith doctrine.\textsuperscript{160} Common law countries including the United States generally take a narrower view of the doctrine.\textsuperscript{161} Professor Farnsworth observed civil lawyers’ “unsettling tendency to use the good faith doctrine as a cloak with which to envelop other doctrines.”\textsuperscript{162} The Chinese courts exhibit a similar tendency to use the good faith doctrine as a broad theory to address various contract breaches.

China’s legal system is not only different, but also relatively new. China set up the current legal system essentially in the last three decades in response to Chinese leader Deng, Xiaoping’s call for economic reforms in the early 1980s.\textsuperscript{163} Prior to that, China did not have an opportunity to develop a functioning legal system. Before the end of the Qing Dynasty in 1911, the Emperor ruled China who had all the powers concentrated in him.\textsuperscript{164} After 1911, China experienced a series of internal fighting among the warlords, the bloody struggles for power between the Nationalist Party and the Communist Party, Japanese invasion, the Second World War, and the subsequent

\textsuperscript{158} It would not be precise if one describes the Chinese legal system as a strictly civil law system. China has been attempting to fashion a legal system with Chinese characteristics.\textsuperscript{159} Farnsworth, \textit{supra} note 57 at pp. 51-52.\textsuperscript{160} \textit{Id.} at pp. 57-58; Powers, \textit{supra} note 56 at p. 336. A detailed examination of the application of the good faith doctrine in civil law countries in Europe and a comparison between the Chinese good faith doctrine and its European civil law counterpart is beyond the scope of this article.\textsuperscript{161} Farnsworth, \textit{supra} note 57 at pp. 57-58.\textsuperscript{162} \textit{Id.} at p. 60.\textsuperscript{163} Chow, \textit{supra} note 29 at pp. 18, 324-25; Volker Behr, \textit{Development of a New Legal System in the People’s Republic of China}, 67 La. L. REV. 1161, 1165-66, 1174-75 (Summer 2007).\textsuperscript{164} Chow, \textit{supra} note 29 at p. 62.
When the Communist Party eventually won the civil war in 1949, several political campaigns including the infamous Cultural Revolution plunged the country into political and class struggles.\textsuperscript{166} It was only until the late 1970s that China actually began developing its economy as well as the necessary legal system.\textsuperscript{167}

The Chinese substantive commercial law development is also fairly recent.\textsuperscript{168} The influence of Confucianism -- with its contempt for commercial activities -- deterred the development of private commercial law.\textsuperscript{169} When the Communist Party took over in 1949, it abolished private property ownership.\textsuperscript{170} It was only until the late 1980s when GPCL officially sanctioned private individuals' entering into contracts.\textsuperscript{171} Subsequently, the Chinese Contract Law explicitly allowed private individuals to enter into contract.\textsuperscript{172} China did not have a coherent body of contract law until the 1990s.\textsuperscript{173} The concept of freedom of contract inherent in an individual (as envisioned in the United States) never existed and still does not exist in China.\textsuperscript{174}

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\textsuperscript{165} Id. at pp. 9-12.
\textsuperscript{166} Id. at pp. 14-18.
\textsuperscript{167} Chow, supra note 29 at p. 18.
\textsuperscript{168} Id. at pp. 50-52.
\textsuperscript{169} Id. at pp. 51-52.
\textsuperscript{170} Id. at pp. 54-55.
\textsuperscript{171} Id. at p. 329.
\textsuperscript{172} Chinese Contract Law, supra note 4 at p. 2 (Article 4).
\textsuperscript{173} Wang, supra note 33 at p. 9; Zhen, Qiang, Hetongfa Chengshi Xinyong Yuanze Bijiao Yanjiu [Comparative Study of Contract Law Doctrine of Good Faith], 1 BIJIAOFA YANJIU [COMPARATIVE LEGAL STUDIES] 38, 43 (2000).
China’s recent legal history and lack of legislative experience may be the reason why Chinese judges have resorted to using the good faith doctrine to fill in legislative or doctrinal gaps. 

In contrast, the United States has had a long tradition of common law contract. The modern U.S. contract law has evolved on the basis of certain well entrenched principles such as freedom of contract and individual autonomy. Individual autonomy is viewed as a check on the “the whims and dictates of authoritarian social, economic and political structures of command and control.” In the U.S., individuals are free to arrange their own private affairs and the governmental role in this process is to protect the parties’ private bargains. 

Individual freedom also means that individuals are free to enter into bad deals. The U.S. culture expects individuals to be diligent on their own behalf and the law will not intervene where the individual could have prevented the loss. Focusing on those basic principles, U.S. contract law strives hard to protect the contractual parties’ expectation interests, no more and no less.

The United States contract law aims to maintain predictability of contracts. These are considered necessary to allow the parties to rely on the contracts to arrange their private affairs accordingly. U.S. courts have struggled to strike a balance between values of predictability and certainty and individual fairness. This balancing reflects the U.S. cultural focus on individual

Whether or not China has adopted the freedom of contract principle in the same sense as the United States is a topic to be explored another day.

175 Xu & Liang, supra note 44 at p. 39.
176 Williams, supra note 77 at p. 193; Summers, supra note 18 at p. 833
179 Bridge, supra note 68 at p. 435 (noting the principle that “judges should not be doing for parties what they are well able to achieve for themselves.”)
freedom and autonomy. Chinese courts seem more ready to intervene on behalf of the perceived weaker party or for the greater good.

The two different approaches also reflect the different jurisprudential philosophy between the two countries. United States jurisprudence has traditionally been influenced by legal positivism.\(^\text{181}\) One of the basic notions of legal positivism is that law is separate from morality, even though law can stem from morality.\(^\text{182}\) One concern about setting moral principles as legal rules is that moral rules tend to be so vague that it would invite a lot of frivolous lawsuits.\(^\text{183}\) This jurisprudential hostility is reflected in the narrow application of the good faith doctrine in U.S. contract law.

In contrast, law and morality were traditionally intertwined in China.\(^\text{184}\) Confucianism which has influenced China for over two thousand years viewed morality as the foundation of the society.\(^\text{185}\) Law was considered secondary and supplementary.\(^\text{186}\) In traditional China, Chinese officials often used Confucian principles to resolve disputes.\(^\text{187}\) The Chinese contract jurisprudence seems to have not made any distinction between the good faith doctrine as a moral principle and as a legal principle. One of the frequent justifications for the Chinese doctrine’s

\(^{180}\) Summers, supra note 18 at p. 823.
\(^{181}\) Chow, supra note 29 at p. 48.
\(^{182}\) Posner, supra note 82 at p. 1357; Phillips, supra note 90 at p. 1185; Summers, supra note 18 at p. 834; Chow, supra note 29 at p. 48. Melvin Aron Eisenberg, The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake and Nonperformance, 107 MICHIGAN L. REV. 1413, 1430 (June 2009) (arguing that “moral norms are basic building blocks of law in all fields of law.”)
\(^{183}\) Phillips, supra note 90 at p. 1179 (referring to the good faith duty as “an open invitation to litigate even the most specific agreements”) (internal citations and quotations omitted).
\(^{184}\) Chow, supra note 29 p. 49.
\(^{185}\) Id. at p. 49.
\(^{186}\) Id. at p. 49
broad scope with apparently unlimited judicial discretion is the perceived necessity for the rule because of the breakdown of morality in the Chinese transition market economy.\textsuperscript{188}

\textbf{VI. Conclusion}

Despite the similarity in name, the good faith doctrine in China and the United States has emerged as two fundamentally different doctrines. The good faith doctrine in China has its root in the civil law origin and China has adopted it as a general principle of civil law.\textsuperscript{189} The good faith doctrine as conceptualized and applied in China seems more akin to a general duty of care in contractual relationships. Chinese courts and scholars have by and large embraced the doctrine.\textsuperscript{190} The courts have applied it very broadly, using the doctrine when they deem it appropriate to fill in legislative or doctrinal gaps if necessary, without any apparent limitations.

In the United States, although the doctrine has been generally accepted, its application is by and large limited to situations where a contract vests one party with discretion or similar type of situations.\textsuperscript{191} The U.S. good faith doctrine is focused on fulfilling the intent of the parties—“securing faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”\textsuperscript{192} It is a narrow tool to facilitate the U.S. contract law’s ultimate goal—protection of the parties’ private bargain as reached at arms’ length by the parties exercising

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} Wang Yang, \textit{supra} note 43 at p. 6; Tong, \textit{supra} note 43 at p. 1.
\textsuperscript{189} GPCL, supra note 13 at p. ___.
\textsuperscript{190} \textit{See} discussions \textit{supra} in Part II(A).
\textsuperscript{191} \textit{See} discussions \textit{supra} in Parts IV(A), B(1) and C(1).
\textsuperscript{192} \textit{See} discussions \textit{supra} in Part IV(A), (B)(2) and C(2); Summers, \textit{supra} note 18 at p. 821 (internal citations and quotations omitted).
their free will. A broad concept of good faith similar to the Chinese doctrine would have likely jeopardized the ultimate goal.

193 Lim, supra note 178 at p. 590.