Good Faith in European Contract Law

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1 Good faith in European contract law: surveying the legal landscape

SIMON WHITTAKER AND REINHARD ZIMMERMANN

Note: Sections I–IV and VII have been drafted by *Reinhard Zimmermann*, sections V and VI by *Simon Whittaker* and section VIII jointly. In writing sections V and VII we have drawn on information kindly supplied by the country reporters for the case studies printed in the present volume.

I. A change in perspective

Private law in Europe is in the process of reacquiring a genuinely European character.[1] The Council of the European Communities enacts directives deeply affecting core areas of the national legal systems of the member states.[2] The European Court of Justice develops rules and concepts transcending national legal borders and constituting an embryonic general part of European contract and liability law.[3] The so-called Lando Commission has produced Part I of a Restatement of European Contract Law,[4] is in the process of publishing the second part and has started work on the remaining areas of general contract law.

[1] See generally, e.g., Jochen Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* (1993); Ivo E. Schwartz, 'Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft', *ZEuP* 2 (1994) 559 ff.; Reinhard Zimmermann, 'Civil Code and Civil Law – The Europeanization of Private Law within the European Community and the Re-emergence of a European Legal Science', (1994/95) 1 *Columbia Journal of European Law* 63 ff.; Martin Gebauer, *Grundfragen der Europäisierung des Privatrechts* (1998); Jürgen Basedow, 'The Renascence of Uniform Law: European Contract Law and its Components', (1998) 18 *Legal Studies* 121 ff.; the contributions in Peter-Christian Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft* (1993), Nicolò Lipari (ed.), *Diritto Privato Europeo* (1997), and Arthur Hartkamp, Martijn Hesselink *et al*., *Towards a European Civil Code* (2nd edn, 1998).

[2] For overviews, see Schwartz, *ZEuP* 2 (1994) 559 ff.; Zimmermann, (1994/95) 1 *Columbia Journal of European Law* 68 ff.; Peter-Christian Müller-Graff, 'EC Directives as a Means of Private Law Unification', in: Hartkamp/Hesselink *et al.* (n. 1) 71 ff.; Marian Paschke, Constantin Iliopoulos (eds.), *Europäisches Privatrecht* (1998); concerning contract law see, most recently, Stefan Grundmann, *Europäisches Schuldvertragsrecht* (1999).

[3] On the role of the European Court of Justice, see Ulrich Everling, 'Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft', *RabelsZ* 50 (1986) 193 ff.; Christian Joerges, Gert Brüggemeier, 'Europäisierung des Vertragsrechts und Haftungsrechts', in: Müller-Graff (n. 1) 233 ff.; the contributions by David A. O. Edward and Lord Mackenzie Stuart, in: David L. Carey Miller, Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997) 307 ff., 351 ff.; Nicola Scannichio, 'Il diritto privato europeo nel sistema delle fonti', in: Lipari (n. 1) 58 ff.; Walter van Gerven, 'The ECJ-Case Law as a Means of Unification of Private Law?', in: Hartkamp/Hesselink *et al*. (n. 1) 91 ff.; for general background on legal unification by means of appeal court decisions in states with several legal systems see the symposium edited by Klaus Luig, *ZEuP* 5 (1997) 762 ff. (with contributions by Antonio Padoa-Schioppa, Filippo Ranieri, Herbert Kronke, Michael Rainer, Klaus Luig, Barbara Pozzo and Ulrich Everling).

[4] Ole Lando, Hugh Beale (eds.), *Principles of European Contract Law*, Part I (1995); for comment, see Reinhard Zimmermann, 'Konturen eines Europäischen Privatrechts', *JZ* 1995, 477 ff.; Hugh Beale, 'The Principles of European Contract Law and Harmonisation of the Law of Contract', in: *Festskrift til Ole Lando* (1997) 21 ff.; Ralf Michaels, 'Privatautonomie und Privatkodifikation', *RabelsZ* 62 (1998) 580 ff. Generally, cf. also the contributions in Hans-Leo Weyers (ed.), *Europäisches Vertragsrecht* (1997).

International groups of academics are busy drafting European principles of delictual liability[5] and of trust law.[6] Textbooks are being written which analyse particular areas of law under a European perspective and deal with the rules of English, French or German law as local variations of a common theme.[7] At least two legal periodicals are competing for the attention of lawyers interested in the development of European private law.[8] The Commission of the European Communities has increased the mobility of law students through its immensely successful Erasmus (now Socrates) scheme.[9] More and more law faculties in Europe try to obtain a 'Euro'-profile by establishing integrated courses and programmes on an undergraduate and postgraduate level.[10] Chairs are established for European Private Law, European Legal History or Comparative Legal Culture. Interest has been rekindled in the 'old' European *ius commune* and legal historians are busy recognising, once again, the European perspective of their subject, rediscovering the common historical foundations of the modern law and restoring

[5] This group is referred to as the 'European Group on Tort Law' (formerly 'Tilburg-group'); see Jaap Spier (ed.), *The Limits of Liability* (1996); Spier (ed.), *The Limits of Expanding Liability* (1998); H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998); for general background, see Ulrich Magnus, 'Elemente eines europäischen Deliktsrechts', *ZEuP* 6 (1998) 602 ff. with further references.

[6] This group has been established by the *Onderzoekcentrum Onderneming & Recht* of the University of Nijmegen. The 'Principles of European Trust Law' (eds. D. J. Hayton, S. C. J. J. Kortmann, H. L. E. Verhagen, 1999) have recently been published and discussed at a conference in The Hague on 15 January 1999. The historical background is explored in Richard Helmholz, Reinhard Zimmermann (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998).

[7] Cf. the programme sketched by Hein Kötz, 'Gemeineuropäisches Zivilrecht', in: *Festschrift für Konrad Zweigert* (1981) 498, and now implemented in Hein Kötz, *Europäisches Privatrecht*, vol. I (1996), and Christian von Bar, *Gemeineuropäisches Deliktsrecht*, vol. I (1996). The first chapter of *Europäisches Vertragsrecht*, vol. II, is published in *ZEuP* 5 (1997) 255 ff.: Axel Flessner, 'Befreiung vom Vertrag wegen Nichterfüllung'.

[8] *Zeitschrift für Europäisches Privatrecht* (*ZEuP*), since 1993; *European Review of Private Law* (*ERPL*), also since 1993. Cf. also the *Maastricht Journal of European and Comparative Law* (which is, however, not confined to Private Law), since 1994; *Contratto e Impresa/Europa*, since 1996; *Uniform Law Review* (published by Unidroit), since 1996; *Europa e diritto privato*, since 1998.

[9] Cf. the presentations by J. A. Dieckmann, *ZEuP* 1 (1993) 615 ff. (Erasmus) and U. Caspar, *ZEuP* 5 (1997) 910 ff. (Socrates).

[10] For discussion on the Europeanisation of Legal Training, see Bruno de Witte, Caroline Forder (eds.), *The Common Law of Europe and the Future of Legal Education* (1992); Hein Kötz, 'Europäische Juristenausbildung', *ZEuP* 1 (1993) 268 ff.; Roy Goode, 'The European Law School', (1994) 13 *Legal Studies* 1 ff.; Filippo Ranieri, 'Juristen für Europa: Wahre und falsche Probleme in der derzeitigen Reformdiskussion zur deutschen Juristenausbildung', *JZ* 1997, 801 ff.

intellectual contact with comparative and modern private lawyers.[11] Attention is paid to models of legal harmonisation in other parts of the world, such as the United States of America (here, in particular, the Uniform Commercial Code and the Restatements),[12] Latin America,[13] or the mixed legal systems in South Africa,[14] Scotland,[15] Louisiana,[16] Quebec[17]

[11] Reinhard Zimmermann, 'Roman and Comparative Law: The European Perspective', (1995) 16 *JLH* 21 ff.; Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 *LQR* 576 ff.; cf. also, e.g., Reiner Schulze, 'European Legal History – A New Field of Research in Germany', (1992) 13 *JLH* 270 ff.; Schulze, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht', *ZEuP* 1 (1993) 442 ff.; Rolf Knütel, 'Rechtseinheit in Europa und römisches Recht', *ZEuP* 2 (1994) 244 ff.; Eugen Bucher, 'Recht – Geschicklichkeit – Europa', in: Bruno Schmidlin (ed.), *Vers un droit privé commun? – Skizzen zum gemeineuropäischen Privatrecht* (1994) 7 ff.; John Blackie, Niall Whitty, 'Scots Law and the New Ius Commune', in: Hector MacQueen (ed.), *Scots Law into the 21st Century: Essays in Honour of W. A. Wilson* (1996) 65 ff.; and see the symposium on the Teaching of Legal History at the University of Cape Town, published in *ZEuP* 5 (1997) 366 ff. (with contributions by Hector MacQueen, Peter Stein, Willem Zwalve, Klaus Luig, Gerhard Lubbe and Alfred Cockrell). Two series of monographs, both published by Duncker & Humblot, Berlin, have been founded with the aim of re-establishing the European dimension of legal history: *Comparative Studies in Continental and Anglo-American Legal History*, since 1985; *Schriften zur Europäischen Rechts- und Verfassungsgeschichte*, since 1992.

[12] Cf., e.g., Mathias Reimann, 'Amerikanisches Privatrecht und europäische Rechtseinheit – Können die USA als Vorbild dienen?', in: Reinhard Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht – Impressionen aus der Neuen Welt* (1995) 132 ff.; Melvin A. Eisenberg, 'Why is American Contract Law so Uniform? – National Law in the United States', in: Weyers (n. 4) 23 ff.; Richard Hyland, 'The American Restatements and the Uniform Commercial Code', in: Hartkamp/Hesselink *et al.* (n. 1) 105 ff.; Thomas Schindler, 'Die Restatements und ihre Bedeutung für das amerikanische Privatrecht', *ZEuP* 6 (1998) 277 ff.

[13] Jurisprudence in Latin America has never been completely reduced to a national legal science. Particularly under the auspices of *Mercosur* attempts are now being made to unify commercial law. See the contributions in the new journal *Roma e America, Diritto Romano Comune: Rivista di Diritto in Europa e in America Latino, Roma*, since 1996; and see Thilo Scholl, *ZEuP* 5 (1997) 1180 ff.; Scholl, *Die Rezeption des kontinental-europäischen Vertragsrechts in Lateinamerika am Beispiel der allgemeinen Vertragslehre in Costa Rica* (1999).

[14] Reinhard Zimmermann, Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (1996).

[15] Cf., e.g., the contributions in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (1995); Alan Rodger, 'Thinking About Scots Law', (1996) 1 *Edinburgh Law Review* 3 ff.; Niall R. Whitty, 'The Civilian Tradition and Debates on Scots Law', 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 227 ff. and 442 ff.; David Carey Miller, Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law – Aberdeen Quincentenary Essays* (1997).

[16] Cf., e.g., Joachim Zekoll, 'Zwischen den Welten – Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung', in: *Amerikanische Rechtskultur und europäisches Privatrecht* (n. 12) 11 ff.

[17] On the new civil code cf., e.g., Pierre Legrand, 'Civil Law Codification in Quebec: A Case of Decivilianization', *ZEuP* 1 (1993) 574 ff.; Bernd von Hoffmann, 'Le nouveau Code civil

or Israel.[18] The internationalisation of private law is also vigorously promoted by the uniform private law based on international conventions which cover large areas of commercial law.[19] The United Nations Convention on Contracts for the International Sale of Goods, in particular, has been adopted by close to fifty states (among them ten of the member states of the European Union)[20] and is starting to give rise to a considerable amount of case law.[21] The International Institute for the Unification of Private Law has published a set of Principles of International Commercial Contracts.[22] Somewhat surprisingly, in view of widespread scepticism expressed in the 1960s and '70s, the idea of codification has been regaining ground internationally.[23] The new Dutch *Burgerlijk Wetboek* (B.W.) has aroused considerable interest but it is neither the only nor even the latest recent codification.[24] The academic lawyer today does indeed live in a golden age.[25]

There can no longer be any question about the change in perspective we are experiencing at the moment: we cannot stop, or wish away, the re-emergence of a European (as opposed to merely national) private law. We can, however, influence both the speed and scope of the development. One of

du Québec – modèle d'une harmonisation du droit privé européen?', in: *Études Québécoises: Bilan et perspectives* (1996) 15 ff.

[18] Cf., e.g., Alfredo Mordechai Rabello (ed.), *Essays on European Law and Israel* (1996).

[19] Cf., e.g., Jan Ramberg, *International Commercial Transactions* (1997) and the contributions in Franco Ferrari (ed.), *The Unification of International Commercial Law* (1998).

[20] It has not been implemented by Greece, Portugal, Belgium, Great Britain and Luxembourg; concerning Great Britain, see the comments by Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* (1993).

[21] Cf. Michael R. Will, *International Sales Law under CISG: The First 284 or so Decisions* (1996); Ulrich Magnus, 'Stand und Entwicklung des UN-Kaufrechts', *ZEuP* 3 (1995) 202 ff.; Magnus, 'Das UN-Kaufrecht: Fragen und Probleme seiner praktischen Bewährung', *ZEuP* 5 (1997) 823 ff. Cf. also the new *Review of the Convention on Contracts for the International Sale of Goods*, since 1996.

[22] Rome, 1994. Cf. also Michael Joachim Bonell, *An International Restatement of Contract Law* (2nd edn, 1997); Bonell, 'The Unidroit Principles – A Modern Approach to Contract Law', in: Weyers (n. 4) 9 ff.; Arthur Hartkamp, 'Principles of Contract Law', in: Hartkamp/Hesselink *et al.* (n. 1) 105 ff. with further references.

[23] For details, see Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', (1995) 3 *ERPL* 95 ff. For a historical evaluation see, most recently, Pio Caroni, *Saggi sulla storia della codificazione* (1998); for a comparative appraisal, see the symposium 'Codification in the Twenty-First Century', (1998) 31 *University of California Davis Law Review* 655 ff.

[24] Even as far as England is concerned, the draft of a Contract Code, drawn up on behalf of the English Law Commission by Harvey McGregor, was uncovered and published in Italy. The discovery was hailed as 'sensational' by Professor Gandolfi in his preface.

[25] Kenneth G. C. Reid, 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland', in: *Scots Law into the 21st Century* (n. 11) 39.

the most important issues discussed in this respect today is whether European private law (or at least the law of obligations) should be codified. The European Parliament, for instance, has repeatedly called for such a step to be taken.[26] Academic lawyers have, by and large, received this idea with considerable reservation; the opinion seems to prevail that, even if a European Civil Code may ultimately be desirable, the time is not yet ripe for it. But whether one inclines towards the bold proposition of a Thibaut *redivivus* or subscribes to the more cautious attitude of a modern Savigny,[27] it is clearly desirable to take stock of the situation *de lege lata*: to ascertain the amount of common ground already existing between the national legal systems and to identify discrepancies on the level of specific result, general approach and doctrinal nuance. This is what the present comparative study attempts to do for one specific topic within the general law of contract.

II. Good faith: common core or imposition?

The topic chosen is, no doubt, somewhat unconventional. So is the method adopted. Both points therefore need some explanation. It is hardly accidental that neither the second part of *Zweigert/Kötz*, 'An Introduction to Comparative Law',[28] nor *Kötz*, 'Europäisches Vertragsrecht'[29] contain a chapter on 'good faith'. Comparative studies normally focus on specific subject matters, problem areas and real life sit-

[26] Cf., e.g., Winfried Tilmann, 'Entschließung des Europäischen Parlaments über die Angleichung des Privatrechts der Mitgliedsstaaten vom 26.5.1989', *ZEuP* 1 (1993) 613 ff.; Tilmann, 'Eine Privatrechtskodifikation für die Europäische Gemeinschaft?', in: Müller-Graff (n. 1) 485 ff.; Tilmann, 'Zweiter Kodifikationsbeschluß des Europäischen Parlaments', *ZEuP* 3 (1995) 534 ff.; Tilmann, 'Artikel 100 a EGV als Grundlage für ein Europäisches Zivilgesetzbuch', in: *Festskrift til Ole Lando* (n. 4) 351 ff.; Giuseppe Gandolfi, 'Pour un code européen des contracts', *RIDC* 1992, 707 ff.; Jürgen Basedow, 'Über Privatrechtsvereinheitlichung und Marktintegration', in: *Festschrift für Ernst-Joachim Mestmäcker* (1996) 347 ff. The question was discussed at a symposium in The Hague on 28 February 1997; cf. René de Groot, 'European Private Law between Utopia and Early Reality', (1997) 4 *Maastricht Journal of European and Comparative Law* 1 ff.; Winfried Tilmann, 'Towards a European Civil Code', *ZEuP* 5 (1997) 595 ff.; and the contributions in (1997) 5 *ERPL* 455 ff.

[27] Cf. (1996) 112 *LQR* 576 ff. for a discussion drawing on Savigny's programmatic writings. Cf. also Marcel Storme, 'Lord Mansfield, Portalis of von Savigny? Overwegingen over de eenmaking van het recht in Europa, i.h.b. via vergelijkende rechtspraak', *Tijdschrift voor privaatrecht* 1991, 849 ff.; Ole Lando, 'The Principles of European Contract Law after Year 2000', in: Franz Werro (ed.), *New Perspectives on European Private Law* (1998) 59 ff.

[28] Konrad Zweigert, Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, 1996); the work has been translated into English by Tony Weir: *An Introduction to Comparative Law* (3rd edn, 1998).

[29] Cf. n. 7 above.

uations, or on relatively well-defined legal institutions like mistake, agency or *stipulatio alteri*. 'Good faith' fits into neither of these categories. At the same time, however, it is at least in some legal systems regarded as a vitally important ingredient for a modern general law of contract.[30] That immediately raises the question how other legal systems cope without it. This inquiry appears to be all the more topical since all member states of the European Union have implemented the Directive on Unfair Terms in Consumer Contracts and will thus have to come to terms with a general notion of 'good faith' in a central area of their contract law.[31] Moreover, both the Principles of European Contract Law as proposed by the Lando Commission and the Principles of International Commercial Contracts as published by Unidroit contain general provisions according to which 'in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing'.[32] At least the Principles of

[30] Concerning German law, Werner F. Ebke and Bettina M. Steinhauer describe the doctrine of good faith as having ripened from little more than a legislative acorn 'into a judicial oak that overshadows the contractual relationship of private parties': 'The Doctrine of Good Faith in German Contract Law', in: Jack Beatson, Daniel Friedmann (eds.), *Good Faith and Fault in Contract Law* (1995) 171.

[31] For England, see Hugh Collins, 'Good Faith in European Contract Law', (1994) 14 *Oxford JLS* 229 ff.; Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts', in: Beatson/Friedmann (n. 30) 231 ff.; Jack Beatson, 'The Incorporation of the EC Directive on Unfair Consumer Contracts into English Law', *ZEuP* 6 (1998) 957 ff.; for Germany, see Oliver Remien, 'AGB-Gesetz und Richtlinie über mißbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld', *ZEuP* 2 (1994) 34 ff.; Helmut Heinrichs, 'Das Gesetz zur Änderung des AGB-Gesetzes', *NJW* 1996, 2190 ff.; for France: Claude Witz, Gerhard Wolter, 'Die Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen', *ZEuP* 3 (1995) 885 ff.; cf. also the comparative analyses in (1995) 3 *ERPL* 211 ff. The Directive on Unfair Terms in Consumer Contracts was not the first E.C. directive to use the standard of good faith; see, seven years earlier, the Directive on Self-Employed Commercial Agents (OJ EC 1986 L 382/17), arts. 3 I and 4 I.

[32] Art. 1:201 Principles of European Contract Law; Art. 1.7 Principles of International Commercial Contracts. For comment, see Zimmermann, *JZ* 1995, 491 f.; Basedow, (1998) 18 *Legal Studies* 141 f. In this context it must also be noted that according to Art. 1.107 Principles of European Contract Law and Art. 5.3 Principles of International Commercial Contracts '[e]ach party owes to the other a duty to co-operate in order to give full effect to the contract'. In most European legal systems this rule is regarded as flowing from the principle of good faith. Peter Schlechtriem has recently drawn attention to the fact that 'similar to the irresistible force of fundamental laws of nature such as the law of gravity, the principle that . . . the evaluation of the relations, rights and remedies of the parties, should be subject to the principles of good faith and fair dealing has found its way into the Convention [on Contracts for the International Sale of Goods], its understanding by the majority of legal writers and its application by the courts', even though the draftsmen of the Convention ultimately refrained from adopting a respective provision: *Good Faith in German Law and in International Uniform Laws* (1997) 3.

European Contract Law, however, profess to be inspired by the idea of a European Restatement of Contract Law. Their draftsmen expressly refer to a common core of contract law of all member states of the European Union which has to be elaborated – even though they concede that this may be a somewhat more 'creative' task than the one tackled by the draftsmen of the American Restatements.[33] Does 'good faith', as embodied in a rule like Art. 1.106 of the Principles of European Contract Law, constitute part of the common core of European contract law,[34] or is it a notion to be found in one or several legal systems and artificially imposed on others? Until very recently, the question has not attracted much scholarly attention.[35]

[33] Lando/Beale (n. 4) xx f.

[34] Cf., e.g., ibid., 56: 'The principle of good faith and fair dealing is recognised or at least appears to be acted on as a guideline for contractual behaviour in all EC countries'; Otto Sandrock, 'Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland – Europa – und die Welt', *JZ* 1996, 9: 'Es gibt . . . einige allgemeine Rechtsgrundsätze, die allen Rechtskreisen dieser Welt gemeinsam sind, wie z.B. der Grundsatz pacta sunt servanda oder die Verpflichtung, Verträge bona fide zu erfüllen'; BGH *NJW* 1993, 259 (263): the principle of good faith is 'als übergesetzlicher Rechtssatz allen Rechtsordnungen immanent' (inherent in all legal systems as pre-positive law). According to Basedow, good faith is a general principle of E.C. contract law: (1998) 18 *Legal Studies* 137. For support of this proposition, he draws attention to the case law of the European Court of Justice (more specifically, to two judgments interpreting the Brussels Judgments Convention (on which, see also Jürgen Basedow, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. I (3rd edn, 1993) § 12 AGBG, n. 29)) and to the directives on self-employed commercial agents and unfair terms in consumer contracts. Cf. also, in this context, the observations by Van Gerven (n. 3) 102 ff.

[35] Cf. also Schlechtriem (n. 32) 5 who states: 'If the principle of good faith and fair dealing is indeed common to all legal systems based on the values of western civilization, then it should be easy to find a common core of concrete rules derived from this principle . . . But I have looked in vain for a monograph comparable to, say, Ernst Rabel's "Recht des Warenkaufs", which would report and compare in detail the various manifestations of the principle and its applications and understanding in the legal systems of the Western world . . .'. As far as modern comparative literature is concerned, cf., in particular, Beatson/Friedmann (n. 30); J. M. Smits, *Het vertrouwensbeginsel en de contractuele gebondenheit* (1995); Hans Jürgen Sonnenberger, 'Treu und Glauben – ein supranationaler Grundsatz?', in: *Festschrift für Walter Odersky* (1996) 703 ff.; Martijn Hesselink, 'Good Faith', in: Hartkamp/Hesselink *et al.* (n. 1) 285 ff.; Filippo Ranieri, 'Bonne foi et exercice du droit dans la tradition du civil law', *RIDC* 1998, 1055 ff. (building on a number of previous studies on more specific topics by the same author); Hein Kötz, 'Towards a European Civil Code: The Duty of Good Faith', in: Peter Cane, Jane Stapleton (eds.), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) 243 ff. Mention should also be made of the essays collected in *La bonne foi (Journées louisianaises)*, (1992) 43 *Travaux de l'Association Henri Capitant*, and in Alfredo Mordechai Rabello, *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997); and of the fact that no less than four out of the twenty-four booklets published, so far, under the auspices of the *Centro di studi e ricerche*

At first sight, one might be inclined to agree with the latter proposition. Moreover, we appear to be dealing with a rather clear-cut civil law/common law divide. 'Scots law based its system of consensual contracts on the *ius commune* but . . . it has not accepted the civilian doctrine that the exercise of contractual rights is subject to the principles of good faith. The better view is that like English law it requires strict adherence to contracts': this is how a prominent lawyer from a mixed jurisdiction has recently restated the apparent dichotomy.[36] And indeed, statements to the effect that English contract law does not recognise a general concept of good faith are legion. It tolerates 'a certain moral insensitivity in the interest of economic efficiency'[37] and values 'predictability of the legal outcome of a case' more highly 'than absolute justice'.[38] Common law lawyers have traditionally tended to regard 'good faith [as] an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values'; and they point out that it 'could well work practical mischief if ruthlessly implanted into our system of law'.[39] A duty to negotiate in good faith has even been described as 'inherently repugnant to the adversarial position of the parties when involved in negotiations' and as 'unworkable in practice'.[40] Closer inspection, however, shows that matters are more complex. The position in English law appears to be much less unequivocal than a continental lawyer faced with some of these general propositions might be led to expect. Conversely, the civilian approach is much less uniform than a common law lawyer might be led to believe.[41] This, we hope, will become apparent in the main section of this book which seeks to investigate the

di diritto comparato e straniero in Rome are dealing with the topic of good faith: Roy Goode, *The Concept of 'Good Faith' in English Law* (no. 2); Allan Farnsworth, *The Concept of Good Faith in American Law* (no. 10); Denis Tallon, *Le concept de bonne foi en droit français du contrat* (no. 15); and Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws* (no. 24); cf. also Arthur S. Hartkamp, *Judicial Discretion under the New Civil Code of the Netherlands* (no. 4).

[36] Niall Whitty, as quoted by David Carey Miller, 'A Scottish Celebration of the European Legal Tradition', in: Carey Miller/Zimmermann (n. 15) 45.

[37] Barry Nicholas, 'The Pre-contractual Obligation to Disclose Information, English Report', in: Donald Harris, Denis Tallon (eds.), *Contract Law Today: Anglo-French Comparisons* (paperback reprint 1991) 187.

[38] Roy Goode, *The Concept of 'Good Faith' in English Law* (1992) 7.

[39] M. G. Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?', (1984) 9 *Canadian Business Law Journal* 412 f., 426.

[40] *Walford v. Miles* [1992] 2 AC 128, 138, *per* Lord *Ackner*. But see the comparative observations by Kötz, in *Essays Fleming* (n. 35) 253 f.

[41] Cf., as far as Germany and France are concerned, the comparative remarks by Sonnenberger (n. 35) 703 ff.

ways in which European legal systems deal with cases which, in the view of some of them, attract the application of a general principle of good faith. Before explaining how this section was put together, we will offer a few introductory remarks attempting to set the scene.

III. *Bona fides*

The notion of 'good faith', or *bona fides*, finds its origin in Roman law.[42] In relation to *iudicia stricti iuris* (claims which have to be adjudicated upon according to strict law) it gained its influence as a result of a specific standard clause, inserted at the request of the defendant into the procedural *formula* which defined the issue to be tried by the judge. This clause was known as the *exceptio doli* and it was worded in the alternative: 'si in ea re nihil dolo malo A^i A^i factum sit neque fiat' (if in this matter nothing has been done, or is being done, in bad faith by the plaintiff).[43] It was particularly the second alternative (*neque fiat* – or is being done) that made the *exceptio doli* such a powerful instrument in bringing about a just solution, for it invited an answer which located *dolus* not so much in personal misconduct, but rather in an inequity or injustice that would flow from the action being allowed to succeed.[44] Ultimately, therefore, it gave the judge an equitable discretion to decide the case before him in accordance with what appeared to be fair and reasonable.[45] This, essentially, was the regime applicable to one cornerstone of the Roman contractual system, the stipulation, for it was governed by the *iudicium stricti iuris par excellence*, the *condictio*.[46] The other cornerstone was the consensual contracts. A specific device in the form of an *exceptio doli* was here not necessary in order to check the improper exercise of contractual rights.[47] The judge had this discretion anyway for he was, according to the *formulae* applicable to these kinds of contracts, instructed to condemn the defendant into 'quidquid ob eam rem N^m N^m A^o A^o dare facere oportet ex fide bona' (whatever on

[42] For all details, see the study by Martin Schermaier in the present volume.

[43] Gai. IV, 119.

[44] Geoffrey MacCormack, 'Dolus in the Law of the Early Classical Period (Labeo-Celsus)', *Studia et documenta historiae et iuris* 52 (1986) 263 f.

[45] On *bona fides* and *dolus* and on the meaning of *dolus* in the present context, see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (paperback edn, 1996) 667 ff.

[46] For details, see ibid., 68 ff.

[47] Cf. D. 30, 84, 5: '. . . quia hoc iudicium fidei bonae est et continet in se doli mali exceptionem'.

that account the defendant should give to, or do for, the plaintiff in good faith).[48] The substantive content of the *exceptio doli*, in other words, was absorbed into the requirement of good faith according to which the dispute had to be decided.

Bona fides was one of the most fertile agents in the development of Roman contract law. In the contract of sale, for instance, it paved the way for the reception of the aedilitian remedies into the *ius civile*.[49] The harsh principle of *caveat emptor* was thus largely abandoned. Similarly, the buyer was granted an action to claim his positive interest in cases of eviction.[50] On a more general level, *bona fides* allowed error (mistake) and *metus* (duress) to be taken into account in determining whether an *actio empti* or *venditi* could be granted.[51] Equally, the judge was able to consider a counterclaim arising from the same transaction and to condemn the defendant only in the difference between the two claims.[52] Liability for latent defects, the rules relating to the implied warranty of peaceable possession, rescission of contracts on account of mistake and *metus*, set-off: these and many other institutions of modern contract law can be traced back to the *iudicia bonae fidei* of Roman law. They were retained in spite of the fact that decline, and eventual abolition, of the formulary procedure had led to an absorption of the concept of *bona fides* into the broader notion of *aequitas* (equity).[53] Throughout the Middle Ages, and in the early modern period, *aequitas* remained in the forefront of discussion as a counterpoise to the *ius strictum* (strict law),[54] but it was commonly identified with *bona fides*.[55] *Bona fides* and/or *aequitas* also dominated relations between merchants and became a fundamental principle of the medieval and early modern *lex mercatoria*.[56] 'Bona fides est primum mobile ac

[48] The respective claims therefore came to be designated *iudicia bonae fidei* (claims which have to be adjudicated upon in terms of the requirements of good faith).

[49] See *Law of Obligations* (n. 45) 320 ff. The aedilitian remedies had been created by the magistrates responsible for the conduct and regulation of the Roman markets and dealt with defects in slaves and certain livestock bought on these markets.

[50] Ibid., 296 ff. [51] Ibid., 587 ff., 658. [52] Ibid., 761 ff.

[53] See Alexander Beck, 'Zu den Grundprinzipien der bona fides im römischen Vertragsrecht', in: *Aequitas und bona fides – Festgabe für August Simonius* (1955) 24 ff.

[54] Cf., e.g., Gunter Wesener, 'Aequitas naturalis, "natürliche Billigkeit", in der privatrechtlichen Dogmen- und Kodifikationsgeschichte', in: *Der Gerechtigkeitsanspruch des Rechts* (1996) 81 ff.; Jan Schröder, 'Aequitas und Rechtsquellenlehre in der frühen Neuzeit', *Quaderni Fiorentini* 26 (1997) 265 ff.

[55] For all details, see the contribution by James Gordley to the present volume.

[56] Rudolf Meyer, *Bona fides und lex mercatoria in der europäischen Rechtstradition* (1994) 61 ff.

spiritus vivificans commercii' (good faith is the prime mover and lifegiving spirit of commerce) as *Casaregis* put it; and in the same vein *Baldus* had stated 'bonam fidem valde requiri in his, qui plurimum negotiantur' (good faith is much required of those, who trade most).[57] As in Roman law, *bona fides* significantly contributed to the kind of flexibility, convenience and informality required by the international community of merchants.

IV. *Treu und Glauben*

1. 'Baneful plague' or 'queen of rules'?

In Germany, *bona fides* could conveniently be blended with the indigenous notion of *Treu und Glauben* (literally: fidelity and faith): a phrase which we find in a number of medieval sources and which was used, in the context of commercial relations, as a synonym for *bona fides*.[58] *Treu und Glauben* also, of course, was ultimately destined to find its way into the famous § 242 of the German Civil Code of 1900: 'Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'[59] This is not the only place where the BGB refers to *Treu und Glauben*; for according to § 157 BGB 'contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration'.

In view of its subsequent interpretation, the wording of § 242 BGB is surprisingly narrow. It merely relates to the manner in which performance must be rendered.[60] Determination of the content of a contract is regulated in § 157 and is regarded as a matter of interpretation. It is not entirely clear whether the draftsmen of the BGB really intended to give the principle of good faith such a restricted field of operation. The first draft had still contained one comprehensive clause according to which 'the contract obliges the contracting party to whatever results from the

[57] Both quotations taken from ibid., 62.

[58] Ibid., 64 ff.; Adalbert Erler, 'Treu und Glauben', in: *Handwörterbuch zur deutschen Rechtsgeschichte*, 34th part (1992) cols. 317 ff.; Okko Behrends, 'Treu und Glauben: Zu den christlichen Grundlagen der Willenstheorie im heutigen Vertragsrecht', in: Gerhard Dilcher, Ilse Staff, *Christentum und modernes Recht* (1984) 277 ff.; Hans-Wolfgang Strätz, *Treu und Glauben*, vol. I (1974).

[59] (The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration.)

[60] Case 8 provides a typical example. It is based on Rudolf Henle, *Treu und Glauben im Rechtsverkehr* (1912) 30 f.

provisions and the nature of the contract according to law and ordinary usage and with reference to good faith, as content of his obligation'.[61] This had come closer to the *exceptio doli generalis* as it had been recognised in pandectist legal literature and applied by nineteenth-century courts.[62] The term *exceptio doli*, of course, no longer had the procedural implications of the Roman formulary procedure and was retained, predominantly, as a convenient label. The four consensual contracts, after all, were *bonae fidei iudicia*; and since they provided the historical foundation of the modern general concept of contract law,[63] the latter was bound to be subject to the regime of *bona fides*, too.[64] Use of the term *exceptio doli*, in other words, was tantamount to a recourse to the idea of good faith except that the matter was seen, naturally enough, from the point of view of the defendant.

Soon after the BGB had been adopted, a debate flared up as to whether the *exceptio doli* was still applicable, be it on the basis of § 242 BGB or as a result of 'the grace of God'.[65] Judicial practice, without much ado, opted for the former alternative and continued to operate as it had done before the promulgation of the code. The Imperial Court, in particular, did not hesitate to grant protection against the improper exercise of legal

[61] § 359 E I; on which see 'Motive', in: Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol. II (1899) 109. There is no indication that the draftsmen of the BGB, when revising § 359 E I and splitting up its content into what were to become §§ 157 and 242 BGB, intended a substantial change of the law; cf. 'Protokolle', in: Mugdan, ibid., 521 ff. For all details, see the discussion by Jürgen Schmidt, in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (13th edn, 1995) § 242, nn. 19 ff.

[62] For all details, see Wendt, 'Die exceptio doli generalis im heutigen Recht oder Treu und Glauben im Recht der Schuldverhältnisse', *AcP* 100 (1906) 1 ff.; cf. also the references in Bruno Huwiler, 'Aequitas und bona fides als Faktoren der Rechtsverwirklichung', in: Bruno Schmidlin (ed.), *Vers un droit privé européen commun? – Skizzen zum gemeineuropäischen Privatrecht* (1994) 59 ff. and the discussion by Ranieri, *RIDC* 1998, 1058 ff., 1064 ff.

[63] For an account of this development, see Helmut Coing, *Europäisches Privatrecht*, vol. I (1985) 398 ff.; *Law of Obligations* (n. 45) 508 ff., 537 ff.; and the contributions to John Barton (ed.), *Towards a General Law of Contract* (1990).

[64] Cf., e.g., Ferdinand Regelsberger, *Pandekten*, vol. I (1893) 686; Heinrich Dernburg, *Pandekten*, vol. I (5th edn, 1896) § 138, 4; Bernhard Windscheid, Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th edn, 1906) § 47, n. 7. Windscheid/Kipp refer to the *exceptio doli* as being 'unpraktisch' (which may mean 'impractical' or 'no longer used in practice'). On the use of *bona fides* and the *exceptio doli* in Roman-Dutch and modern South African law, see Reinhard Zimmermann, 'Good Faith and Equity', in: Zimmermann/Visser (n. 14) 217 ff.

[65] The various points of view are set out by Wendt, *AcP* 100 (1906) 1 ff.; cf. also, e.g., Paul Oertmann, *Das Recht der Schuldverhältnisse* (vol. II of a commentary to the German Civil Code edited by Biermann, von Blume and others), (2nd edn, 1906) § 242, 4.

rights.[66] The Court thus tried to steer a middle course: neither was it regarded as sufficient if the plaintiff merely acted inequitably nor was judicial intervention to be confined to the extreme case where the only purpose of exercising a right had been to cause damage to another.[67] The application of § 242 BGB soon became a bone of contention in the great methodological disputes of the first part of this century (positivism, free law movement, jurisprudence of interests).[68] Strong language was used. The good faith provision was seen, on the one hand, as 'the source of the baneful plague gnawing in a most sinister manner at the inner core of our legal culture';[69] on the other hand, it was celebrated as the 'queen of rules'[70] which could be used to unhinge the established legal world.

2. Adjusting exchange rates

These hopes and fears concerning the judicial function did not, at first, have any impact on mainstream legal literature and practice. Sooner or later, however, the potential conflict between Imperial Supreme Court and Imperial Parliament inherent in this issue was bound to become politically and practically relevant. In Germany this happened on 28 November 1923 when the Imperial Court decided, effectively, to abandon the principle of the nominal value with regard to the *Reichsmark.*[71] Inflation, by that time, had reached hitherto unimaginable

[66] See the references in Wendt (n. 65) or in: *Das Bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichts (Reichsgerichtsrätekommentar)*, vol. I (6th edn, 1928) § 242, 4. And see the discussion by Ranieri, *RIDC* 1998, 1065 ff. who also emphasises the continuity of development ('la réalisation du principe de la bonne foi et de l'idée de l'exceptio doli generalis dans la doctrine et la pratique allemande . . . a été constante de l'époque de l'usus modernus pandectarum jusqu'à la jurisprudence du Bundesgerichtshof': 1081). Generally on the development of the interpretation of § 242 BGB since 1900, see *Staudinger/*J. Schmidt (n. 61) § 242, nn. 51 ff.

[67] The latter case, incidentally, is covered by a special rule: § 226 BGB. In view of the wide interpretation of § 242 BGB, it does not have much practical significance ('weitgehend leerlaufend': Helmut Heinrichs, in: Palandt, *Bürgerliches Gesetzbuch* (57th edn, 1998) § 226, n. 1). On the historical background of § 226 BGB (*aemulatio*), see Huwiler (n. 62) 57 ff. and Antonio Gambaro, 'Abuse of Right in Civil Law Tradition', in: *Aequitas and Equity* (n. 35) 632 ff.

[68] For an overview of these methodological positions, see Peter Raisch, *Juristische Methoden* (1995) 107 ff.; Franz Wieacker, *A History of Private Law in Europe with particular reference to Germany*, translated by Tony Weir (1995) 363 ff., 453 ff.

[69] Henle (n. 60) 3.

[70] Cf. the (critical) discussion by Justus Wilhelm Hedemann, *Die Flucht in die Generalklauseln: Eine Gefahr für Recht und Staat* (1933) 10 f.

[71] For details of what follows cf., in particular, the discussion by Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (paperback edn, 1973) 64 ff.

dimensions: one gold mark was traded in November 1923 for 522 billion paper marks. The association of judges of the Imperial Supreme Court had submitted, and published, draft legislation to deal with the problem but the Imperial Parliament remained impassive. It was in this situation that the Court refused to allow a debtor to discharge an obligation incurred before the First World War, and secured by means of a mortgage, by paying the nominal value of the debt in paper marks.[72] The creditor, in the opinion of the Court, could not be compelled to consent to a deletion of the mortgage from the register. Moreover, the Court considered itself entitled to fix a new exchange rate. Obviously, the judges found themselves in a grave moral dilemma: they regarded the inaction of the legislature as intolerable and gravely detrimental to the general respect for law and justice. But the Court attempted to disguise the fundamental issues by using § 242 BGB as a positivistic peg. The unforeseeable devaluation of the mark, so it was argued, had given rise to a conflict between what the principle of nominal value, as embodied in contemporary currency legislation, required and what could in good faith be expected of a debtor concerning the discharge of his obligations. In this conflict, preference had to be given to § 242 BGB which, after all, governed all legal transactions. The currency laws had to be disregarded in so far as they could not be reconciled with the precepts of good faith.[73]

This decision hit the German legal community like a bombshell.[74] Here was finally a case where the Court could indeed be said to have unhinged the established legal world. The fixing of exchange rates was certainly not the business of the courts and it was irreconcilable with the *exceptio doli generalis* even in its most extended version. If general legal provisions could be used to justify this kind of judicial interventionism, anything seemed possible. Perspicacious critics started to realise that this conceivably entailed grave 'dangers for State and law'.[75] These misgivings were fully confirmed by what happened after 1933. The general provisions were one of the most convenient points of departure for imbuing the legal

[72] RGZ 107, 78 ff. Differently still RGZ 101, 141 ff.

[73] Cf. also the discussion and further references in *Reichsgerichtsrätekommentar* (n. 66) § 242, 5 b)–d) (pp. 368 ff.).

[74] Rüthers (n. 71) 66 (with references).

[75] Cf. the subtitle of the booklet published by Hedemann (n. 70) on the eve of the Nazi regime. Hedemann himself, incidentally, soon became a leading proponent of the idea to replace the BGB by a 'people's code' better suited to a national spirit emanating from the 'community of blood and soil'. For details, see Heinz Mohnhaupt, 'Justus Wilhelm Hedemann als Rechtshistoriker und Zivilrechtler vor und während der Epoche des Nationalsozialismus', in: Michael Stolleis, Dieter Simon (eds.), *Rechtsgeschichte im Nationalsozialismus: Beiträge zur Geschichte einer Disziplin* (1989) 107 ff.

system with the spirit of the new, 'national' (*völkisch*) legal ideology.[76] A study of the history of private law of this period reveals the frightening flexibility of the methodological tools available to lawyers inspired by ideological premises and preconceptions. The 'unlimited interpretation' was an important key to the insidious perversion of the legal system by those charged with its preservation.[77]

3. Domesticating the monster

Today we have still not managed to find a magic formula which defines the line to be drawn between what may properly be classified as 'interpretation' and what is usually referred to as 'judicial development' of the law.[78] The latter phenomenon is not merely tolerated but very widely regarded as indispensable. As long as judicial law-making *contra legem* is not (openly) permitted, the parliamentary prerogative remains substantially unaffected.[79] But even if great advances have not been made at a general methodological level, the modern German situation is different in two very significant respects. Most importantly, of course, it is no longer the fascist ideology of the 1930s and early '40s which sustains and informs the German legal system. Reacting to the totalitarianism of the Nazi regime, the draftsmen of the Basic Law entrenched respect for human dignity and the right to personal freedom, very prominently, in its first two articles. These articles constitute part of a comprehensive Bill of Rights which does not only provide the individual citizen with protection against the activities of the state but also constitutes a system of basic values permeating the legal system as a whole.[80] Thus, for example, the entire body of private law has to be interpreted in the spirit of the fundamental rights,[81] and the general provisions contained in the BGB are par-

[76] The seminal publication on this subject is the book by Bernd Rüthers (n. 71).

[77] Generally on the perversion of law after 1933 cf. Reinhard Zimmermann, 'An Introduction to German Legal Culture', in: Werner F. Ebke, Matthew W. Finkin (eds.), *Introduction to German Law* (1996) 22 ff. with references to the abundant literature.

[78] Cf., e.g., Karl Larenz, Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, 1995) 133 ff. as opposed to 187 ff.

[79] Cf., e.g., Fritz Ossenbühl, 'Gesetz und Recht – Die Rechtsquellen im demokratischen Rechtsstaat', in: Josef Isensee, Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. III (1988) § 61, nn. 35 ff.

[80] Of fundamental importance was the *Lüth* decision of the Federal Constitutional Court: BVerfGE 7, 198 ff.; on which see, e.g., David P. Curry, *The Constitution of the Federal Republic of Germany* (1994) 27 ff.; Ernst-Wolfgang Böckenförde, *Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz* (1989) 25 ff.

[81] The concept of *mittelbare Drittwirkung*, or indirect effect, of fundamental rights in the

ticularly malleable tools in this process. They have greatly facilitated the constitutionalisation of private law and have thus, on the whole, performed a very beneficial function.

In the second place it must be noted that German lawyers have become accustomed to thick layers of case law emerging from the interstices of their Code[82] and that they have learnt to cope with this phenomenon. Since the enactment of the Civil Code, countless decisions have relied, in one form or another, on § 242 BGB; and one attempt to record the relevant case law as comprehensively as possible has led to what many consider as the hypertrophy of legal commentary.[83] But despite appearances, the modern German lawyer is not faced with an impenetrable wilderness of single instances.[84] This is due to the endeavours by legal writers, operating in close interaction with the Federal Supreme Court, to discern the different functions of § 242, to categorise its various fields of application and to establish typical 'groups of cases' (*Fallgruppen*). This process of domestication (or 'concretisation'[85]) was stimulated by an influential study of the great legal historian *Franz Wieacker*[86] and it has led, generally speaking, to a more orderly and rational analysis.[87]

area of private law was developed by Günter Dürig, 'Grundrechte und Zivilrechtsprechung', in: *Festschrift für Hans Nawiasky* (1956) 158 ff. For a brief summary in English on the 'constitutionalization of private law', see Basil S. Markesinis, *A Comparative Introduction to the German Law of Torts* (3rd edn, 1994) 27 ff. See also Johannes Hager, 'Grundrechte im Privatrecht', *JZ* 1994, 373 ff. Generally on interpretation in conformity with the Constitution, see Robert Alexy, Ralf Dreier, 'Statutory Interpretation in the Federal Republic of Germany', in: D. Neil MacCormick, Robert S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (1991) 73 ff.

[82] John P. Dawson has referred to Germany's 'case-law revolution'; cf., in this context, the remarks in Ebke/Finkin (n. 77) 16 ff. and Zimmermann, (1994/95) 1 *Columbia Journal of European Law* 89 ff.; and see Reinhard Zimmermann, Nils Jansen, 'Quieta Movere: Interpretative Change in a Codified System', in: Cane/Stapleton (n. 35) 285 ff.

[83] Wilhelm Weber, in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (11th edn, 1961) § 242, a volume of more than 1,500 pages.

[84] Kötz, in: *Essays Fleming* (n. 35) 250.

[85] Hesselink (n. 35) 289. *Staudinger*/J. Schmidt (n. 61) refers to a 'Binnensystem' (inner system).

[86] *Zur rechtstheoretischen Präzisierung des § 242 BGB* (1956). Generally on the chances, and on the ways and means, of specifying the content of general provisions, see Franz Bydlinski, 'Möglichkeiten und Grenzen der Präzisierung aktueller Generalklauseln', in: Okko Behrends, Malte Diesselhorst, Ralf Dreier (eds.), *Rechtsdogmatik und praktische Vernunft – Symposium zum 80. Geburtstag von Franz Wieacker* (1990) 189 ff. See also, in this context, the remarks by John P. Dawson, 'The General Clauses, Viewed from a Distance', *RabelsZ* 41 (1977) 441 ff.; Ernst Zeller, *Treu und Glauben und Rechtsmißbrauchsverbot* (1981) 5 ff.

[87] This emerges very clearly from the way in which standard commentaries like Max Vollkommer, in: Jauernig, *Bürgerliches Gesetzbuch* (8th edn, 1997); *Palandt*/Heinrichs (n. 67); Olaf Werner, in: Erman, *Handkommentar zum Bürgerlichen Gesetzbuch*, vol. I (9th edn, 1993) and Günter H. Roth, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (3rd edn,

Thus, it is generally recognised today that § 242 BGB operates *supplendi causa* (so as to supplement the law).[88] It specifies the way in which contractual performance has to be rendered and it gives rise to a host of ancillary, or supplementary, duties that may arise under a contract: duties of information, documentation, co-operation, protection, disclosure, etc.[89] These duties can also apply in the precontractual situation[90] and they may extend after the contract has been performed (*post contractum finitum*).[91] In the second place, § 242 BGB serves to limit the exercise of contractual rights.[92] German commentators, in this context, very widely use the term *unzulässige Rechtsausübung*[93] (inadmissible exercise of a right) as a *nomen collectivum* but they also frequently refer to *Rechtsmißbrauch* (abuse of a right).[94] Thus, for instance, going against one's own previous conduct

1994) analyse and classify the case material. Ebke/Steinhauer (n. 30) and Schlechtriem (n. 32) follow, essentially, the same pattern. A different theoretical approach is adopted by *Staudinger*/J. Schmidt (on which, see n. 143 below). Cf. also Hesselink (n. 35) 290 ff. who refers to the trichotomy of functions usually assigned to good faith (interpretative, supplementative and limitative) as constituting the European 'common core' (that the trichotomy adopted in German law, following Franz Wieacker, is slightly different, is a consequence of the fact that interpretation, according to the principles of good faith, is not based on § 242 but on § 157 BGB); and see the discussion by *Staudinger*/J. Schmidt (n. 61) nn. 113 ff. and Ranieri, *RIDC* 1998, 1070 ff.

88 Cf. Wieacker (n. 68) 21 ff. (who alludes to the description of the (praetorian) *ius honorarium* in classical Roman law: 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam': Pap. D. 1, 1, 7, 1).

89 *Jauernig*/Vollkommer (n. 87) § 242, nn. 10 ff.; *Palandt*/Heinrichs (n. 67) § 242, nn. 23 ff.; *Erman*/Werner (n. 87) § 242, nn. 50 ff.; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 109 ff.; cf. also Ebke/Steinhauer (n. 30) 177 ff.

90 This is the field of application of *culpa in contrahendo*; on which cf. the German report to case 1.

91 *Jauernig*/Vollkommer (n. 87) § 242, nn. 28 ff.; *Palandt*/Heinrichs (n. 67) § 276, n. 121; *Erman*/Werner (n. 87) § 242, n. 58; *Münchener Kommentar*/Roth (n. 87) § 242, n. 117 and *passim*.

92 Wieacker (n. 68) 24 ff.

93 *Jauernig*/Vollkommer (n. 87) § 242, nn. 32 ff.; *Palandt*/Heinrichs (n. 67) § 242, nn. 38 ff.; *Erman*/Werner (n. 87) § 242, nn. 73 ff.; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 255 ff.

94 Abuse of a right (*abus de droit*), therefore, does not in German law constitute a special defence outside the range of application of § 242 BGB but constitutes a sub-category of cases covered by this general provision. Since it does not have a specific technical significance, use of the term *Rechtsmißbrauch* differs considerably (cf., e.g., *Münchener Kommentar*/Roth (n. 87) § 242, nn. 280 ff. who refers to 'Rechtsmißbrauch im engen Sinne' (abuse of a right in the narrow sense)). See also § 226 BGB as an emanation of the idea that a right must not be abused (n. 67 above) and see, on abuse of rights in general, the contributions by Paul A. Crépau, Antonio Gambaro, Ergun Özsunay, Shmuel Shilo, Fritz Sturm and A. N. Yiannoloulos, in: *Aequitas and Equity* (n. 35) 583 ff. Even though *Rechtsmißbrauch* is the German translation of *abus de droit*, it has a different significance; see, in particular, Ranieri, *RIDC* 1998, 1082 ff. The Swiss Civil Code contains both a good

(*venire contra factum proprium*) is frowned upon[95] and so is relying on a right which has been dishonestly acquired (*nemo auditur turpitudinem suam allegans*),[96] demanding something which has to be given back immediately (*dolo agit qui petit quod statim redditurus est*),[97] proceeding ruthlessly and without due consideration to the reasonable interests of the other party (*inciviliter agere*),[98] or reacting in a way which must be considered as excessive when compared with the event occasioning the reaction (*Übermaßverbot*).[99] Lapse of time may also lead to a loss of right even before the relevant period of prescription has expired (*Verwirkung*).[100] We are dealing here with the core area of application of the old *exceptio doli*. Many rules and legal maxims of the *ius commune* thus continue to apply under the guise of § 242 BGB. Finally, and most problematically, § 242 BGB has also been used to interfere in contractual relations in order to avoid grave injustice.[101] The modern German version of the *clausula rebus sic stantibus*, the doctrine of the collapse of the underlying basis of the transaction (*Wegfall der Geschäftsgrundlage*),[102] owes its origin to this corrective function

faith clause (Art. 2 I ZGB) and a separate provision dealing with the abuse of a right (Art. 2 II ZGB). For background discussion, see Huwiler (n. 62) 57 ff.; Pio Caroni, *Einleitungstitel des Zivilgesetzbuches* (1996) 189 ff. and the contributions by Sturm and Gambaro mentioned earlier in this note.

[95] *Jauernig*/Vollkommer (n. 87) § 242, nn. 48 ff.; *Palandt*/Heinrichs (n. 67) § 242, nn. 55 ff.; *Erman*/Werner (n. 87) § 242, n. 79; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 322 ff. The prohibition of *venire contra factum proprium* has recently been investigated in depth by Reinhard Singer, *Das Verbot widersprüchlichen Verhaltens* (1993).

[96] *Jauernig*/Vollkommer (n. 87) § 242, n. 45; *Palandt*/Heinrichs (n. 67) § 242, nn. 42 ff.; *Erman*/Werner (n. 87) § 242, n. 80; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 286 ff.

[97] *Jauernig*/Vollkommer (n. 87) § 242, n. 39; *Palandt*/Heinrichs (n. 67) § 242, n. 52; *Erman*/Werner (n. 87) § 242, n. 81; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 435 ff. The rules on set-off are an emanation of this principle: see Reinhard Zimmermann, 'Die Aufrechnung: Eine rechtsvergleichende Skizze zum europäischen Vertragsrecht', in: *Festschrift für Dieter Medicus* (1999) 715 f.

[98] *Jauernig*/Vollkommer (n. 87) § 242, n. 43; *Palandt*/Heinrichs (n. 67) § 242, nn. 50 f.; *Erman*/Werner (n. 87) § 242, n. 83; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 280 ff.

[99] *Jauernig*/Vollkommer (n. 87) § 242, n. 40; *Palandt*/Heinrichs (n. 67) § 242, nn. 53 f.; *Erman*/Werner (n. 87) § 242, n. 71; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 438, 442 ff.

[100] *Jauernig*/Vollkommer (n. 87) § 242, nn. 53 ff.; *Palandt*/Heinrichs (n. 67) § 242, nn. 87 ff.; *Erman*/Werner (n. 87) § 242, nn. 84 ff.; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 360 ff. On *Verwirkung*, see also Gerhard Kegel, 'Verwirkung, Vertrag und Vertrauen', in: *Festschrift für Klemens Pleyer* (1986) 513 ff.; Ranieri, *RIDC* 1998, 1066 ff. ('. . . sans doute l'un des développements jurisprudentiels les plus importants que les juges allemands ont effectués dans l'interprétation du § 242 du BGB, comme norme générale pour tout le droit privé').

[101] Wieacker (n. 68) 36 ff.

[102] On which see Rüthers (n. 71) 38 ff.; for the historical background, see *Law of Obligations* (n. 45) 579 ff.; and see the German report to case 25.

of § 242 BGB. It is obvious, however, that by arrogating to themselves the right to adjust the contract, the courts are also interfering with the law as laid down by the draftsmen of the BGB.[103] Not unlike the Roman *praetor*, they have thus acted to *correct* the civil law (*iuris civilis corrigendi causa*).[104]

4. Doctrinal innovations

This is, of course, merely the roughest survey as to how the requirements of § 242 BGB have been specified over the years. *Wegfall der Geschäftsgrundlage* has become a sophisticated doctrine in its own right even though it is still discussed, for the sake of convenience, under the umbrella of § 242 BGB.[105] Both the consequences of the Second World War and of the reunification of Germany[106] have provided opportunities for its deployment. But *Wegfall der Geschäftsgrundlage* is not confined to the cataclysmic events in the history of a nation: cases of hardship resulting from an unforeseeable change of circumstances have come before the courts at all times and quite independently of war, inflation and change of political system. Judicial revaluation of the type undertaken by RGZ 107, 78[107] (not, strictly speaking, a case of *Wegfall der Geschäftsgrundlage* since the Imperial Court based its decision directly upon § 242 BGB) has remained a very exceptional *cause célèbre*; it is today, as one of the leading commentaries puts it reassuringly, of only historical significance.[108] Closely related to *Wegfall der Geschäftsgrundlage* is the right to terminate a long-term contractual relationship 'for an important reason' without the necessity to observe a period of notice.[109] This is specifically laid down with regard to leases of accommodation (§ 554 a BGB), contracts of service (§ 626 BGB)

[103] They, after all, had decided not to adopt the *clausula rebus sic stantibus* (nor Bernhard Windscheid's doctrine of tacit presupposition). [104] Cf. n. 88 above.

[105] *Jauernig*/Vollkommer (n. 87) § 242, nn. 64 ff.; *Palandt*/Heinrichs (n. 67) § 242, nn. 110 ff.; *Erman*/Werner (n. 87) § 242, nn. 166 ff.; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 496 ff. See also the excellent discussion, in English, by Werner Lorenz, 'Contract Modification as a Result of Change of Circumstances', in: Beatson/Friedmann (n. 30) 357 ff.; Ebke/Steinhauer (n. 30) 180 ff. Both the Principles of European Contract Law (Art. 2.117) and the Principles of International Commercial Contracts (Arts. 6.2.1 ff.) contain specific provisions dealing with hardship as a result of change of circumstances and have thus separated the matter from the general issue of good faith in contract law; for comment, see *JZ* 1995, 486 f.

[106] *Palandt*/Heinrichs (n. 67) § 242, nn. 152 a ff.; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 626 ff. [107] Cf. n. 72 above. [108] *Palandt*/Heinrichs (n. 67) § 242, n. 172.

[109] See, e.g., *Palandt*/Heinrichs (n. 67) § 242, n. 120; *Münchener Kommentar*/Roth (n. 87) § 242, nn. 583 ff.; *Staudinger*/J. Schmidt (n. 61) § 242, nn. 1383 ff.; cf. also, in this context, the explanation in the German report to case 7.