Good Faith in European Contract Law

edited by
Reinhard Zimmermann
and Simon Whittaker
# Contents

*General editors’ preface*  
*Preface*  
*Contributors*  
*Table of legislation*

## Part I  Setting the Scene

*Abbreviations*  

1. **Good faith in European contract law: surveying the legal landscape**  
   *Simon Whittaker and Reinhard Zimmermann*  
   p. 7

2. **Bona fides in Roman contract law**  
   *Martin Josef Schermaier*  
   p. 63

3. **Good faith in contract law in the medieval *ius commune***  
   *James Gordley*  
   p. 93

4. **The conceptualisation of good faith in American contract law: a general account**  
   *Robert S. Summers*  
   p. 118

## Part II  The Case Studies

*Contributors to the case studies*  
*Abbreviations*  
*Bibliographies*  

Case 1: Courgettes perishing  
*Discussions*  
*Editors’ comparative observations*  

vii
Case 2: Degas drawing
  Discussions 208
  Editors’ comparative observations 233

Case 3: Breaking off negotiations
  Discussions 236
  Editors’ comparative observations 256

Case 4: Formalities I
  Discussions 258
  Editors’ comparative observations 280

Case 5: Formalities II
  Discussions 281
  Editors’ comparative observations 289

Case 6: One bag too few
  Discussions 292
  Editors’ comparative observations 303

Case 7: Late payment of rent
  Discussions 305
  Editors’ comparative observations 320

Case 8: Delivery at night
  Discussions 322
  Editors’ comparative observations 330

Case 9: Uniformity of outfit
  Discussions 331
  Editors’ comparative observations 346

Case 10: Dissolution of partnership
  Discussions 348
  Editors’ comparative observations 360

Case 11: Untested motors working
  Discussions 362
  Editors’ comparative observations 377

Case 12: No use for borrowed motor bike
  Discussions 379
  Editors’ comparative observations 390
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Topic</th>
<th>Discussions</th>
<th>Editors’ comparative observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>Inspecting the books</td>
<td>391</td>
<td>402</td>
</tr>
<tr>
<td>14</td>
<td>Producing new bumpers</td>
<td>404</td>
<td>417</td>
</tr>
<tr>
<td>15</td>
<td>Two cracks in a shed</td>
<td>419</td>
<td>432</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>433</td>
</tr>
<tr>
<td>16</td>
<td>Drug causing drowsiness in driving</td>
<td>439</td>
<td>456</td>
</tr>
<tr>
<td>17</td>
<td>Bank miscrediting customer</td>
<td>458</td>
<td>468</td>
</tr>
<tr>
<td>18</td>
<td>Access to medical records</td>
<td>470</td>
<td>478</td>
</tr>
<tr>
<td>19</td>
<td>Doctors swapping practices</td>
<td>481</td>
<td>492</td>
</tr>
<tr>
<td>20</td>
<td>Prescription I</td>
<td>493</td>
<td>507</td>
</tr>
<tr>
<td>21</td>
<td>Prescription II</td>
<td>508</td>
<td>513</td>
</tr>
<tr>
<td>22</td>
<td>Sitting on one’s rights</td>
<td>515</td>
<td>530</td>
</tr>
<tr>
<td>23</td>
<td>Long-term business relationships I</td>
<td>532</td>
<td>545</td>
</tr>
<tr>
<td>Case Number</td>
<td>Case Title</td>
<td>Discussions</td>
<td>Editors' comparative observations</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------------------------------------</td>
<td>-------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>24</td>
<td>Long-term business relationships II</td>
<td>546</td>
<td>554</td>
</tr>
<tr>
<td>25</td>
<td>Effect of inflation</td>
<td>557</td>
<td>576</td>
</tr>
<tr>
<td>26</td>
<td>‘Sale’ of soccer player</td>
<td>578</td>
<td>596</td>
</tr>
<tr>
<td>27</td>
<td>Disability insurance</td>
<td>598</td>
<td>609</td>
</tr>
<tr>
<td>28</td>
<td>Crop destroyed by hail</td>
<td>611</td>
<td>621</td>
</tr>
<tr>
<td>29</td>
<td>Divorce settlement</td>
<td>623</td>
<td>639</td>
</tr>
<tr>
<td>30</td>
<td>Penalty for late delivery</td>
<td>640</td>
<td>651</td>
</tr>
</tbody>
</table>

Coming to terms with good faith 653

Index 703
1 Good faith in European contract law: surveying the legal landscape

SIMON WHITTAKER AND REINHARD ZIMMERMANN

I. A change in perspective p. 8
II. Good faith: common core or imposition? p. 12
III. Bona fides p. 16
IV. Treu und Glauben p. 18
1. ‘Baneful plague’ or ‘queen of rules’? p. 18
2. Adjusting exchange rates p. 20
3. Domesticating the monster p. 22
4. Doctrinal innovations p. 26
5. An open norm p. 30
V. Bonne foi p. 32
1. The Code civil and its background p. 32
2. The abuse of rights, accessory obligations and the control of unfair contract terms p. 34
3. How wide is the impact of good faith in French contract law? p. 37
VI. Good faith p. 39
1. The absence of a general principle of good faith p. 39
2. The law merchant, Lord Mansfield and a looser approach to ‘fraud’ p. 41
3. The modern law p. 44
VII. More national variations on the common theme p. 48
VIII. The genesis of this book p. 57

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. The Council of the European Communities enacts directives deeply affecting core areas of the national legal systems of the member states. 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. The so-called Lando Commission has produced Part I of a Restatement of European Contract Law, is in the process of publishing the second part and has started work on the remaining areas of general contract law.


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


\(^6\) 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).


\(^8\) *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.


intellectual contact with comparative and modern private lawyers. 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), Latin America, or the mixed legal systems in South Africa, Scotland, Louisiana, Quebec.


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).


or Israel. 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. 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) and is starting to give rise to a considerable amount of case law. The International Institute for the Unification of Private Law has published a set of Principles of International Commercial Contracts. Somewhat surprisingly, in view of widespread scepticism expressed in the 1960s and '70s, the idea of codification has been regaining ground internationally. The new Dutch Burgerlijk Wetboek (B.W.) has aroused considerable interest but it is neither the only nor even the latest recent codification. The academic lawyer today does indeed live in a golden age.

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
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. 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, 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’, nor Kötz, ‘Europäisches Vertragsrecht’ contain a chapter on ‘good faith’. Comparative studies normally focus on specific subject matters, problem areas and real life sit-


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. 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. 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’. 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.


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 ‘each 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 gebondenheid (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

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. 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 Ai Ai factum sit neque fiat’ (if in this matter nothing has been done, or is being done, in bad faith by the plaintiff). 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. 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. 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. 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. 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 Nm Nm Ao Ao 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.
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. For details, see ibid., 68 ff.
46 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*.\(^{56}\)

---

\(^{48}\) 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.


\(^{55}\) For all details, see the contribution by James Gordley to the present volume.

spiritus vivificans commercii’ (good faith is the prime mover and life-giving 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.
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.


\(^{65}\) 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. 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. 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). 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’; on the other hand, it was celebrated as the ‘queen of rules’ 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. 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 (Reichsgerichtsräterkommentar)*, 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 [Schmidt (n. 61)] § 242, nn. 51 ff.


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

70 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 impasse. 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.\textsuperscript{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.\textsuperscript{73}

This decision hit the German legal community like a bombshell.\textsuperscript{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’.\textsuperscript{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

\textsuperscript{72} RGZ 107, 78 ff. Differently still RGZ 101, 141 ff.
\textsuperscript{73} Cf. also the discussion and further references in Reichsgerichtsrätekommentar (n. 66) § 242, 5 b–d (pp. 368 ff.).\textsuperscript{74} Rüthers (n. 71) 66 (with references).
\textsuperscript{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. 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.

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. 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. 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. Thus, for example, the entire body of private law has to be interpreted in the spirit of the fundamental rights, 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).
78 Cf., e.g., Karl Larenz, Claus-Wilhelm Canaris, Methodenlehre der Rechtswissenschaft (3rd edn, 1995) 133 ff. as opposed to 187 ff.
81 The concept of mittelbare Drittwirkung, or indirect effect, of fundamental rights in the
particularly 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 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. But despite appearances, the modern German lawyer is not faced with an impenetrable wilderness of single instances. 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’) was stimulated by an influential study of the great legal historian Franz Wieacker and it has led, generally speaking, to a more orderly and rational analysis.


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.


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

85 Hesselink (n. 35) 289. Staudinger/J. Schmidt (n. 61) refers to a ‘Binnensystem’ (inner system).


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). 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. These duties can also apply in the precontractual situation and they may extend after the contract has been performed (*post contractum finitum*).

In the second place, § 242 BGB serves to limit the exercise of contractual rights. German commentators, in this context, very widely use the term *unzulässige Rechtsausübung* (inadmissible exercise of a right) as a *nomen collectivum* but they also frequently refer to *Rechtsmissbrauch* (abuse of a right). 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, R IDC 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, R IDC 1998, 1082 ff. The Swiss Civil Code contains both a good
(venire contra factum proprium) is frowned upon and so is relying on a right which has been dishonestly acquired (nemo auditur turpitudinem suam alle- 
gans), demanding something which has to be given back immediately (dolo agit qui petit quod statim redditurus est), proceeding ruthlessly and without due consideration to the reasonable interests of the other party (inciviliter agere), or reacting in a way which must be considered as excessive when compared with the event occasioning the reaction (Übermaßverbot). Lapse of time may also lead to a loss of right even before the relevant period of prescription has expired (Verwirkung). 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. 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), owes its origin to this corrective function.
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. Not unlike the Roman praetor, they have thus acted to correct the civil law (iuris civilis corrigendi causa).

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. Both the consequences of the Second World War and of the reunification of Germany 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 (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. 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. 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 JB 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. Schmidt (n. 61) § 242, nn. 1383 ff.; cf. also, in this context, the explanation in the German report to case 7.