

Good Faith, the DCFR and Shipping Law¹

I. Introduction

The purpose of this article is to investigate the possible effect on English shipping law of one aspect of European contract harmonisation, namely the idea of good faith that comes as part of the package. This is not too far-fetched. Among other proposals,² the Principles of European Contract Law (PECL)³ and the vastly more ambitious Draft Common Frame of Reference (DCFR), a document not limited to contracts and with a distinct whiff of a European Civil Code in waiting,⁴ are on the table. Both have a great deal to say on the subject of good faith.

II. Background: English law, civilians and good faith

The words ‘good faith’ frequently appear in English law: furthermore, English law often shares rules which would be regarded by a civilian as stemming from good faith. But this does not mean that England⁵ has anything like a doctrine of good faith as understood elsewhere. On the contrary: there are two vital differences.

First, ‘good faith’ is used in England narrowly⁶ to refer to behaviour in specific contexts: for instance, unawareness of a given state of affairs (witness the protection given in many cases to a ‘good faith’ purchaser⁷ or the

rule that the marine assured’s ‘good faith’ duty of disclosure is limited to facts known to him⁸), or an obligation attaching to a particular type of transaction (for example, a receiver’s duty not to misuse a power of sale⁹). Wider appeal to good faith as a generalised free-standing principle supplementing or qualifying the exercise of particular rights is impermissible.¹⁰

Secondly, while English court decisions often replicate the results which civilians obtain by applying the principle of good faith, when this happens the courts articulate specifically what rule is being applied: they see no need to generalise further by invoking any single umbrella concept called ‘good faith’ or anything else. So (for instance) a contractor’s implicit duty not to subvert the

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2. Notably the proposed 2011 Common European Sales Law adopted by the European Parliament in February 2014.

3. See e.g. O. Lando, ‘Principles of European Contract Law: An Alternative to or a Precursor of European Legislation’ (1992) 40 *Am. J. Comp. L.* 573, 577; J. Smits (ed.), *The Need for a European Contract Code*, Chs 1, 2. Less radically, the Principles can be presented as merely reflecting hidden similarities within European legal thought: see J. Basedow, ‘Codification of Private Law in the EU: The Making of a Hybrid’ (2001) 9 *Eur. Rev. Priv. L.* 35.

4. In particular it incorporates a good deal of the EU *acquis*, and greatly expands the contract section to encompass a good many specific types of contract, as well as general contract principles. See generally H. Eidenmüller et al., ‘The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems’ (2008) 28 *OJLS* 659, esp. 669 ff; N. Jansen & R. Zimmermann, ‘“A European Civil Code in All But Name”: Discussing the Nature and Purposes of the Draft Common Frame of Reference’ (2010) *C.L.J.* 98. S. Whittaker, ‘A framework of principle for European contract law?’ (2009) 125 *L.Q.R.* 615, 623-624 regards with some disbelief the stout denial of the European Commission that a code is envisaged as the eventual outcome.

5. Note the limitation to English law. Other common lawyers find it easier to understand. US orthodoxy, for example, now recognises at least a limited doctrine, both at common law (e.g. *Wigand v Bachmann-Bechtel Brewing Co*, 222 NY 272 at 277 (1918), *Feld v Levy & Sons*, 37 NY 2d 466, 470 (1975)), and under the UCC, § 1-203 and the Restatement 2d of Contracts, § 205: see generally R. Summers, ‘“Good faith” in General Contract Law and the Sales Provision of the Uniform Commercial Code’, 54 *Va L.Rev.* 195 (1968) and J. Calamari & J. Perillo, *The Law of Contracts* (4th edn), 457 *et seq.*

6. For a useful summary, see *Max Planck Encyclopedia of European Private Law*, Vol. I, pp. 792-793; also A. Forte (ed.), *Good Faith in Contract and Property Law* (1999), Chapter 3.

7. E.g. Sale of Goods Act 1979, ss. 23-25.

8. Marine Insurance Act 1906, ss. 17 (marine insurance comports utmost good faith) and 18(1) (assured to disclose relevant facts *known to him*).

9. See e.g. *Downsview Nominees Ltd v First City Corporation Ltd* (1993) AC 295, 312 (Lord Templeman). A receiver in this context is a person appointed by a creditor or lender under a power to take over management of a debtor’s property for the creditor’s benefit.

10. See *Chitty on Contracts* (31st edn, 2012), § 1-039 *et seq.*; and e.g. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) QB 433, 439 (Lord Bingham MR); *Timeload Ltd v British Telecommunications Plc* (1995) *E.M.L.R.* 459, 468 (Lord Bingham MR); *ING Bank NV v. Ros Roca SA* (2011) *EWCA Civ* 353, (2012) 1 *W.L.R.* 472 at [92] (Rix LJ); *Horkulak v. Cantor Fitzgerald International Ltd* (2004) *EWCA Civ* 1287; (2005) *I.C.R.* 402 at [30] (Potter LJ); *Chitty on Contracts* (31st edn), Vol. 1, para. 1-039. The point is not lost on the drafters of the DCFR: *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (hereafter DCFR Commentary), 36. This is not entirely uncontroversial: see e.g. *Yam Seng Pte Ltd v. International Trade Corp Ltd* (2013) *EWHC* 111 (QB), (2013) 1 *C.L.C.* 662 at [120]-[155] (Leggatt J).

purpose of a contract,¹¹ the rule protecting those who rely on assertions of fact¹² or promises not to invoke rights such as prescription,¹³ and the principle that contracts are construed according to business realities and the parties' reasonable understanding¹⁴ apply in England as elsewhere. But they are called what they are: the implied term of co-operation, estoppel, and the rule of business interpretation. It would never occur to an English lawyer to unite them under one rubric.¹⁵

The difference with the civilian approach is patent. Civil lawyers universally accept some generalised requirement for parties to act in good faith. Admittedly its width varies. In France, for example, until recently the doctrine was of surprisingly little importance in practice,¹⁶ whereas in Germany it has always marked a central point of departure,¹⁷ affecting all rights of any description, whatever their source.¹⁸ Yet again, in the contractual context, while it is generally accepted that the duty of good faith cannot be excluded as such, its practical constraint on freedom of contract varies between jurisdictions. Some allow good faith effectively to be controlled by the terms of the contract: by contrast, others (in particular German law) often regard attempts to modify particular contractual duties as ipso facto inadmissible bad faith.¹⁹

III. PECL, DCFR and good faith

There is no doubt where the DCFR stands on good faith. (We will concentrate here on the DCFR, although we will also periodically mention the PECL, the contractual provisions of which are similar though not identical.) The basis is civilian, not common law: good faith is both general and fundamental.²⁰ It pervades everything, starting with a general provision requiring everyone 'to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship', which may not be 'excluded or limited by contract or other juridical act'.²¹ This is supplemented by specific provisions mandating good faith in the pursuit of pre-contractual negotiations;²² in interpreting contracts and implying terms;²³ in requiring co-operation with co-contractors;²⁴ in cases involving conditional contracts,²⁵ error,²⁶ fraud,²⁷ and change of circumstances;²⁸ and in the treatment of exculpatory clauses.²⁹ Moreover, it is fairly clear that the inspiration is the German view of good faith. Both share the idea that good faith qualifies all rights;³⁰ the explicit incorporation of good faith duties in numerous particular provisions,³¹

11. E.g. *Cory & Son Ltd v. London Corporation* (1951) 2 KB 476, 484 (Lord Asquith); *CEL Group Ltd v. Nedlloyd Lines UK Ltd* (2003) EWCA Civ 1716; (2004) 1 Lloyd's Rep. 381; *Chitty on Contracts* (31st edn, 2012), § 13-013.
12. A rule neatly summarised in *Spencer Bower on Estoppel by Representation* (4th edn), Ch.1; and epitomised by cases such as *Pickard v. Sears* (1837) 6 A & E 469.
13. See e.g. *The August Leonhardt* (1985) 2 Lloyd's Rep. 28, esp. at 33-35 (Kerr LJ); also *The Antares (No 2)* (1986) 2 Lloyd's Rep. 633; M. Canny, *Limitation of Actions in England and Wales*, paras 1.13-1.14.
14. See in particular *Investors Compensation Scheme Ltd v. West Bromwich Building Society* (1998) 1 WLR 896, 912-913 (Lord Lloyd).
15. These examples are taken, as any German lawyer will recognise, because they are regarded as three of the best-known examples of the application to contracts of the general duty of good faith under BGB, § 242.
16. See P. Malaurie & L. Aynès, *Les Obligations*, 4th edn, § 764. But times are changing: *ibid.* or a reference to the application of good faith varies enormously between different systems, see *Max Planck Encyclopedia of European Private Law*, Vol. I, pp. 791-792.
17. 'The principle of good faith anchored in § 242 BGB puts an intrinsic limitation on the content of all rights' ('Das in § 242 BGB verankerte Prinzip von Treu und Glauben bildet eine allen Rechten immanente Inhaltsbegrenzung'). See BGH 16 February 2005 – IV ZR 18/04, 2005 TranspR 170, 172 quoting from *Palandt v. Heinrichs*, BGB, 64th edn, § 242 Rn. 38. See too BGE 83 II 345, 348 (17 June 1957) (requirement of good faith under Art. 2 of the Swiss Civil Code graphically described as a 'basic assumption of the most general possible type' ('Grundsatz allgemeinsten Art')).
18. Although BGB, § 242, is in terms limited to the performance of obligations ('The debtor is bound to perform in good faith ...' ('Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben ... es erfordern')), it has been consistently interpreted as qualifying the exercise of all rights.
19. As will appear below, in connection with matters such as carriers' attempts to exonerate themselves from the obligation to provide a seaworthy vessel.
20. DCFR Commentary, 67-68, referring to a fundamental principle of '[n]ot allowing people to rely on their own unlawful, dishonest or unreasonable conduct.'
21. DCFR, III-1:103. Parallel is PECL, 1:201: '(1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty.'
22. DCFR, II-3:301 (also PECL, 2:301).
23. DCFR, II-8:102(1)(g) (also PECL, 5:102).
24. DCFR, III-1:104. This is in all but name a duty of good faith, even if the word 'good faith' is not used: see DCFR 715 and e.g. L. Macgregor, *Report on the Draft Common Frame of Reference: a report prepared for the Scottish Government*, University of Edinburgh, Part 4.
25. DCFR, III-1:108(4) (also PECL, 16:102).
26. DCFR, II-7:201 (also PECL, 4:103).
27. DCFR, II-7:205 (also PECL, 4:107).
28. DCFR, III-1:110 (also PECL, 6:111).
29. See DCFR, II-7:215, II-9:405 (also PECL, 4:110, 4:118, 8:109). Similarly with terms exempting from non-contractual liabilities: DCFR, III-3:105 and VI-5:401.
30. The width of DCFR, III-1:103, under which a person 'has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship', is a clear deliberate parallel to the references in note 16 above.
31. Thus, as with the DCFR, good faith under German law explicitly extends to the rules of contract interpretation (BGB, § 157); the duty not to subvert conditional contracts (BGB, § 162); the test of an unfair and unenforceable standard term (BGB, § 307); what happens in the case of change of circumstances (BGB, § 313); and the right to withhold performance (BGB, § 320).

such as exoneration clauses;³² and a clear willingness to allow good faith considerations to trump commercial freedom of contract.³³ The point is significant, since it means that when considering the possible effect of good faith à la DCFR on English law, reference to German and related authorities on the matter (which are extensive) is likely to be particularly relevant.

IV. The effect on English shipping law

A. Starting point: change may be surprisingly limited

Despite what appears above, introducing good faith as envisaged by the DCFR would not be entirely cataclysmic. There are two reasons for this. One is hinted at above: many classic applications of good faith doctrine, even in its extensive DCFR version, are familiar to English lawyers under another name. Commercial examples include a contractor's good faith duty to co-operate³⁴ and not to subvert the contract,³⁵ appearing in England in the guise of implied terms;³⁶ the prohibition on invoking

a time-bar after lulling a claimant into thinking it will not be invoked,³⁷ or invoking tardy payment of instalments having repeatedly accepted late payments earlier,³⁸ reproduced in England through estoppel.³⁹ And so also with the rule that a recipient of a time-critical notice cannot buy time by deliberately delaying receipt;⁴⁰ and that one cannot connive at breach of a carriage contract and then claim damages for it,⁴¹ deny a contractual relationship after dealing on the basis that it exists,⁴² or complain of carriage of containers above deck on a container vessel where everyone knows that it is standard practice.⁴³ Or yet again, take the case where a goods owner acquiesces in carriage being subcontracted on standard terms. Even absent a contract between owner and actual carrier, the owner cannot disregard the subcontracted terms limiting the carrier's liability, the reason being good faith in Germany⁴⁴ and in England the doctrine of sub-bailment on terms.⁴⁵

The other reason is that the undoubted power of the good faith doctrine to trench on freedom of contract, or inval-

32. Compare DCFR, II-9:405 ('A term in a contract between businesses is unfair ... if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing') with BGB, § 307 ('Provisions in a party's standard business terms are ineffective if they unduly disadvantage the other party contrary to the requirements of good faith and fair dealing' ('Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen')).

33. E.g. BGB, § 307 (see above). For instances see BGH 28 February 1983, II ZR 31/82, *VersR* 1983, 549 (charterparty limitation of seaworthiness obligation annulled: cf. too OLG Köln 3 July 1998, 3 U 105/93); BGH 20 March 1978, II ZR 19/76 (contractual time-bar in inland water carriage disregarded); also the famous Reichsgericht case of the *Hansa*, 117 RGZ 354, 356 (29 June 1927) (no right to cancel charter for harmlessly late delivery, despite contract term to that effect).

34. See DCFR, III-1:104.

35. Above, note 10.

36. See in particular *Chitty on Contracts* (31st edn, 2012), § 13-013; *CEL Group Ltd v. Nedlloyd Lines UK Ltd* (2004) 1 *Lloyd's Rep.* 381 (sea carrier's duty to entrust all onshore haulage business requirements to claimant infringed when, owing to merger, it argued that it no longer had any requirements to entrust). Standard implied terms necessary to make a contract work come in this category: e.g. the wharfinger's duty to provide a safe mooring (*The Moorcock* (1889) 14 PD 64), or the duty on a fob buyer to nominate a ship (*The Kriti Rex* (1996) 2 *Lloyd's Rep.* 171). See DCFR Commentary, 606, 713.

37. See e.g. OLG Frankfurt 15 September 1999 – 21 U 259/98 (time-bar under Warsaw Convention); also OLG Köln, *VersR* 1970, 1005 and O. Vortisch & W. Bemm, *Binnenschiffahrtsrecht: Kommentar*, para. 118, p. 627 (inland water transport); DCFR Commentary, 706-707.

38. OLG Nürnberg 22 June 2010 – 13 U 947/10, 10 *MDR* 2010, 1442.

39. See the English cases cited at note 12 above; also, e.g., *The Ion* (1980) 2 *Lloyd's Rep.* 245 (Hague Rules time-bar under charter); A. McGee, *Limitation Periods* (6th edn, 2010), § 21-020. Similarly, under both systems a promise not to rely on a time-bar can be withdrawn (BGH 19 April 2001, I ZR 340/98, *TranspR* 2001, 375 and dicta in *The Ion* (1980) 2 *Lloyd's Rep.* 245, 250-251 clearly accepting the same principle).

40. One of the few examples from shipping law in the DCFR Commentary: see p. 136 (shipowner deliberately delaying picking up charterer's telephone message extending charter). Compare the similar conclusion on an analogous point (receipt of a notice of withdrawal) in *The Brimnes* (1975) *QB* 929, 945-946.

41. BGH 27 February 2003, I ZR 145/00, *TranspR* 2003, 298, 299 (carrier in Germany conniving in parking of vehicle by sub-contractor in ill-secured compound owned by carrier, contrary to strict terms of sub-contract). Compare the English authorities saying the same thing in *Hickman v. Haynes* (1875) LR 10 CP 598, 604; and *The Kanchenjunga* (1989) 1 *Lloyd's Rep.* 354, 358 (Lloyd LJ) (affirmed (1990) 1 *Lloyd's Rep.* 391).

42. See the German land carriage decision in BGH 6 December 2007 – I ZR 174/04 (good faith duty means inveterate practice may put responsibility for IT equipment dropped during loading on trucker, despite risk normally being on shipper under HGB 412(1)). In England cf. *The Vistafjord* (1988) 2 *Lloyd's Rep.* 343 (assumption that different contractual regime applied: parties bound as if it did); *The Henrik Sif* (1982) 1 *Lloyd's Rep.* 456 (estoppel preventing reliance on demise clause).

43. Bad faith in Germany: OLG Hamburg 4 August 2000, 6 U 184/98. For the English reasoning see N. Gaskell, R. Asariotis & Y. Baatz, *Bills of Lading: Law and Contracts*, para. 10.28.

44. So held in Germany: see the colourful land carriage decision in KG Berlin 19 March 1998 – 2 U 4685/97 (owner of Renaissance sculpture bound as a matter of good faith by terms of subcontracted carriage for exhibition in Frederick the Great's erstwhile palace at Sans-Souci at Potsdam); also e.g. BGH 21 December 1993, VI ZR 103/93, *TranspR* 1994, 162, 166. But this applies only as against the subcontractor, not the head carrier: see OLG Hamburg 10 April 2008 – 6 U 90/05, 2008, *TranspR* 213, 216.

45. See notably *The Pioneer Container* (1994) 2 AC 324; N. Palmer, *Bailment* (3rd edn, 2009), § 20-021 *et seq.*

idate the unjustified exercise of an otherwise clear right,⁴⁶ is balanced by hesitancy in its exercise.⁴⁷ In Germany, footing or undeserving attacks on contract terms on good faith grounds are regularly rejected,⁴⁸ the tendency being instead to accept that good faith allows their application where there is good commercial reason to use them⁴⁹ or where they deal with matters specifically exempted from regulation under international transport regimes.⁵⁰ The same goes for good faith challenges to the exercise of rights;⁵¹ it is thus unobjectionable to refuse to perform a substantial contract of sale where a relatively small part of the price remains outstanding,⁵² to insist on strict compliance with payment timetables in settlement agreements,⁵³ or (in the case of an insurer) to deny cover when premiums are overdue, even if they are hurriedly paid shortly afterwards.⁵⁴

B. Moving on: some significant effects of a requirement of good faith

Nevertheless, in a number of areas the introduction of good faith on the model of the DCFR may well have a distinctly unsettling effect.

(a) Contract formation and formalities

For English commercial and shipping lawyers, contractual liability is black and white.⁵⁵ Either there is a formal contractual relationship, when the usual panoply of contractual obligations obtains; or there is not (for instance because parties are negotiating,⁵⁶ or some necessary formality remains unobserved⁵⁷), in which case only the most skeletal tortious duties can apply. The DCFR, following civilian tradition, is in stark contrast. Parties negotiating owe an (inescapable) duty to act ‘in accordance with good faith and fair dealing’, and face damages liability if they bargain without adequate intent to contract, or unreasonably break off negotiations.⁵⁸ Such liability, albeit supposedly limited to egregious cases,⁵⁹ should still give pause – what, for example, happens in the case of simultaneous negotiations by an owner with a number of potential charterers, or where an apparent obstacle to agreement appears which might trigger a duty to warn of it? Furthermore, there might also be a threat to the long-standing English practice of assuming no liability until a stipulated formal contract is signed,⁶⁰ not to mention a fairly open-ended jurisdiction to award reliance losses to addressees of even the most cautiously drafted letters of comfort issued by holding companies and others.⁶¹ Furthermore, there are indications that under

46. See DCFR Commentary, 67 *et seq.*

47. Something the drafters of the DCFR clearly consider: DCFR Commentary, 136 (‘In many commercial contracts the rights and obligations of the parties will be so carefully regulated that in the normal course of events considerations of good faith and fair dealing will remain entirely in the background’).

48. In the transport context see e.g. BGH 4 May 1995, I ZR 90/93, 1995, *TranspR* 381 (unsuccessful attack on haulier’s six-month time-bar); OLG Köln 30 May 2008, 3 U 7/07, *TranspR* 2009, 37, 41 (river cargo by arrangement carried appreciably short: when intermediate carriage contractor failed, no objection to actual carrier charging, and exercising lien against owner for, full original freight). And cf. the hopeful plea of a carrier defendant that accusing it of gross negligence in the context of limitation of liability was *treuwidrig* and *rechtsmissbräuchlich* – i.e. contrary to good faith – merely because the plaintiff had later continued to employ it for further work: OLG Hamm 28 September 1995 (18 U 195/94), *TranspR* 1996, 156, 159.

49. For instance, in the case of anti-set-off clauses; see DCFR Commentary, 671.

50. See too OLG Nürnberg 27 October 1993, 12 U 1951/93, *TranspR* 1994, 154 (anti-set-off clause allowed in CMR contract re late delivery, in the light of fact that it was not prevented by CMR Art. 23.4). So too with simple negligence exclusions (e.g., OLG Bremen 1 January 1973, *VersR* 1985, 759, 761 (negligence exemption in towage contract)), reasonable time-bars (BGH 17 November 1980, *VersR* 1981, 229 (six-month time-bar re inland waterway carriage)), tackle-to-tackle limitations (BGH 26 June 1997 – I ZR 248/94, 1997 *TranspR* 379 and OLG Hamburg 2 November 2000, 6 U 277/99), and ‘weight unknown’ stipulations in a bill of lading (BGH 27 October 1960, II ZR 127/59).

51. BGH 3 March 2011 – I ZR 50/10, *TranspR* 2011, 220, 223 (‘It is also not clear why the defendant should be in breach of the duty of good faith, if he is merely relying on the liability regime established by law and contractually agreed between the parties’ (‘... [es] ist auch nicht ersichtlich, warum die Bekl. gegen Treu und Glauben verstoßen soll, wenn sie sich auf das gesetzliche und vertraglich vereinbarte Haftungsregime verlässt’)). See e.g. BGH 6 October 2005 – I ZR 14/03 (not bad faith peremptorily and harshly to invoke Warsaw Convention time-bar against recourse claimant).

52. BGH 8 July 1983, 88, *BGHZ* 91, 95.

53. BGH 19 December 1979 – VIII ZR 46/79, *NJW* 1980, 1043.

54. OLG Nürnberg, *VersR* 1966, 1125, 1126.

55. See generally H. Beale et al., *Cases, Materials and Text on Contract Law (Ius Commune Casebooks for the Common Law of Europe)* (2nd edn, 2010), Chapter 9.

56. See generally the non-carriage case of *Regalian Properties Plc v. LDDC* (1995) 1 *WLR* 212.

57. Such as writing in the case of an agreement amounting to a contract of guarantee: *Actionstrength Ltd v International Glass Engineering SpA* (2003) *UKHL* 17 (2003) 2 *AC* 541.

58. DCFR, II-3:301.

59. DCFR Commentary, 71.

60. See e.g. BGE 105 II 75 (Swiss Supreme Court 6 February 1979) (bank liable for agreeing in principle, explicitly subject to formal signature, then changing its mind). As the same court later put it in another 2002 case, ‘It is inconsistent with the rules of good faith to give one’s unreserved assent in principle to the conclusion of a formal contract and then at the last minute to refuse to put one’s agreement in the necessary form without vouchsafing any reason’ (‘Il est contraire aux règles de la bonne foi de donner sans réserve son accord de principe à la conclusion d’un contrat formel et de refuser in extremis, sans raison, de le traduire dans la forme requise’): *TF SJ* 2002, I 164, c.3a, quoted in N. Rouiller, *Droit suisse des obligations et les principes du droit européen des contrats*, 267.

61. See the analogous decision in BGE 120 II 331 (BG 15 November 1994) (letter of comfort by Swissair concerning land deal by subsidiary); N. Rouiller, *Droit suisse des obligations et les principes du droit européen des contrats*, 153-4. So too, possibly, with letters of intent: R. Schlosser, ‘Les lettres d’intentions: portée et sanction des accords précontractuelles’, in: *Mélanges en honneur de Baptiste Rusconi*, Lausanne 2000, 345, at 362.

the DCFR there would also be potential incursions into the rule that formal requirements mean what they say.⁶²

(b) The right of withdrawal

In England, the right to withdraw from a contract on account of non-performance is instinctively regarded, not as the civil lawyer's legally controlled remedy for breach,⁶³ but as a condition placed on the innocent party's obligation to continue performing, the scope of which depends on the interpretation of the contract.⁶⁴ The point matters in shipping law. As anyone who has dealt with ship sales or charter disputes knows, certainty as to when a contract can be cancelled is vital. Businessmen appreciate the rule of English law that this boils down to interpretation: if withdrawal is clearly permitted, the law's task is not to look to motives, reasons or justice but simply to effectuate the contract terms.⁶⁵ Contrast the DCFR, which not only characterises cancellation civilian-style as a remedy ancillary to the right to performance,⁶⁶ but also makes all rights to refuse performance subject to a (non-negotiable) duty to act in good faith,⁶⁷ at the same time openly attacking the English approach⁶⁸ as 'a

weak one as it cannot prevail against clear contrary provisions in the agreement'.⁶⁹

The possible practical effects appear from one of the few German shipping cases featuring good faith. A charterer was held liable for refusing to load rye in Stettin after the ship declared readiness some half-an-hour later than the cancelling time: although the right to cancel was express and unequivocal, it was contrary to good faith to invoke it in the circumstances.⁷⁰ Indeed, cancellation for harmless infractions of time-limits, though standard in English shipping and sales law,⁷¹ provides one of the commonest instances of good-faith limits on the right to withdraw, whether in sales⁷² or other contracts.⁷³

Furthermore, the effect of good faith may go further and negate another fundamental English assumption: namely, that if a person has a right to refuse performance, this remains so even if he gives no reason for exercising it, or even a wrong one.⁷⁴ Hence in the shipping context, an owner or charterer withdrawing from a charter with good reason is protected from liability even if the justification given was a bad one.⁷⁵ The DCFR leaves this uncovered explicitly, but it seems would mandate the opposite result.

62. A point of some little importance as regards guarantees. With the robust decision in *Actionstrength Ltd v. International Glass Engineering SpA* (2003) UKHL 17; (2003) 2 AC 54 (unenforceability for lack of writing under Statute of Frauds 1677 cannot be sidestepped, even by estoppel), compare DCFR, II-1:106 (defendant may be liable for not informing claimant that claim against him unenforceable on formal grounds). Compare German jurisprudence, which while generally condoning even unreasonable reliance on formal requirements (e.g. BGH 16 July 2004 – V ZR 222/03) nevertheless may dispense with them where good faith so demands: e.g. BGHZ 48, 396 (27 October 1967).

63. To see this, take German law. There it is regarded as obvious that the right to withdrawal (*Rücktritt*) presumptively only arises after a claimant faced with non-performance has formally demanded it and failed to get it (BGB, § 323(1)), the right to escape in other circumstances being exceptional (BGB, § 323(2)). In the DCFR, termination under Art. III-3:501 *et seq.* appears explicitly under 'Chapter 3: Remedies for non-performance'.

64. See *Chitty on Contracts* (31st edn, 2012), § 24-035 *et seq.*

65. Nicely encapsulated in the opening lines of the judgment in *The Li Hai* (2005) EWHC 735 (Comm); (2005) 1 C.L.C. 704 at [1]: 'This case represents commerce, red in tooth and claw. The issue is whether the Defendant owners were entitled to withdraw the [vessel] from the Claimant time charterers ... for non-payment of US\$500, after the market had risen in the space of 10 months to about 2½ times the charter rate. ... The Court has no power to relieve from forfeiture on the grounds that this is a harsh case.'

66. See note 61 above.

67. Art. III-1:103.

68. In the shape of the well-known fob sale case of *Bunge Corporation v. Tradax SA* (1981) 1 WLR 711.

69. DCFR Commentary, 708-9. The PECL also rejects freedom of contract here: see comment to PECL 1:201 ('even if the non-performance of an obligation is fundamental because strict compliance with the obligations is of the essence of the contract under Article 8:103, a party would not be permitted to terminate because of a trivial breach of the obligation') and O. Lando, 'Salient Features of the Principles of European Contract Law: A Comparison with the UCC' 13 *Pace Int'l L. Rev.* 339, 362-363 (2001). Indeed the DCFR rules go even further and apply a converse control: it may under DCFR, III-3:105(2) be contrary to good faith to invoke an express right not to have a contract terminated for a breach that would generally allow it.

70. RGZ 117, 354 (RG 1927) (sometimes known as the *Hansa* case). See too the later converse case in BGHZ 11, 80 (BGH 1953), (cancellation under GENCON charter for failure to provide cargo: no bad faith because breach sufficiently serious).

71. Straightforward instances are *The Brimnes* (1975) QB 929 and *The Chikuma* (1981) 1 WLR 314.

72. E.g. RGHZ 76, 150 (RG 1911) (cancellation of sale of bleached yarn for non-payment of small sum in dispute); RGZ 169, 140, 143 (RG 1941) (instalment on truck) (cf. BGH 8 July 1983 – V ZR 53/82).

73. Traditionally in leases, as in BGH 2 March 1972, NJW 1972, 1324. But more recently, and potentially more serious for commercial law, see OLG Stuttgart 2 May 2005 – 5 U 10/05, MDR 06, 378 (settlement agreement dependent on prompt payment: contrary to good faith to claim right to disregard agreement when late payment fault of bank rather than payer). See generally *Münchener Kommentar zum BGB* (6th edn), § 242 Rn 413 *et seq.* ('*geringfügigkeit*').

74. Illustrated in two sales cases, *Manbre Saccharine Co Ltd v. Corn Products Co Ltd* (1919) 1 KB 198 (shipping documents rejected on legally-insufficient ground that cargo lost at time of tender: when sued, buyer could instead rely on technical inadequacy of documents, even though point not raised earlier); *Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce* (1997) 4 All ER 514 (sellers cancel on inadmissible pretext of late arrival of buyers' ship: can rely on technical inaccuracy of buyer's letter of credit). See generally *Chitty on Contracts* (31st edn, 2012), para. 24-014. The rule has been criticised as unjust (Evans LJ in *Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce* (1997) 4 All ER 514, 529-531): but it is hard to see why. If the creditor has done something that justifies the other party in refusing his performance, then it is difficult to justify awarding the creditor damages. He is essentially asking to be compensated for the loss of something he had no right to in the first place.

75. See e.g. *The Mihalis Angelos* (1971) 1 QB 164 (charter cancelled ostensibly for force majeure: even though in fact no force majeure, charterers entitled to rely on breach by charterer of readiness condition); see also the owners' cancellation case of *Universal Cargo Carriers Corporation v. Citati* (1957) 2 QB 401, 443-444 (Devlin J).

The relevant provision⁷⁶ regards it as an obvious corollary of the obligation of good faith that a contractor relying on the right to withdraw must give both notice,⁷⁷ and in many cases reasons,⁷⁸ for the refusal. But if it is bad faith to cancel with no reason, then a fortiori the giving of a bad reason would be treated similarly as an abuse of the right to withdraw.⁷⁹

(c) The effect of a change of circumstances

If anything is clear in English commercial law, it is the limits placed on the right to escape from a contract on the basis of change of circumstances,⁸⁰ with any such right further subject to ouster by agreement.⁸¹ The civilian instinct starkly differs.⁸² Well before the PECL and the DCFR, German law regarded it as axiomatic that when circumstances radically changed, there was a duty in the advantaged party to renegotiate in good faith, and a corresponding curial power to relieve and if necessary rewrite the contract.⁸³ The DCFR now provides an express power of curial adjustment where an obligation becomes so onerous because of an exceptional change of circumstances that it would be ‘manifestly unjust’ to hold the debtor to it.⁸⁴ This could be important in a number of cases where English law chooses certainty over apparent justice. The relevant DCFR commentary makes pointed

reference to the consequences of a closure of the Suez Canal,⁸⁵ something hard to interpret save as a thinly disguised attack on the whole restrictive English doctrine, which (it will be remembered), was remarkably steadfast in refusing to regard this as a frustrating event in either shipping or sale cases, even when the result was a wholesale skewing of costs and benefits which made the economics ruinous to one or other party.⁸⁶ Furthermore, there is also some doubt about how far under the DCFR the terms of the parties’ agreement should trump any other rules on change of circumstance. Ostensibly they do;⁸⁷ however, it must be arguable that relying on an agreement to put the entire risk of a game-changing event on one party⁸⁸ might be regarded as unfair and thus incompatible with the general duty of good faith.⁸⁹ This seems particularly plausible since the revised version of the PECL⁹⁰ specifically disapplies unreasonable allocations of risk, which have the effect of sidelining the good faith power of modification;⁹¹ and furthermore indeed certain national systems have accepted that the modification power is non-negotiable mandatory law.⁹²

(d) Exclusion of liability and similar clauses

English law starts from a strong presumption of commercial freedom of contract, both substantively⁹³ and in its

76. DCFR, III-3:501.

77. A requirement specifically stated in the case where further time is given for late performance under DCFR, III-3:503: DCFR Commentary, 883. By parity of reasoning it might well also apply elsewhere.

78. ‘The duty to exercise rights in accordance with good faith and fair dealing ... may, in appropriate cases, require the notice [of termination] to indicate the reason for the termination’ (DCFR Commentary, 898).

79. As held in Germany: e.g. BAG, NJW 1995, 275 (employment contract). Generally, *Münchener Kommentar zum BGB* (6th edn), § 242 Rn 214.

80. E.g. in the shipping context the Suez Canal cases, typified by decisions such as *The Eugenia* (1964) 2 QB 226: generally G. Treitel, *The Law of Contract* (13th edn, 2011), § 19-006.

81. E.g. *Kuwait Supply Co v. Oyster Marine Management Inc* (1994) 1 Lloyd’s Rep. 637; *The Sea Angel* (2007) 2 Lloyd’s Rep. 517; G. Treitel, *The Law of Contract* (13th edn, 2011), § 19-069 *et seq.*

82. K. Zweigert & H. Kötz, *Introduction to Comparative Law* (3rd edn, 1998), Chapter 37; J. Gordley & A. von Mehren, *An Introduction to the Comparative Study of Private Law*, 494 *et seq.*

83. A power originally based on the general good faith clause, and now codified in BGB, § 313(1); for useful analysis see *Münchener Kommentar zum BGB* (6th edn), § 313 Rn 1-2 and P. Ridder & M-P. Weller, ‘Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law’ (2014) 22 *ERPL* 371.

84. DCFR III, Art. 1:110.

85. DCFR Commentary, 739 (‘The excessive onerosity may be the direct result of increased cost in performance – for example, the increased cost of transport if the Suez Canal is closed and ships have to be sent round the Cape of Good Hope’).

86. The two most notable examples are *The Eugenia* (1964) 2 QB 226 (a charter case) and the sale decision in *Tsakiroglou & Co Ltd v. Noble Thorl GmbH* (1962) AC 93. See also, in a different context, *The Sea Angel* (2007) 2 Lloyd’s Rep. 517.

87. DCFR Commentary, III-1:110(3)(c) (necessary that ‘the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances’).

88. As was held to be the case in *The Sea Angel*, above.

89. Under DCFR, III-3:103.

90. This amendment was prepared in 2008 by the French Association Henri Capitant, under the direction of Guillaume Wicker and Jean-Baptiste Racine. For the influence of this on the DCFR, see DCFR Commentary, 11 *et seq.*

91. See PECL (revised), 7:102. See R. Uribe, ‘Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR’, 15 *Vindobona Journal of International Commercial Law & Arbitration* 233, 266 *et seq.* (2011).

92. For example, Germany: see *Münchener Kommentar zum BGB* (6th edn), § 313 Rn 112 *et seq.*

93. ‘[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.’ (Jessel MR in *Printing & Numerical Registering Co v. Sampson* (1875) LR 19 Eq 462, 465); generally, see *Chitty on Contracts* (31st edn, 2012), § 1-029.

willingness to enforce signed terms in small print,⁹⁴ a practice reinforced by its disapplication of legislative controls to almost all international commercial transactions.⁹⁵ By contrast, the DCFR under the good faith rubric calculatedly seeks to undermine freedom of contract⁹⁶ and impose significant general controls even in business-to-business arrangements.⁹⁷ First, there is a general provision disapplying standard terms regarded as ‘unfair’,⁹⁸ meaning any term which by reference to transparency⁹⁹ and other circumstances¹⁰⁰ ‘grossly deviates from good commercial practice, contrary to good faith and fair dealing’.¹⁰¹ Secondly, Art. III-3:105 says, with deliberate emphasis,¹⁰² that a commercial party may also be prevented from relying on any term whatever restricting a remedy for non-performance even one otherwise perfectly valid, ‘if it would be contrary to good faith and fair dealing to do so’. The potentially subversive effect of these provisions is difficult to underestimate. The first, with its reference to transparency, could well invalidate (for example) a jurisdiction or arbitration clause on the back of a closely printed bill of lading,¹⁰³ which in English law would fairly clearly be effective.¹⁰⁴ Similarly with the general rules on unfairness. Under the nearly parallel practice of German courts in invalidating standard terms on good faith grounds,¹⁰⁵ an interventionist back-

ground is clear and disconcerting. Even where no mandatory liability regime exists, German courts have regularly used good faith to disallow terms excluding liability for breach of obligations it sees as fundamental. Victims have included terms in non-ocean carriage¹⁰⁶ exonerating the carrier in the case of unseaworthiness or gross negligence.¹⁰⁷ So too in voyage charterparties: for instance, a Hamburg court in 1968 refused to allow exoneration for what it saw as the carrier's gross negligence,¹⁰⁸ and in a 1983 case¹⁰⁹ the court ignored a standard Gencon owner's responsibility clause disclaiming liability for unseaworthiness except where personal want of due diligence was proved. It remains to be seen what would happen (for example) to the very extensive exemptions in modern offshore charters such as SUPPLYTIME, or the drastic curtailments of rights to damages inherent in knock-for-knock clauses in that and similar agreements. Turning to Art. III-3:105 of the DCFR, the indications are that this too may be highly relevant to shipping lawyers. This is true for at least two reasons. First, the commentary makes it quite clear that this provision can invalidate a term a priori, even if it would otherwise pass muster impeccably. This is on the apparent basis that a term may be so one-sided that the very act of invoking it is automatically contrary to good faith, the informative example given being a sale contract where

94. A point made with particular reference to shipping law, in the shape of bills of lading, in *Crooks v. Allan* (1879) 5 QBD 38.

95. See in particular the Unfair Contract Terms Act 1977, which applies certain reasonableness controls to business-to-business contracts, but then specifically disapplies those very same controls to contracts for international sales and contracts governed by English law solely by virtue of party choice: see ss. 26, 27, and *Chitty on Contracts* (31st edn, 2012), §§ 14-110 and 14-113.

96. Admittedly so. Having accepted that the matter is politically charged, the authors of the DCFR Commentary at p. 670 say, rather disingenuously, that their proposed controls are ‘not justified by a general assumption of unequal negotiation power between the parties but by the assumption that the use of standard terms drafted in advance by one party enabled the party supplying these terms to restrict the other party's contractual freedom.’

97. True, there is no explicit control over the ‘definition of the main subject matter of the contract’ or the ‘adequacy of the price to be paid’ (DCFR, II-9:406): but this restriction is unlikely to be important in practice.

98. DCFR, II-9:408.

99. DCFR, II-9:402(1) (person using standard terms ‘has a duty to ensure that they are drafted and communicated in plain, intelligible language’). This is transposed from Art. 5 of the Unfair Terms Directive 1993/13/EEC applicable to consumers. It is not immediately clear that a transposition of this sort, from consumer to business law, is appropriate.

100. DCFR, II-9:407.

101. DCFR, II-9:405.

102. The DCFR Commentary states explicitly at p. 818 that ‘it is useful to make clear the potentially powerful effect of the good faith requirement in this area’.

103. Compare the German decision in BGH 30 May 1983, NJW 1983, 2772, 2773, disapplying on good faith grounds (under what is now BGB, §§ 305 *et seq.*) a clear Indian jurisdiction clause in the small print of a contract by an Indian sea carrier to carry rugs from Calcutta to Hamburg, and consequently allowing suit against it in Germany.

104. Because of the principle in *Crooks v. Allan* (1879) 5 QBD 38, referred to above. On such clauses in carriage contracts see e.g. *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2011), Chapter 21.

105. Under BGB, §§ 305 *et seq.* (controls over standard terms (*Allgemeinen Geschäftsbedingungen*)). The practice is not exactly parallel, since under those provisions the effect need simply be to unfairly disadvantage (*‘unangemessen benachteiligen’*) the counterparty, whereas under the DCFR the victim must go further and prove a ‘gross deviation’ from good commercial practice. However, whether this is a very substantial distinction is doubtful.

106. I.e., terms to which the Hague-Visby Rules do not apply.

107. E.g. BGH 8 December 1975, II ZR 64/74 (inland transport: uncargoworthy ship causes wetting of rice cargo by rain); also OLG Hamburg 8 January 1976, *VersR* 1977, 221 and OLG Köln 3 July 1998, 3 U 105/93 (inland transport: unseaworthy collier). See also generally the non-marine decision in BGH 3 February 2005 – I ZR 276/02 (recklessness by carrier). So too with time-bars: BGH 20 March 1978, II ZR 19/76.

108. OLG Hamburg, 1968 *VersR* 552.

109. BGH 28 February 1983, II ZR 31/82, *VersR* 1983, 549.

the seller insists on excluding liability for consequential losses and the buyer knowingly but unhappily acquiesces.¹¹⁰ But extensive exclusion of liability for consequential losses is standard in many kinds of shipping contract, from shipbuilding¹¹¹ to specialised charters.¹¹² If such provisions are now to be thrown in doubt, the effects could be, to say the least, considerable.

Secondly, this raises the issue of the relation between exculpatory clauses and fundamental breach of contract. The present position in England is that while such clauses are strongly presumed inapplicable to deliberate or blatant breach,¹¹³ the matter is one of interpretation. On principle freedom of contract in a commercial context should allow an agreement to exonerate a party for the effects of any breach whatever: a point put beyond doubt by the House of Lords in 1966,¹¹⁴ discountenancing earlier contrary authority.¹¹⁵ Since then, there has been no difficulty in applying exculpatory clauses even to cases of deliberate breach.¹¹⁶ But the DCFR rejects this solution, remaining adamant that invoking exculpatory clauses in deliberate breach cases is generally incompatible with good faith.¹¹⁷ And, of course, this is independent of what the parties actually agreed, since the duty of good faith on which it all depends is inexcludible.¹¹⁸ The result is a large hole in freedom of contract and, in effect, forcible restoration of the discredited pre-1966 English position on fundamental breach. The point matters in shipping law, too. Suppose a shipowner is in breach of provisions in a charter: if (as is not unlikely) someone in his employ knows of it, any agreed limitation of liability for cargo damage immediately becomes suspect. So too with a carrier who knows that there may be a defect in his vessel's ability to protect

the cargo properly. And indeed, the DCFR seems to suggest that a voyage charterer who deliberately keeps a ship on demurrage rather than loading or unloading it without good excuse willy-nilly becomes liable not for demurrage but for damages at large for detention.¹¹⁹ Now, this may actually be desirable: it may indeed be right that the ability to invoke the protection of a contractual clause should depend, willy-nilly, on a close investigation of the conduct of the person seeking to do so (though this is something on which P & I clubs, who need as much certainty as possible in matters of liability, may well have an opinion). But the potentially drastic effect on English shipping law as currently understood should not be underestimated.

(e) Other matters

Apart from the substantial points of principle mentioned above, a number of other miscellaneous, but nevertheless important, potential effects on the present English approach to shipping law are worth mentioning.

(i) Time-bars. The application of time-bars in English commercial law is essentially mechanical: a time-bar either applies or it does not, and if it does then the defendant can invoke it, however unfairly, unless he has clearly and unequivocally represented that it will be waived.¹²⁰ Under the DCFR, by contrast, the general good faith duty may prevent reliance even on a time-bar otherwise clearly available.¹²¹ A couple of examples from German law, which observes a similar principle,¹²² show what might happen. In one 2011 case from Munich,¹²³ lawyers waived the time-bar on claims for a carrier's misdelivery of mobile phones that had been waived in lawyers' correspond-

110.DCFR Commentary, 821 (sale of seed to a farming company).

111.E.g. Cl.IX.4 of the widespread SAJ form of shipbuilding contract (builder shall not 'in any circumstances be responsible or liable for any consequential or special losses, damages or expenses, including, but not limited to, loss of time, loss of profit or earning or demurrage directly or indirectly occasioned to the BUYER by reason of [defects] or due to repairs or other works done to the VESSEL to remedy such defects'). A similar clause was without compunction applied au pied de la lettre by an English court in *China Shipbuilding Corp v. Nippon Yusen Kabukishi Kaisha* (2000) 1 *Lloyd's Rep.* 367.

112.E.g. SUPPLYTIME 2005, Cl.14(b); WINDTIME, Cl.16(a).

113.*The Cap Palos* (1921) P. 458 (abandonment of tow by tugs). See generally the non-marine case of *Karsales (Harrow) Ltd v. Wallis* (1956) 1 *WLR* 936.

114.*Suisse Atlantique Societe d'Armement SA v. NV Rotterdamsche Kolen Centrale* (1967) 1 *AC* 361. See too *Photo Production Ltd v. Securicor Transport Ltd* (1980) *AC* 827, where an exception clause was indeed applied to exonerate a security company in a case of deliberate arson by one of its employees.

115.Notably *Karsales (Harrow) Ltd v. Wallis* (1956) 1 *WLR* 936. See generally, for exhaustive discussion, *Chitty on Contracts* (31st edn, 2012), § 14-020 *et seq.*

116.See *Photo Production Ltd v. Securicor Transport Ltd* (1980) *AC* 827, above; also *A Turtle Offshore SA v. Superior Trading Inc* (2008) *EWHC* 3034 (Admlty); (2009) 1 *Lloyd's Rep.* 177 (deliberate abandonment by tug).

117.For instance, a building contractor must lose any right to limit liability for late completion where late completion is due to his concentrating on other competing work (DCFR commentary to Art. III-3:105, p. 819); a security company knowingly providing inadequate protection similarly forfeits the right to invoke any limitation of liability (DCFR commentary to Art. III-3:105, p. 820); and so too with a carrier who provides inadequate protection hoping that the goods will probably come to no hurt (*ibid.*).

118.As, indeed, is explicitly recognised. See DCFR commentary on Art. III-3:105, p. 821 ('It should not be possible to set aside by agreement the restrictions on the availability of terms under the Article; this exclusion would be contrary to the duty of good faith and fair dealing.').

119.See DCFR Commentary, 820, on DCFR, III-3:105, Illustration 4, where the emphasis on the presence of an excuse (port congestion) suggests that if it is absent the charterer is liable in full. As any English lawyer will have noticed, this effectively means that not only the reasoning in *Suisse Atlantique Societe d'Armement SA v. NV Rotterdamsche Kolen Centrale* (1967) 1 *A.C.* 361, but the result itself, is to be overturned: and this again despite any contrary agreement by the parties.

120.*Seechurn v. Ace Insurance NV* (2002) 2 *Lloyd's Rep.* 390, esp. at [26], [55]-[58] (Ward L.J.); *Fortisbank SA v. Trenwick International Ltd* (2005) *EWHC* 399 (Comm) at [30]-[42]; generally, M. Canny, *Limitation Periods in England and Wales*, paras 1.13-1.14. For where an estoppel was established, see e.g. *The Ion* (1980) 2 *Lloyd's Rep.* 245.

121.See DCFR commentary on Art. III-7:307, p. 1223. Most of the cases envisaged do involve representations that the bar will be waived, but not all: see below.

122.E.g. BGH 6 June 1966 – II ZR 66/64, *VersR* 1966, 723 (section V).

123.See OLG München 26 January 2011, 7 U 3426/10, *TranspR* 2011, 147.

ence, but mistakenly did so on behalf of the wrong defendant.¹²⁴ Good faith, it was held, nevertheless prevented the real defendant taking advantage of the time-bar, which in the meantime had expired. And in a 2005 decision, the owner of a stolen yacht mistakenly brought suit on a marine policy, not against the underwriters, but against the brokers. By the time the mistake came to light, the six-month time-bar for claims against the underwriters had expired. The Supreme Court of Germany found nothing amiss in a Celle court's determination that the underwriters were barred in the circumstances by the rules of elementary good faith from invoking the time-bar.¹²⁵

(ii) Limitation of liability. Limitation is vital in shipping law. Under the 1976 Limitation Convention, the right to limit is uniformly lost 'if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'.¹²⁶ Under this wording, the burden of proving such conduct is incontrovertibly on the claimant: to recover in full, he must prove knowing wrongdoing.¹²⁷ Nevertheless, established practice in Germany suggests that a duty to act in good faith such as appears in the DCFR may considerably muddy these waters. In a series of cases¹²⁸ on road transport (where German law similarly established monetary limits breakable on proof of enhanced fault), courts regularly decided that where wilful fault in the carrier was alleged but the significant facts were within the carrier's exclusive knowledge, the latter could not in good faith sit back and say 'prove it'. On the contrary: he had to provide and evidence an explanation consistent with the lack of enhanced fault, and if he could not, then such fault was held established.¹²⁹ This curious doctrine later migrated to sea carriage. In a 2009 case, machinery en route from Australia to Germany for repair was damaged at sea having been insufficiently secured. The carrier, being unable to give sufficient details to indicate that there had been

no systemic organisational failings leading to the loss, was held liable in full.¹³⁰

(iii) Lien. Under English practice, the lien is a powerful weapon in the hands of a carrier. There are essentially no inherent limits on its exercise. It can be exerted over any goods, for any debt, whether or not owed by the owner, and (in the case of a general lien) in respect of any transaction whatever, and not simply the carriage of those particular goods.¹³¹ By contrast, German authority here once again suggests that good faith duties may substantially constrain this freedom. First, the lien must it seems be exercised with remarkable regard for the owner's interests: it may, for example, be contrary to good faith to exercise a right of retention of goods of little value merely as a means of pressure for payment.¹³² And secondly, the carrier must it seems take care to limit what part of the cargo he takes steps to retain. He may, it seems, exercise his rights only over that part of the cargo reasonably necessary to cover the amount for which the lien is held: it is not open to him simply to sell the cargo as a whole, reimburse himself and account for the rest.¹³³ If he does this, he may find himself liable in tort to the owner for any loss that the latter can prove due to his failure to receive the excess goods.¹³⁴

V. Conclusion

The conclusion to be drawn from this is largely apparent from what has gone before. One may accept the argument that English law in practice accepts a good many of the rules civilians regard as stemming from good faith, and hence that overall the effect of introducing it might not be as cataclysmic as appears at first sight. Nevertheless, in the rough-and-tumble of shipping law there is enough potential uncertainty and restriction on the freedom of parties to arrange their affairs the way they wish to give rise to disquiet. In this context at least, the instinctive mistrust by English commercial lawyers of good faith as

124. Essentially a corporate reorganisation had intervened.

125. See BGH 16 February 2005 – IV ZR 18/04, 2005, *TranspR* 170, 172. See too similar reasoning in BGH 12 June 2002, VIII ZR 187/01.

126. Art. 4. A similar rule applies under Art. 22 of the Montreal Convention 1999 governing carriage of goods by air. The original Warsaw Convention 1929, still applicable to some carriage, in Art. 25 referred to 'wilful misconduct' as the factor necessary to break limitation.

127. P. Griggs & R. Williams, *Limitation of Liability for Maritime Claims* (4th edn, 2005), 39.

128. LG Wuppertal 13 July 1995, 9 S 275/94, 1996 *TranspR* 212; BGH 18 December 2008, 1 ZR 128/06; BGH 10 December 2009, 1 ZR 154/07; BGH 13 June 2012, I ZR 87/11. See also the Austrian decision in OGH (Wien) 14 July 1993, 7 Ob 540/93. Air carriage was treated in the same way: see the Warsaw Convention case of OLG Köln 27 June 1995, 22 U 265/94, *TranspR* 1996, 26.

129. As the courts repeatedly put it, 'The burden lying on the claimant to establish the facts and prove his case is nevertheless mitigated on the basis that, given the contracting parties' disparate access to information, the carrier is bound on the basis of good faith to elucidate the immediate circumstances surrounding the casualty, as far as this is possible and can reasonably be expected.' ('*Die dem Anspruchsteller obliegende Darlegungs- und Beweislast kann jedoch dadurch gemildert werden, dass der Frachtführer angesichts des unterschiedlichen Informationsstands der Vertragsparteien nach Treu und Glauben gehalten ist, soweit möglich und zumutbar, zu den näheren Umständen des Schadensfalls eingehend vorzutragen*'). See e.g. BGH 13 June 2012, I ZR 87/11.

130. BGH 29 July 2009 – I ZR 212/06, 2009 *TranspR* 331. See too, for cases accepting the same doctrine, BGH 3 November 2005 – I ZR 325/02, 2006 *TranspR* 35, 37 and OLG Stuttgart 20 August 2010 – 3 U 60/10, 2010 *TranspR* 387, 393, 394.

131. For an example, see *Jarl Trä AB v Convoys Ltd* (2003) EWHC 1488 (Comm); (2003) 2 *Lloyd's Rep.* 459.

132. OLG Karlsruhe 8 August 1972 – 8 U 69/71, *BB* 1972, 1163 (goods valuable to debtor but almost valueless on the market).

133. See O. Vortisch & W. Bemm, *Binnenschiffahrtsrecht: Kommentar*, p. 352 (regarding this as a matter of good faith in the context of inland carriage); also OLG Köln 30 May 2008, 3 U 7/07, *TranspR* 2009, 37, below.

134. As happened in OLG Köln 30 May 2008, 3 U 7/07, *TranspR* 2009, 37 (carrier of maize cargo has lien for about € 22,000: liable to owner when sold maize worth three times that amount).

an overarching conception¹³⁵ may well have a good deal more going for it than meets the civilian eye.

135. For instances, see e.g., R. Goode, *Commercial Law in the Next Millennium*, 19-20; M. Bridge, 'Doubting Good Faith' (2005) *New Zealand Business Law Quarterly* 426; A. Forte, *Good Faith in Property and Contract Law*, Chapter 4 (J. Thomson, *Good Faith in Contracting: A Sceptical View*).