

# English and continental contract laws: key differences

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# Outline

- ▶ Background
  - Ways of making transnational contracts easier
  - Uses of soft law restatements
- ▶ Similarities between laws of contracts
  - ‘False friends’
- ▶ Key differences
- ▶ Reasons for the differences
- ▶ Suitable models
- ▶ [PECL answers – for you to read later]

# Easier transnational contracts

## ▶ Private International Law

### – Rome I and II Regulations

- Free choice of national law (for B2B)
- Shared rules where no choice made

## ▶ “Harmonization”

### – Reducing differences between States’ laws

- EU consumer law: Directives
  - Consumer Rights (information; right to withdraw)
  - Consumer Sales (seller’s obligations, buyer’s remedies)
  - Unfair Terms Directive (unfair terms of no effect)
- Few directives B2B; some convergence, see later

# Alternative: “optional” systems

- ▶ ‘Neutral’ rules, in several languages
- ▶ International conventions:
  - CISG 1980 (HU signed up; any international contract subject to CISG unless opt out)
  - Common European Sales Law withdrawn, 2014
- ▶ Soft law:
  - Principles of European Contract Law (PECL)
  - UNIDROIT Principles of International Commercial Contracts (UPICC)

# Uses of soft law ‘Principles’

- ▶ Basis for EU or national legislation
- ▶ Use as “soft law”
  - Express adoption by parties
    - Cannot replace national law
      - Incorporate into contract, subject to mandatory rules
    - But arbitration under non-national rules
  - By arbitrators as *lex mercatoria*
- ▶ Need a workable system

# PECL: a 'Restatement'

- ▶ cf American Law Institute Restatements
  - 50 laws of contract
  - Restatement of Contracts 2d
  - Uniform laws e.g Uniform Commercial Code
    - But all except Louisiana common law
    - Some differences between States' laws remain
- ▶ Functional approach
  - Strip away different terminology, concepts
  - Base Principles on outcomes

# Shared rules and false friends

- ▶ Great deal in common
  - Agreement, offer and acceptance
  - Contents
  - Third party rights
  - Damages
- ▶ Often ‘transplants’, e.g. offer & acceptance
- ▶ But
  - Obvious differences
    - Not only civil law vs common law
  - Beware false friends

# Agreement, mistake over terms

- ▶ Agreement if offer + acceptance
  - Actual meeting of minds? (“Subjective”)
  - Apparent agreement? (“Objective”)
    - What other party reasonably thought
- ▶ Trier wine auction?
  - Contract?
    - France: no meeting of minds (*erreur obstacle*)
  - Nullity for mistake?
    - Civil law, yes (though may have to compensate)
    - Common law, only if auctioneer knew



# **BGB § 119: *Voidability for mistake***

(1) A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may avoid the declaration if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation.

...

## **§122: *Avoiding party's duty to compensate***

(1) If a declaration of intent is void under § 118, or avoided under §§ 119, 120, the declarant shall, if the declaration was required to be made to another party, compensate that party, or otherwise any third party, for the damage which the other party has sustained by relying on the validity of the declaration, not, however, beyond the value of the interest which the other or the third party has in the validity of the declaration.

(2) The obligation to compensate does not arise if the injured party knew the ground of the nullity or rescission or did not know of it due to negligence (should have known of it).

# Key differences in contract laws

- ▶ Breaking off negotiations
- ▶ Relief for unilateral mistake of fact
  - If not caused by other party
  - Fraud by silence or duty of disclosure
- ▶ Controls over unfair terms
- ▶ Adjustment if change of circumstances
- ▶ Specific enforcement (*in natura*)
- ▶ Good faith??

# GF: Continental systems: how used?

- ▶ §242 BGB; §§ 6:2, 6:248 BW; art 1104 Cciv
- ▶ German law
  - § 242 BGB: gives court authority to develop doctrine to cover new cases (e.g. unfair terms)
    - But do not refer to § 242 each time
    - Only non-negotiated terms
  - Provides standard (must have reasonable regard to other's interest)
- ▶ Dutch law
  - Court may apply directly to contract term
    - Even if negotiated

# GF in German law

- ▶ During contracting process
  - Liability for breaking off negotiations
  - Duties of disclosure
  - Controls over unfair terms
- ▶ In performance
  - *Contra proprium factum*
- ▶ In exercising remedies
  - No termination for slight breach in order to escape unprofitable contract

# English law: no doctrine of GF

- ▶ English law does not have such a doctrine
  - though express clauses
- ▶ Partly a question of technique
  - Code system: judge needs authority to “expand”
  - English judges have authority to develop common law
    - English courts could develop equivalent controls
    - Rules against some specific instances, similar result

## Bingham LJ, *Interfoto v Stiletto* [1989]

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”

- But have not developed as many or so intense rules

# Breaking off negotiations

- ▶ “Agreement to agree” enforced
- ▶ Germany – “culpa” liability for breaking off negotiations for no good reasons if the party induces the other party to believe that there will be a contract.



# Breaking off negotiations

- ▶ Normally free not to contract
- ▶ *Kontrahierungszwang*: compulsion to enter a contract
  - E.g. car insurance
- ▶ Jhering
  - Culpa in contrahendo
  - Not in original BGB
  - RG used to impose liability when a customer in a shop was injured by employee but without the employer's fault

# The Letter, BGH 8 June 1962

- ▶ Once a party has induced or encouraged in another an expectation that a contract will be concluded, the breaking off of negotiations without good reason will give rise to liability to compensate the other for damage suffered as a result of his reliance on the expectation.
- ▶ “Even at the stage when negotiations are being conducted with a view to the conclusion of contract, each party owes to the other party...a duty to have reasonable regard for the legitimate interests of that other party”.

# BGB (2002)

**§ 311:** *Obligations created by legal transaction and similar obligations*

(2) An obligation with duties in accordance with § 241 (2) also arises as a result of

1. entry into contractual negotiations,
2. preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interest or other interests or entrusts them to that party, or
3. similar business contact.

**§ 241:** *Duties arising out of the obligation*

(2) An obligation may require each party to have regard to the other party's rights, legally protected interests and other interests.

# France – delictual liability

- ▶ *Manoukian Cass Com, 26 November 2003*  
P and D had been exchanging drafts of an agreement. D agreed to allow until 15 Nov for certain conditions to be satisfied; was sent new draft on 13 Nov, said nothing; but in fact had given option to 3<sup>rd</sup> person on 10 November.
  - Held: liable

# French Cciv

- ▶ **Article 1112:** The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.

# E: agreement to agree

## ▶ *Walford v Miles*

- Negotiation sale of business; S agreed would not negotiate with anyone else but sold to third party. Bingham in CA: bound until clear that negotiations in GF would not succeed.

## ▶ HoL: unenforceable

- Too uncertain: what required, what would be outcome
- ‘Contrary to adversarial nature of negotiations’

# No intention to contract

- ▶ A purports to negotiate with B
  - But A has already decided to contract with C, merely trying to make procedure look proper
  - Merely discouraging competitor C from making offer to B
  
- Damages for fraud

## ***E: Box v Midland Bank Ltd***

- ▶ P wanted finance from bank for export contract, manager told him application certain to be approved; as a result, P increased overdraft. Manager should have known would not be approved as would not qualify for Government export guarantee
  - Held: bank vicariously liable for manager's negligence



# 'Mistake as to facts': Basis of relief?

- ▶ All systems say fraud and mistake may mean not full consent, avoidable
- ▶ Major divide
  - Civil law: relief because victim's consent impaired
    - Mistaken or 'not fully informed'
  - Common law: because of defendant's bad behaviour, ie misrepresentation (though must have influenced C)
    - D has forfeited right to enforce contract

# France: Art 1132 Cciv

Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party.

# France

- ▶ The Villa Jacqueline (1931): A villa which had been advertised as having 7,800 square metres was brought by the plaintiffs who intended to divide the property into lots and resell them (as the seller knew). The buyers discovered the true area was only 5,119 square metres and claimed the contract was null.
  - A party who has entered a contract under a mistake as to an essential quality of the thing sold may have the contract declared null.
  - Essential qualities may include matters affecting the party's intended use of the property when this was known to the other party.

# France

- ▶ Poussin (1983, 1987): A family owned a painting believed to be by Poussin. An art dealer advised them that it was not and sold it at an undervalue to the dealer. A national museum exercised its right of pre-emption and exhibited the painting as a Poussin. The family sought to set the sale aside. Was there a mistake as to substance or merely as to value?
  - Where a party has been advised that a painting is not the work of a particular painter and therefore believes that the painting was painted by another, the party will be mistaken as to an essential attribute of the thing and will therefore be entitled to avoid the contract.
  - This was even though there were still uncertainties as to the painter.
  - A mistaken seller can avoid the contract under art. 1110.

# Germany: BGB § 119

(1) A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may avoid the declaration ...

(2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.

- NB § 122

# England

- ▶ Avoidance for fraud or non-fraudulent misrepresentation
  - Remedy in *Villa Jacqueline* but not *Poussin*
- ▶ Self-induced mistake as to facts by one party irrelevant
  - *The Harriette N*
    - B owes demurrage for delay in unloading ship
    - S mistaken about when finished, offers to settle for too little
    - B knows but accepts
      - No relief

# Fraud by silence

## Cass civ 3, 2 October 1974 (The pig farm)

- ▶ An agent acting for the buyers contracted to purchase a house and some land for 95,000 FF, of which 10,000 FF was paid on account.
- ▶ The sellers had not told the buyers that a pig farm was to be built next door. The buyers would never have agreed to buy the house had they known about the piggery.
  - Germany: fraud where duty to disclose

# A duty of disclosure beyond cases of fraud?

- ▶ French law has many examples of duties of disclosure imposed by statute. There are a number of cases in French law in which the courts have imposed liability for non-disclosure without reference to either fraud or mistake
  - ‘Constructability’ cases



# Code civil, Article 1112-1

The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.

However, this duty to inform does not apply to an assessment of the value of the act of performance.

Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.

# German law

- ▶ German law recognises that a party to a contract is under an obligation to make disclosure of certain facts to the other party.
- ▶ Enforced by a number of provisions of the code
  - § 123 (Fraud) - Silence can constitute conduct where there was a duty to disclose.
  - *culpa in contrahendo*

# German law

- 1) Questions must be answered truthfully;
- 2) A partial concealment is as good as a lie;
- 3) An imbalance in skill or access to information leading to significant reliance on the part of the challenging party is likely to lead to a duty to disclose;
- 4) Increasing complexity of the transaction is also likely to lead to such a duty.
- 5) But hard to predict when 3) and 4) will apply

# English law: *Smith v Hughes*

Buyer, a race horse trainer, wanted old oats. What if the seller did not say the oats were new?

Cockburn CJ: The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding . . .

Now, in this case, there was plainly no legal obligation on the plaintiff in the first instance to state whether the oats were new or old...

# English law

- ▶ No fraud by silence
- ▶ No duty of disclosure, except
  - Insurance
  - Partnership
  - Relationship of trust and confidence between parties
  - *Sykes v Taylor-Rose* (sale of house)
    - No guarantee against hidden defects

# Standard terms: incorporated?

- ▶ Fr: only if C was aware of term
- ▶ BGB § 305c (1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.
- ▶ E: if P signed document, terms in document form part of contract even if P unaware

# Control over substance

- § 307 BGB (1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible ...
- Art 1171 Cciv (2016) is similar
  - Apply B2C (as required by UTCC Dir) and B2B

# Unfair Contract Terms Act 1977

- ▶ Only clauses excluding or restricting liability
  - For negligence or non-conformity of goods
    - Even if negotiated
  - In “written standard terms of business”
    - Excluding / restricting liability for other breaches
    - Allowing performance in way “substantially different to what reasonably expected”
  - Mostly invalid unless reasonable
- ▶ Applies B2B
  - not to international supply or
  - contracts subject to E law only by choice of parties



# Imprévision

- ▶ § 313 BGB (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
- ▶ Art 1195 Cciv (2016) is similar
  - Unknown to English law
    - Discharge for 'frustration' only if contract impossible

# Specific performance

- ▶ Civil law: unless impossible or disproportionate (§275 BGB, Art 1221 Cciv)
- ▶ English law: Not if damages would be an adequate remedy
  - Not ‘disproportionate’ test
  - Only granted regularly where sale of land
  - Very rare in goods cases

*Société des Industries Métallurgiques v Bronx Engineering*  
[1975] (no SPP despite 9 months delay)

# SP would require supervision

- ▶ *Cooperative Insurance Society Ltd v Argyll Stores (Holding) Ltd* [1998] (obligation to 'keep open' flagship store in shopping centre)

# Lord Hoffmann ([1998] AC 1, 15-16)

‘... [I]t cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.’

# E: Few restrictions on termination

- ▶ No doctrine of good faith, cf German law
- ▶ No reinstatement of contract by ct., cf Fr
  - If D disputes right, must claim C is in breach
  - Extra time ('Relief against forfeiture') only if D will lose proprietary/ possessory interest
- ▶ Termination for ulterior motives?

*Arcos Ltd v EA Ronaasen* [1933] (1 mm too thick)

- SGA 1979 s 15A: not if non-conformity slight, termination unreasonable

*Union Eagle v Golden Achievement* [1997] (10 min late) <sup>45</sup>



# Compare the systems

	GF	Breaking off	Duty to disclose	Unfair std terms B2B	Imprévision	Specific performance
DE	✓	✓	✓	✓	✓	✓
F	✓	✓	✓	✓	✓	✓
English law	✗	Fraud/neg	✗	Exclusion clauses Domestic ✓ Int'l ✗	✗	✗
Hungary						

# Why these differences

- ▶ History – but why persisting?
- ▶ Enduring philosophy
  - G, F: will theory
  - E: protection of reasonable reliance

# Remedies

- ▶ A 'mercantilist' approach
  - Assume ready market to obtain substitute
  - Ready to allow termination
    - Do not seek to 'preserve the contract'
  - Performance not a moral imperative
    - Provided C can be compensated



# Role of contract law

- ▶ F: guide to behaviour
- ▶ E: outer limits
- ▶ Empirical evidence of business view
- ▶ G contracts build trust, E last resort

# Different role of judge

- ▶ English approach
  - Not to rescue party who was unwise
  - Hold parties to what agreed, and only that
  - Do not add additional terms
    - Parties have comparative advantage
    - Penalty defaults (e.g. force majeure)
- ▶ Civil law: judges readier to control behaviour, protect ill-advised or ill-informed party

# Type of case

- ▶ English higher courts
  - Mostly “heavy commercial”
  - High value contracts
  - Sophisticated parties with legal advice
  - Repeat players
  - Fluctuating markets
    - Dispute often zero sum, who bears loss from change in market
    - Certainty crucial

# How do court dockets compare?

- ▶ Suspect continental higher courts see more cases involving individuals, SMEs
- ▶ Or may be that cater for them better
  - E seems to ignore smaller disputes, less sophisticated players
    - See fewer because of expense of litigation
    - Or concentrate on commercial cases
      - Law of choice
      - Law for export
  - UCTA 1977 n/a international contracts

# “Horses for courses”

- ▶ France wanted to make its law more influential and attractive for business
  - Did it do that?
- ▶ Transnational contract law
  - Must make choices or compromise
  - Aimed at whom?
    - CISG: key questions omitted, left to otherwise applicable law
    - CESL (and PECL?) aimed at B2C and B2B where one party an SME
    - Unidroit PICC? (std terms: only surprising clause)

# PECL: Good faith as basis for expansion

- ▶ §242 BGB; §§ 6:2, 6:248 BW; art 1104 Cciv
- ▶ PECL has separate 'expansion clause': art 1:106:

(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles...

# PECL Art 1:201: Good Faith and Fair Dealing

(1) Each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty

- Use?
  - Contra proprium factum
- Fit with specific controls?
  - Exclusion and limitation of liability clauses
  - Non-individually negotiated terms

# DCFR / CESL Reg Art 2

‘good faith and fair dealing’ means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question



# DCFR III-1:103

(1) 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.

(2) The duty may not be excluded or limited by contract or other juridical act.

(3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

# **CESL: Good faith art 2**

- (1) Each party has a duty to act in accordance with good faith and fair dealing.
- (2) Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
- (3) The parties may not exclude the application of this Article or derogate from or vary its effects.

# Subsidiary role: recital 31

The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules...

# PECL Art 2:102: Intention

The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

# PECL

- ▶ **Article 2:301: *Negotiations Contrary to Good Faith***
- ▶ (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- ▶ (2) However, a party who has negotiated or broken off contrary to good faith is liable for the losses caused to the other party.

# ***Art 2:301: Negotiations Contrary to Good Faith***

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party which has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.

(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

# Article 4:103: Fundamental Mistake

## as to Facts or Law (applied by art 4:104)

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) (i) the mistake was caused by information given by the other party; or

(ii) **the other party knew or ought to have known of the mistake** and it was contrary to good faith and fair dealing to leave the mistaken party in error; or

(iii) the other party made the same mistake

## ***Art 4:106: Incorrect Information***

A party which has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117(2) and (3) even if the information does not give rise to a fundamental mistake under Article 4:103, unless the party which gave the information had reason to believe that the information was correct.



# ***Art 4:107: Fraud***

- (1) A party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.
- (2) ...
- (3) [sets out factors in assessing GF: relative expertise, cost of acquiring, importance]

# Duty to disclose beyond fraud

- ▶ PECL, UPICC: not included
- ▶ CESL art 23: ‘... the supplier has a duty to disclose ...to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party ...’

# ***Art 4:110: Unfair Terms not Individually Negotiated***

(1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded [except subject matter, adequacy of price]

# Art 6:111 Change of circumstances

...(2) If... performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it, provided that:

- (a) the change of circumstances occurred after the time of conclusion of the contract,
- (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
- (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear... [Court may end or adapt contract, award damages for failure to negotiate]

# Termination

- ▶ Only if non-performance fundamental: Art 8:103
  - if effect serious
  - Intentional, gives reason to doubt can rely
  - if obligation ‘of essence’
- ▶ Warning only necessary if late and delay not fundamental: Art 8:106(3)
- ▶ Right to cure only if before date or delay not fundamental
- ▶ Termination if repudiation or no assurance

# ***Art 8:109: Clause Excluding or Restricting Remedies***

Remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction.

[Originally: ‘cannot limit liability if non-performance deliberate or clause unreasonable’]

# PECL: Specific performance

- ▶ PECL Art 9:102: not if aggrieved party may reasonably obtain performance from another source
- ▶ CESL Art 110: unless disproportionate