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The Jurisdiction of Choice: England and Wales or Germany?

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In October 2007, the Law Society published a brochure entitled 'England and Wales: The Jurisdiction of Choice'. The Secretary of State for Justice and Lord Chancellor, Jack Straw, contributed a foreword, and special support and assistance were provided by Eversheds, Norton Rose, Herbert Smith, and other law firms. In the brochure, the reasons were set out, in no uncertain terms and rather blunt language, why it was in the best interest of parties to select English law as the law governing their contracts and English courts and arbitral tribunals for the resolution of their disputes. It took the German side a little less than two years to come up with a rejoinder. All major professional organizations of German attorneys, notaries, and judges formed what was called a 'Union for German Law' and produced last year a counter-brochure in both German and English entitled 'Law – Made in Germany' with a preface by the then German Minister of Justice. As was to be expected, this brochure painted the virtues of German law and German procedure in equally bright colours.

In general, the task of the courts is to administer justice in accordance with law. However, where courts and arbitral tribunals are engaged in the resolution of disputes in civil and commercial matters they are also delivering a service and are therefore, as service providers, competing against each other whenever the parties are conducting cross-border transactions and are therefore free to choose the forum. Not only is there competition between courts and arbitral tribunals. In a time of globalization, it is increasingly realized that there is also 'regulatory competition' between various legal systems, one of which the parties may select as the law governing their transaction. Where there is competition between courts, arbitral tribunals, and legal systems, there will also be marketing efforts. Such efforts are not generally known for a careful and impartial evaluation of the qualities of the competing products. Even so, the rapturous language used in the two brochures made me a bit uneasy at times. There is one thing, however, I like about the brochures, and that is that they provide me with an opportunity to discuss, in a way perhaps *un peu plus nuancé*, the assertions made in them in the hope that some light might be shed in the process on the time-honoured question of what the differences and similarities are between the common law and the civil law.

I first turn to substantive law.

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1. Substantive Law

1.1 The Good Faith Standard

Special emphasis is attached in the Law Society brochure on the fact that there is no overriding principle in English law requiring the parties, in making and carrying out contracts, to act in good faith. The Lord Chancellor roundly asserted in his preface that it is 'the absence of any general duty of good faith' that ensures the 'predictability of outcome' and the 'legal certainty' of English law. With that view, he does not stand alone. Lord Goff once asked:

> Do we lack an overriding principle requiring good faith in the exercise of contractual rights? We know that there is such a principle in one of the most famous provisions of the German BGB. . . . Do we need such a principle as this in our commercial law? The vast majority of commercial judges and practitioners in this country would, I believe, instinctively answer that question in the negative.[1]

Professor Roy Goode once observed that:

> [T]he predictability of the legal outcome of a case is more important than absolute justice. It is necessary in a commercial setting that businessmen at least should know where they stand . . . The last thing that we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants.[2]

Likewise, in his Hamlyn Lecture, Professor Goode added that:

> [w]e are in my view right to be cautious about adopting a general requirement of good faith in contracts, even though this is enshrined not only in the civil law but in the American Uniform Commercial Code and has powerful supporters in England. . . . It can prove very difficult to give a definable content to the good faith standard and to predict the outcome of commercial disputes in which one party has sought to do no more than enforce the terms of a contract freely negotiated. For convincing evidence of this we need go no further than section 242 of the German Civil Code, which provides that: 'The debtor is obliged to perform in accordance with the requirements of good faith, regard being had to ordinary usage.' This innocuous-looking general clause . . . has generated a mass

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[1] Lord Goff, 'Opening Address', *Journal of Contract Law* 5 (1992): 4.

[2] R. Goode, 'The Concept of "Good Faith" in English Law', in *Centro di studi e ricerche di diritto comparato e straniero*, ed. Saggi (Roma: Conferenze e Seminari, 1992), 7.

of litigation to which more than 500 pages of detailed analysis have been devoted in the leading commentary on the German Civil Code.[3]

In my view, there is no real evidence for the assertion that the Civil Code's provision on good faith breeds uncertainty and must therefore be regarded as the villain in the piece. True, there are many German cases relying in some form or another on section 242. However, this does not mean that these cases form, in Tennyson's words, 'a wilderness of single instances through which a few, by wit or fortune led, may beat a pathway out to wealth and fame'.[4] Closer analysis reveals that most cases can be assigned to one of a number of distinct rules, which have all been developed by the courts under the umbrella of section 242 but lead a quite separate and independent existence. For this reason, it would be a poor advocate who would simply cite section 242 to the judge and invite him to dispense justice to his client according to the principles of good faith and fair dealing. What would be expected of him would be a reference not only to the more specific doctrines of, say, laches, or frustration, or forfeiture, but also to the judgments applying these doctrines to individual cases. There is hardly a case involving a problem of contractual interpretation or the implication of a term in which the court would not, for good measure, put in a reference to section 242. However, this tells you more about the stylistic conventions to be followed in the proper drafting of a German judgment than about the substance of the rules employed to resolve omissions and incoherences of contractual expression. In the *Interfoto* case, Lord Justice Bingham once said that: 'English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed piecemeal solutions to demonstrated problems of unfairness.'[5] German law has done likewise, and the fact that the court will usually embellish its judgment by a passing reference to section 242 means no more than that it is under section 242 that the distinct clusters of cases will be listed and discussed in the commentaries. I shall try to show that differences do exist between English and German contract laws. However, the reasons for them lie in my view elsewhere than in the presence in the German Civil Code of a broad good faith standard.

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[3] R. Goode, *Commercial Law in the Next Millennium* (London: Sweet & Maxwell, 1998), 19. As one of the 'powerful supporters' of the good faith principle, he cites Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men', L.Q.Rev. 113 (1992): 433, 438–439. See for a comparative discussion of the good faith principle, J. Beatson & D. Friedman (eds), *Good Faith and Fault in Contract Law* (Great Britain: Oxford University Press, 1995); R. Zimmermann & S. Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).

[4] A. Tennyson, *Aylmer's Field* (New York: Dodd, Mead, 1894), 146.

[5] *Interfoto Library Ltd v. Stiletto Ltd* [1988] 2 W.L.R. 615, 620–621.

1.2 Freedom of Contract in a Codified Legal System

There is another statement in the Law Society brochure that is, in my view, unpersuasive. This is the statement that 'English law allows the parties much greater flexibility of arrangements than under many civil codes' and that 'English law is more flexible than many civil law systems which rely on a more rigid and prescriptive civil code'. Many common lawyers do not seem to be aware of the fact that the rules of Continental contract law are to a large extent judge-made as well. True, in the civil law tradition, judges do not feel safe unless they have moored their ship to some statutory wharf. However, if you look not at the form but at the substance what really happens is that the judge relies on rules laid down in earlier judgments. In many areas of contract law, code provisions are indeed gradually lapsing into benign neglect and are often cited merely as an afterthought in order to decorate a judgment based on other grounds.

What is perhaps more important is that some common lawyers still seem to think that the German or French code provisions on contract law lay down a rigid and unbendable set of mandatory rules and thereby severely limit the parties' freedom of action. This is misleading, to put it mildly. The vast majority of the German Civil Code's provisions on contract law are no more than a set of default rules, which the court will apply only 'in default' of a contractual agreement by the parties. Of course, employment contracts, residential leases, and consumer credit and consumer sales arrangements are regulated, both in German and English laws, by a host of mandatory rules seeking to protect the weaker party. However, outside these regulated contracts the principle of freedom of contract is acknowledged just as much in England as in Germany or France, and the mere fact that there are civil codes in Germany and France has no bearing on the problem.

It is in another respect that a civil code might indeed make a difference. As I said earlier, a code sets out default rules that, as to each type of contract, seek to deal with all major problems arising during the life of the contract, are expressed in clear language, and presented in a systematic, logical, and well-ordered manner. Now I know that 'being logical' is an eccentric continental practice, in which common-sensical Englishmen indulge at their peril.[6] On the other hand, a system of well-arranged default rules might help keep the law orderly, accessible, and teachable, and Karl Llewellyn, the leading author of the American Uniform Commercial Code and a master of both the common law and German law, may have had a point when he once said that:

> [n]o one who has never seen a puzzled Continental lawyer turn to his little library and then turn out at least a workable understanding of his problem within half an hour will really grasp what the availability of the working leads packed into a

[6] N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978), 40.

> systematic Code can do to cheapen the rendering of respectably adequate legal service.[7]

I am raising this point not in order to win you over to the codificationist camp but merely because it might explain an experience made time and again by international legal practitioners, namely that a contract drafted by common lawyers is typically vastly more detailed than a contract originating in Germany or elsewhere on the Continent. In a story told by the Belgian Professor van Hecke, two companies based in Belgium and the United States had started negotiations over a business deal. In the first meeting, the American attorneys produced drafts of forty pages in fine print. Professor van Hecke then says:

> The European business man had no prior experience with American lawyers, and when presented with the elephantine American drafts he was so shocked that he nearly renounced the deal. Thereupon it was decided to start over, and the European business man arranged for his lawyers to prepare a counterdraft. The result was a document of 1,400 words. It was found by the American party to include all the substance that was really needed, and it was readily executed by both parties and adequately performed.[8]

This anecdote is perhaps a little unusual in that American attorneys will rarely swallow the other side's counterdrafts lock, stock, and barrel. It is true, though, that Continental lawyers are often struck, if not appalled, by the prolixity and the baroque filigree of the drafts by their common law colleagues. I will not discuss the various explanations of this phenomenon offered in the literature.[9] My theory is that Continental lawyers are acting on the assumption that if a doubt arises there will always be available in their civil or commercial codes a full set of well-ordered default rules meant by the legislature to accommodate the typical interests of the parties in a fair and balanced manner. So why should they engage in costly pre-contractual negotiations over 'elephantine' contract drafts if no demonstrable need for specific 'made-to-measure' solutions can be shown to exist?

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[7] K. Llewellyn, 'The Bar's Troubles, and Poultices – and Cures?', *Law and Contemporary Problems* 5 (1938): 104, 118.

[8] G. van Hecke, 'A Civilian Lawyer Looks at the Common-Law Lawyer', in *International Contracts: Choice of Law and Language*, ed. W. Reese (New York: Oceana, 1962), 5, 13.

[9] Cf., e.g., van Hecke (preceding note); J. Langbein, 'Comparative Civil Procedure and the Style of Complex Contracts', *American Journal of Comparative Law* 35 (1987): 381; H. Kötz, 'Der Einfluß des Common Law auf die internationale Vertragspraxis', in *Festschrift für Andreas Heldrich*, ed. S. Lorenz (München: C.H. Beck, 2005), 771.

1.3 The Commercial Flavour of English Contract Law

Contrary to what is stated in the Law Society brochure, I do not think that the good faith principle as such leads to an influx of vague requirements of contractual morality. Nor am I persuaded by the statement that the German or French rules on contract law are less flexible than English law merely because they are partly codified. Even so, I do think that there are differences between English and German laws and that like cases will not always be decided alike. John Galsworthy once said that English law is characterized by what he called its 'savour of fine old cheese'.[10] Maybe. At any rate, what does emanate from English law is a certain commercial flavour and a certain belief that, at least in some cases, it is better – in the words of Professor Goode – 'that the law should be certain than that in every case it should be just'.[11] There is little research on the question and no hard evidence. Let me offer you a few hunches instead.

English law ensures the integrity of written contracts by the parol evidence rule, which provides that evidence extrinsic to the document cannot be used to add to, vary, or contradict the written instrument. The purpose of the rule is to promote commercial certainty by holding parties who have reduced a contract to writing bound by that writing and that writing alone. Under German law, written contracts are presumed to contain a complete and correct record of the parties' arrangements. However, this presumption is rebuttable. Each party is freely admitted to adduce evidence of earlier or later oral negotiations in an effort to show that the terms of the agreement as written must be varied, or supplemented, or interpreted in a certain manner. Such evidence may be adduced even where there is in the written contract a merger clause or a clause providing that any modification of the agreement is ineffective unless it is in writing.[12] I know that the parol evidence rule has been abrogated in Scotland and is so riddled with exceptions in England that little of it seems to be left.[13] Even so it is my hunch that the parol evidence rule is not a dead letter yet and that a party must overcome a substantial hurdle if it wishes to persuade the court to read something into a written contract that is not contained within the four corners of the document.

Let me try to illustrate this statement by two fairly recent cases in which the House of Lords discussed problems of contract interpretation. The general rule is that the intention of the parties must be ascertained from the document in which they have laid down their agreement. While the actual words used and their

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[10] *The Forsyte Saga, a Man of Property* (1922), Part II, Ch. IV.

[11] Goode, 1998, *supra* n. 3, 14.

[12] This does not apply where the 'no oral modifications' clause was individually negotiated by the parties acting in a course of a business and where there is another agreement expressly providing that the 'no oral modifications clause' itself may not be waived unless the waiver is in writing. See the decisions by the Federal Court of Justice in BGHZ 66, 378 and by the Federal Labour Court in NJW 2003, 3725.

[13] See Law Commission Report No. 154 (1986).

ordinary grammatical meaning are of crucial significance, it is clear nowadays that the courts must not isolate these words from the 'background' of the contract or – in the words of Lord Wilberforce – from the 'matrix of facts in which they were set'. In order to interpret a written contract, courts must in his words 'enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from these circumstances, which the persons using them had in view'.[14] However, as made clear by Lord Hoffmann in *Chartbrook Ltd v. Persimmon Houses Ltd*,[15] what must be excluded from the background are the previous negotiations of the parties. Lord Hoffmann does concede that in some cases 'among the dirt of aspirations, proposals and counter-proposals there may gleam the gold of a genuine consensus on some aspect of the transaction expressed in terms which would influence an objective observer in construing the language used by the parties in their final agreement'.[16] Even so evidence of such negotiations is generally inadmissible because trashing through pre-contractual negotiations would in many cases be unhelpful, create greater uncertainty of outcome in disputes over interpretation, and add substantially to the cost of advice, litigation, or arbitration.

This is in clear contrast not only to German law[17] but also to the Principles of European Contract Law,[18] the Principles of International Commercial Contracts,[19] and the UN Convention on the International Sale of Goods.[20] English law still seems to follow what Lord Hoffmann described as the:

> sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings and syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be.[21]

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[14] *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384/85.

[15] [2009] UKHL 38, nos 28–42.

[16] Chartwell (previous note), no. 32.

[17] BGH NJW 1999, 1702; BGH NJW 2001, 144; BGH NJW 2002, 3104.

[18] Article 5:102, Principles of European Contract Law.

[19] Article 4(3), Principles of International Commercial Contracts.

[20] Article 8(3), Convention on the International Sale of Goods.

[21] Chartwell, *supra* n. 16, no. 37. For the same reason, English law refuses to accept subsequent (post-contractual) conduct of the parties as evidence of what they have meant by the language used in the document. See *L. Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] A.C. 235. The exclusionary rule laid down in Chartwell has been criticized. See D. McLauchlan, 'Commonsense Principles of Interpretation and Rectification', L.Q.Rev. 126 (2010): 8; C. Mitchell, 'Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule', *Journal of Contract Law* 26 (2010): 134. See also G. McMeel, 'Prior Negotiations and Subsequent Conduct: The Next Step Forward to Contractual Interpretation', *Law Quarterly Review* 119 (2003): 272; D. McLauchlan, 'Common Assumptions and Contract Interpretation', *Law Quarterly Review* 113 (1997): 237; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words', *Law Quarterly Review* 121 (2005): 577.

The second case I would like to mention was decided by the House of Lords in 1997. This was a case in which a tenant was entitled to terminate a lease on the third anniversary of the commencement date, and it was agreed that this date was 13 January. The tenant served on the landlord a notice to terminate the lease on 12 January. This was obviously a slip on the part of the tenant, and since there was no reasonable doubt that the landlord was perfectly aware of the fact that there was a slip, a German court would have had no problem in finding the notice valid. Not so the Court of Appeal. It held in a unanimous judgment that the notice was ineffective on the simple ground that '12 January' could not possibly mean '13 January', that strict compliance with the terms of the lease was of paramount importance in the interest of legal certainty and predictability, and that if the notice were treated as valid a great deal of confusion and unnecessary litigation would follow. The House of Lords allowed the appeal.[22] However, it did so by a bare majority of 3:2, and I hope you will allow me to cite this case as an example of the propensity of English commercial lawyers to think that 'it is better that the law should be certain than that in every case it should be just'.

Similar reasons seem to underlie *Walford v. Miles*[23] where it was held by the House of Lords that an express agreement that the parties must negotiate in good faith is unenforceable. Lord Ackner observed that:

> [t]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations . . . How is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an agreement? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.[24]

This is in clear contrast to German law. It has been held in many cases and has recently been laid down in section 311 of the German Civil Code that even in the absence of an express promise to negotiate in good faith a relationship of trust and confidence comes into existence once the parties have entered into negotiations, and that there is liability for damages if a party fails to live up to the duties owed by a reasonable person in like circumstances. Time does not permit to state the reasons why I think that the Walfords would also have lost their case had it been

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[22] *Mannai Ltd v. Eagle Star Ass. Co. Ltd* [1997] A.C. 749.
[23] [1992] 2 A.C. 128.
[24] *Ibid.*, 138.

tried to a German or a French court. However, they would have lost not on the grounds stated in Lord Ackner's speech in rather categorical and apodictic form. They would have lost because the defendant Mr Miles would not have been found in breach of his duty to negotiate in good faith. After all, there was no evidence that he had been stringing the Walfords along nor that he had broken off the negotiations – in the words of the Cour de cassation – *sans raison légitime, brutalement et unilatéralement*.[25]

This brings me to the implication of terms. Judges in Germany may fill gaps in the contrast by what is called 'constructive interpretation'. This means that where the parties have omitted to say something the judge must:

> discover and take into account what, in the light of the whole purpose of the contract, they would have said if they had regulated the point in question acting pursuant to the requirements of good faith and sound business practice.[26]

I must admit not to be fully familiar with the detailed English case law on the point nor with its distinction of terms implied by law, implied in fact, and implied by virtue of the usages of trade and commerce. It does seem to me, however, that the approach of English courts is more cautious and circumspect, and that English judges sympathize with the robust rule that it is primarily for the parties, and only very exceptionally for the court, to determine the content and scope of their agreement.[27]

There is perhaps a grain of truth in the observation that English law tolerates 'a certain moral insensitivity in the interest of economic efficiency'[28] and that Continental legal systems rank solidarity higher than individualism. It has also been said that 'the English law of contract was designed for a nation of shopkeepers' while 'the French system was made for a race of peasants'.[29] Of course, 'shopkeepers' might have to be replaced these days by 'hard-nosed business executives' and 'peasants' by 'consumers'. Yet, I am not sure whether speculations on the national character of the English and the Continentals will get us very far. Let me offer you a more mundane explanation. Much of the contract law of a country

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[25] Cass.com. 20 Mar. 1972, J.C.P. 1973. II. 17543. For a more detailed comparative discussion of a party's liability for breaking off negotiations, see H. Kötz, *European Contract Law*, vol. I (Oxford: Clarendon Press, 1997), 34–41.

[26] See BGHZ 16, 71, 76; BGHZ 84, 1, 7. For a comparative discussion of the point, see Kötz, 1997, *supra* n. 25, 115–123.

[27] The gap may be narrowing. See Lord Steyn, *supra* n. 3, 441–442 and W. Grobecker, *Implied Terms und Treu und Glauben* (Berlin: Duncker and Humblot, 1998).

[28] P. Legrand, 'Pre-contractual Disclosure and Information: English and French Law Compared', Oxford J. Legal Studies 6 (1986): 322, 349.

[29] See O. Kahn-Freund, C. Lévy & B. Rudden, *A Source-Book on French Law* (Oxford: Clarendon Press, 1979), 318.

depends on the types of contract most often litigated before the appellate courts of that country. A contract law devised by a court most often confronted with consumer transactions will differ materially from that devised by a court that, like the English Commercial Court, deals primarily with cases arising from disputes over charter parties, marine insurance contracts, agreements for the merger or acquisition of companies, or other transactions where the money at stake is such as to justify the staggering cost of conducting litigation in this country. On the other hand, you would be surprised to learn how much intellectual energy the highest German court in civil matters, the Federal Court of Justice, devotes each year to the resolution of disputes arising from used car deals, residential leases, or consumer credit agreements. Hundreds of cases deal with the validity of standard terms on the basis of the Civil Code's provisions implementing the EC Directive on Unfair Terms in Consumer Contracts. In this country, the Directive has been relegated to the backwater of a Statutory Instrument. Litigation over the validity of standard terms seems to be fairly inconspicuous, and among the available cases, there are some that seem to afford less protection to the interests of the consumer than would be acceptable to most German courts. For example, in the recent case of *Office of Fair Trading v. Abbey National*,[30] the Supreme Court held that a term entitling a bank, in the event of an unauthorized overdraft, to charge its customers not only interest on the sum borrowed but also an additional 'fixed fee' was not subject to an assessment of its fairness. The fee was considered to form part of the 'price or remuneration' payable by the customer in exchange for the bank's services. Accordingly, under Article 4(2) of the European Directive as implemented by the Unfair Terms in Consumer Contract Regulations, the term was held to be exempt from the fairness test. In Germany, on the other hand, there are dozens of appellate decisions that have interpreted Article 4(2) of the Directive to be applicable only to the essential 'core' terms of the contract, and not to merely 'ancillary' clauses as to which there is no real competition between banks on the ground that, as the banks know fully well, customers do not take them into account, not because they are stupid, but because doing so would involve disproportionate transaction costs. It is indeed to be regretted that counsel for the Office of Fair Trading did not place before the Supreme Court the wealth of illustrative material provided in this area by German case law.

I apologize for this comparative excursion into contract law. The point I wish to make is that in view of the type of case most often litigated before German appellate courts it should come as no surprise that the English rules of contract law may differ to some extent, both in form and in substance, from those in Germany. This seems to me a point to which more attention should be devoted by the *aficionados* of instant codification of European contract law.

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[30] [2009] UKSC 6.

2. Procedure

In both brochures, one finds impressive lists of reasons why parties should select English or German courts as the best forum in which to resolve their disputes. In the Law Society brochure, it is emphasized, for example, that the English judiciary is respected throughout the world for their skill in dealing with complex cases, that English judges are recruited from the ranks of senior legal practitioners, and that there is no career judiciary in the United Kingdom. Procedure in the English courts is described as efficient and speedy due to the court's duty to actively manage cases. In contrast to American law, there are no jury trials in civil matters and no punitive damages. In contrast to the civil law, cross-examination is available as a crucial tool of testing the opponent's evidence, and as to the rules on disclosure, English procedure is said to steer a prudent midway course between fishing expeditions in the American style, on the one hand, and the absence of effective disclosure obligations ascribed by the brochure to the civil law, on the other.

Now there is clearly no need here to carry coals to Newcastle and describe the procedure of English courts in detail. However, let me discuss briefly the one central feature that will be quite self-evident to you but seems to be little understood on the Continent, and that is the sharp separation of the pre-trial stage and the trial. The historic centrepiece on the procedural dining table of the common law is the jury, and since a jury cannot be assembled, dismissed, and reconvened from time to time over an extended period, the trial must be carried out as a single continuous drama. Of course, the civil jury has long paled into insignificance in this country. It remains true, though, that once the trial of a civil case has started it will have to run its course without interruption perhaps for a day or for a week or, if need be, for an even longer period until both parties have had their 'day in court' and judgment will be given. There are no adjournments or continuances, and there is simply no opportunity for the parties to go back, search for further information, and present it to the court at some later date. It follows that a most careful and thorough pre-trial preparation of the case is of paramount importance. Not only must counsel for both sides have extensive pre-trial access to the witnesses they might wish to call. They must, in order to prevent surprise, produce 'Witness Statements' and make them available to the opposition and the court. They must prepare their witnesses and expert witnesses for questions they might be asked during cross-examination, and they must themselves develop lines of questioning likely to cast doubt on the substance of the testimony of the opponent's witnesses or on their credibility. Not only must counsel identify and make timely disclosure of all documents they might possibly rely on during the trial. They must also think through the legal points they might wish to raise and disclose them and the supporting authorities to the other side by way of what is called 'Skeleton Arguments'. Thorough pre-trial preparation of a case is undoubtedly conducive of settlement, and it is indispensable if the trial is to be conducted as a single, concentrated, and continuous event. However, as we shall see, costless it is not.

Although the Woolf Reforms may have narrowed the gap, it seems to me to be still basically correct to say that English procedure is based on the assumption that the judge should not at the pre-trial stage 'descend into the arena' and play a part in the collection and preparation of evidence lest he run the risk of having his vision 'clouded by the dust of conflict'.[31] German civil procedure is in sharp contrast. There is no live tradition of the jury and there is accordingly no trial in the common law sense. Proceedings in a civil case may be described as a series of isolated conferences in which briefs are exchanged, documents submitted and witnesses nominated in support of specific factual allegations, and procedural rulings made. The judge may, for example, issue an order requiring one or both parties to 'supplement or explain' their briefs by making a written statement prior to the next hearing on factual or legal issues that, in the eyes of the court, require clarification.[32] Should the case take an unexpected turn the party taken by surprise may be allowed to develop a response within a period fixed by the court. At some time, the judge will make an evidentiary order identifying the witnesses to be heard and describing with some precision the facts on which each witness is to be examined and fixing the order in which they are to be called.[33] What is most likely to strike the common lawyer is the fact that mainly the court conducts the interrogation of witnesses. It is the court that will ask for the witness' name, age, occupation, and residence. It is the court that will then invite the witness to narrate, without undue interruption, what he knows about the matter on which he has been called. After the witness has given his story in his or her own words, the court will ask questions designed to test, clarify, and amplify it. It is then the turn of counsel for the parties to formulate pertinent questions. However, in an ordinary case, there is relatively little questioning by counsel for the parties, at least by common law standards. One reason is that the judge will normally have covered the ground. Another reason is that for counsel to examine at length after the court seemingly has exhausted the witness might appear to imply that the court does not know its business, which is a dubious tactic. There is no cross-examination in the sense of the common law, nor is there a full stenographic transcript of the testimony. Instead, the judge himself pauses from time to time to dictate a summary of what the witness has said so far. At the close of testimony, the clerk will read back the dictated summary in full, and either witness or counsel may suggest improvements in the wording. If the exact phrasing of a particular part of the testimony is believed to be of critical importance, counsel may insist on having it set down verbatim in the minutes.

A similar system is used with respect to expert witnesses. In Germany, as indeed in most Continental countries, the expert will be selected and appointed by

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[31] *Yuill v. Yuill* [1945], 15, 20, per Lord Greene M.R.; *Jones v. National Coal Board* [1957] 2 Q.B.55, 63, per Denning L.J.

[32] See s. 273(2), no. 1 German Code of Civil Procedure.

[33] See s. 358 et seq. German Code of Civil Procedure.

the court after consultation with the parties. It is the court that will conduct his or her examination, and it is the court that will advance the expert's fee eventually to be borne by the losing party. In the common law, it is, at any rate in principle, up to the parties, or rather their lawyers, to find suitable experts who will then be examined and cross-examined in the same way as ordinary witnesses. I understand that British judges now have a power to order that evidence on an issue should be given by a joint expert, jointly instructed and paid for by the parties. I am not sure, though, whether a court-appointed expert may be thrust on the parties even where they would both prefer an expert of their own. At any rate, I have served both as a court-appointed expert on foreign law in cases pending before a German court and as party-selected expert witness on German law in litigation before the High Court in London, and I assure you that there are substantial differences between the two roles. As a court-appointed expert, you are an ally and partner of the court. You assist the court to the best of your ability in reaching a correct result, and it is with the court that your duty of loyalty lies. What struck me most in my role as party-selected expert witness in the English cases was not the experience of being examined and cross-examined, but the difficulty to resist the subtle temptation to join your client's team, to take your client's side, to conceal doubts, to overstate the strong and downplay the weak aspects of his case, and to dampen any scruples you might have by reminding yourself that the other side will select and instruct another expert witness and that, when the dust has settled, the truth will triumph.

There is certainly some truth in the description of common law procedure as 'adversarial' and German procedure as 'inquisitorial'. Concededly, judicial case management is less conspicuous in Germany in cases where an important issue or a lot of money is at stake and the case is handled for both sides by well-prepared and equally competent counsel. In an ordinary case, however, most common law observers will discern an element of benevolent paternalism in the way in which the German judge develops the case, clarifies the issues, informs himself about the legal and factual aspects of the case, marks out areas of agreement and disagreement, encourages the parties to modify or amplify their allegations, and may even try to redress, in a gentle and cautious manner, the handicap caused to one party by the incompetence of his lawyer. Not only is the German judge under a duty to explore the chances for a settlement of the dispute but he will also lay before the parties, if they so wish, a detailed draft of a settlement.[34]

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[34] There are now excellent comparative studies of the German law of civil procedure. Cf., e.g., P. Gottwald, 'Civil Procedure in Germany after the Reform Act of 2001', *Civil Justice Quarterly* (2004): 3; J. Langbein, 'The German Advantage in Civil Procedure', *University of Chicago Law Review* 52 (1985): 823; P.L. Murray & R. Stürner, *German Civil Justice* (Durham, North Carolina: Carolina Academic Press, 2004) reviewed by O.G. Chase, *Civil Justice Quarterly* (2006): 275. For the results of a recent survey of hundred European businesses carried out by the Oxford Institute of European and Comparative Law on 'Civil Justice in Europe: Implications for Choice of Forum and Choice of Contract Law', see <http://denning.law.ox.ac.uk/iecl/ocjsurvey.shtml>.

Needless to say that all this is not easy to reconcile with the principle of adversarialism, which has always been regarded as the hallmark of common law procedure. On the other hand, this principle is not undisputed. There are not just academics but quite a few common law judges who have taken the position that the Woolf Reforms have not gone far enough and that more must be done to curb what they call the excesses of the adversary system.[35] In general, judges know what they are talking about, and when I read their comments, I was reminded of what the British mathematician G.H. Hardy once said: 'If the Archbishop of Canterbury says he believes in God that's all in the way of business, but if he says he doesn't you can take it he means what he says'. What looms large in their comments is the cost factor. In addition, there seems indeed a lot to be said for the view that the strict segmentation of English procedure into the pre-trial and trial compartments may lead to duplicated work and contribute to the enormous cost of litigation in England. Only rarely can a litigator tell at the beginning precisely what issues and what facts will prove important in the end. As a result, he must strain to investigate, analyse, and record in documentary form everything that could possibly arise at trial. He must leave no stone unturned, provided, of course, as is often the case, that he may charge his fees by the stone. Even though the testimony of witnesses may turn out to be more or less irrelevant at trial, the litigator must play it safe during pre-trial: All witnesses whose evidence might conceivably be of help to his client must be approached, examined, and prepared for cross-examination, and their testimony must be recorded in witness statements often needlessly long-winded, if not couched in the form of streams of consciousness. Particularly, in large and complicated cases, solicitors will produce, in order to impress both their client and the opposition and perhaps even the judge, huge bundles of documents that will often remain unread during a lengthy trial, but for which they will charge substantial fees based on what is euphemistically referred to as the 'perusal of documents'. It will come as no surprise that not a single word is said about costs in the Law Society brochure except that it tries to sooth its readers by a reference to the various forms of conditional fee agreements available in England. However, cost is a serious problem. Let me just cite what the Honourable Mr Justice Lightman had to say on the matter:

> It is sufficient to say that increasingly informed advisers wisely recommended prospective litigants . . . in order to make savings in terms of costs, where it is practicable, to sue on the Continent, e.g. in Holland, Belgium or Germany, rather than here. In those countries at least equal justice is obtainable at a

[35] See G. Lightman, 'Civil Litigation in the 21st Century', *Civil Justice Quarterly* (1998): 373; G. Lightman, 'The Civil Justice System: The Challenges Ahead', *Civil Justice Quarterly* (2003): 335; G.L. Davis, 'Civil Justice Reform: Why We Need to Question Some Basic Assumptions', *Civil Justice Quarterly* (2006): 32.

fraction of the cost. The view has been expressed that the movement of litigation to foreign courts for this reason is particularly noted in the field of intellectual property and most especially patents, where the forum of choice is Germany, but the view is controversial.[36]

[36] See Lightman, 2003, 239.