

## Conference European dimensions to national law - August 27-28, 2009

### Abstract – Maud Piers

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The research I wish to present at the conference is part of a larger-scale comparative legal research project regarding the development of the principle of good faith in the European Union member states after the implementation of the ‘European Directive 93/13 on unfair terms in consumer contracts’.

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In what follows, I will more elaborately explain what the broader scope of my research is about.

In 1993 the Council of the European Union issued the Directive 93/13 on unfair clauses in consumer contracts (PB L 95/29). Article 3, 1 of this Directive states that a standard contract term shall be regarded as unfair if, “*contrary to the requirement of good faith*”, it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer. The European Union herewith introduced the principle of good faith in its legislation. The European Union member states were hence required to implement a general application of the good faith principle into their respective legislations.

There was a lot of scepticism amongst academics over the general adoption of this principle of good faith by the European national systems of law. Their criticism primarily arose from the structural differences in legal cultures within Europe. Good faith typically is considered a Civil Law-concept, while English law rejects a general application of such principle. Moreover, also amongst Civil Law countries there is divergence regarding the scope and application of the good faith-principle. This led some to argue that any attempt towards harmonisation of this concept would be futile and unwelcome. Others voiced the opinion that the general use of the good faith principle does not necessarily have to be a “*legal irritant*” to Common Law, but on the contrary provides an opportunity for a more consistent – rather than a “*piecemeal*” – approach.

It is until today unclear whether these several, divergent views expressed in the past 10 years were justified in light of the following development and current stance of the good faith principle in legal practice. Several recent studies assessed to what extent the countries adapted their legislation to *formally* comply with the Directive’s requirements. It has, however, not been examined how article 3, 1 of the Directive influenced the current understanding and development of the principle of good faith in the *actual legal practice* of these European Union member states.

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The essential goal of my larger research project is to answer this question and to derive some useful conclusions this. My research is being done in different stages and through examining differing legal systems. English law seemed an interesting starting point for this research and constitutes the subject matter of the paper that I wish to present at the conference.

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At the conference, I would like to share the first results by presenting a paper that I have prepared in cooperation with the Oxford Institute for European and Comparative Law on some aspects of this larger-scale project. I will go into the more specific question regarding the impact of the introduction of the concept of good faith by Directive 93/13 on the application and content of good faith by both English legal practitioners and courts, *beyond* the sphere of application of the Directive. I attempt to provide an answer to this question by discussing three issues. The first issue is whether English contract law is familiar with a *principle* of good faith. English legal scholars as well as courts are quite straightforward about the current state of the law in this regard. They unanimously voice the opinion that there is no room for a general principle of

good faith in English contract law. A second inquiry considers the extent to which a *rule* of good faith sets out boundaries in specific areas of contract law for the principles of binding force and of freedom of contract. This raises questions both on the meaning and the scope of good faith in English contract law. The parts dealing with questions 1 and 2 provide a diagonal-section view of the current stance of English (positive) contract law on the application of a good faith doctrine. A third and yet unanswered question is whether the significant expansion of the good faith *rule* in different areas of contract law – and not in the least consumer law – might have or has had an influence on the way the *principle* of good faith is generally perceived in English contract law. This third inquiry poses some exciting methodological challenges which I tackle in my paper.