

English law: text, context and the absence of good faith

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English law is the most frequently chosen governing law in international commercial contracts, including many contracts that Basel companies conclude with foreign partners. English contract interpretation seeks the meaning that the document would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of the contract. Lord Hoffmann's restatement in *Investors Compensation Scheme Ltd v West Bromwich Building Society* in 1997 marked a shift towards a contextual approach. In *Rainy Sky SA v Kookmin Bank* in 2011, the Supreme Court held that, where a term is open to more than one interpretation, a court should prefer the one that is more consistent with business common sense.¹

The Supreme Court then restated the primacy of the text. In *Arnold v Britton* in 2015, Lord Neuberger emphasised that the reliance placed on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision, which the parties chose. A court should be slow to depart from the natural meaning of the words merely because the result appears imprudent for one party. In *Wood v Capita Insurance Services Ltd* in 2017, Lord Hodge described textualism and contextualism as tools that a court uses in different proportions depending on the nature, formality and quality of drafting of the contract. A sophisticated contract drafted by skilled professionals may be interpreted principally by textual analysis, whereas a less formal agreement may require more attention to its factual matrix.²

Two further features distinguish English interpretation from the continental approach. English law excludes evidence of pre-contractual negotiations and of the parties' subsequent conduct from the interpretation of a written contract, a rule that the House of Lords confirmed in *Chartbrook Ltd v Persimmon Homes Ltd* in 2009. A Swiss or German court

would treat such evidence as relevant to the real intention of the parties. English law also gives effect to entire agreement clauses, which state that the written document contains the whole agreement and supersedes all prior understandings. Such clauses exist in continental contracts too, yet a Swiss court may still consider negotiations in establishing the real common intention, since the clause itself is subject to interpretation.³

The most profound difference concerns good faith. English law recognises no general principle of good faith in contract. The House of Lords held in *Walford v Miles* in 1992 that an agreement to negotiate in good faith is unenforceable because it lacks certainty and is inherently inconsistent with the adversarial position of negotiating parties. Some later decisions, beginning with *Yam Seng Pte Ltd v International Trade Corporation Ltd* in 2013, have accepted that a duty of good faith may be implied in certain relational contracts. These decisions rest on the implication of terms in particular contracts. English courts continue to reject a general duty of the kind that Article 2 of the Swiss Civil Code or section 242 of the German Civil Code imposes.⁴

For drafters in Basel, this contrast has practical consequences. A clause that states that the parties shall cooperate in good faith may be redundant under Swiss law, where good faith applies anyway, and of uncertain effect under English law, where its meaning depends on the context and on whether the court treats it as an enforceable obligation. When an English-law contract is translated into German for a Swiss or German party, the translator will naturally render good faith as *Treu und Glauben*. The German reader then associates the clause with a far richer set of duties than an English court would recognise. Such misunderstandings are rarely visible at the time of signing, which makes them all the more dangerous when a dispute arises.⁵

1 Notes

1. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50. To be verified. ↩
2. *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. To be verified. ↩
3. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. On entire agreement clauses in English law, see *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611. On their effect under Swiss law, see the commentaries on Art. 18 CO. To be verified. ↩

4. Walford v Miles [1992] 2 AC 128 (HL); Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB). On relational contracts, see also later case law, for example Bates v Post Office Ltd (No 3) [2019] EWHC 606 (QB). To be verified. ↩
5. On the different meanings of good faith in English, Swiss and German law, see the comparative literature, for example Zimmermann and Whittaker (eds), Good Faith in European Contract Law, 2000. To be verified. ↩

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