European Review of Private Law 3-2006 [305–307] © Kluwer Law International | Printed in the Netherlands

Introduction

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Russell Advocaten, a Dutch law firm based in Amsterdam and The Hague, organized the conference at which the papers in this publication were read. The roots of the conference date back to the 1970s and 1980s, when my two brothers, Willem and Reinier, and I, all partners of Russell Advocaten, read law at the Free University in Amsterdam. During that period one of our teachers was Eltjo Schrage. He was appointed reader of Roman law in 1976 and was promoted professor in the same discipline in 1980. After having taken our degrees and having entered the law firm, we maintained regular contact with him. At a certain stage we asked him to become one of the legal advisers to our firm. We greatly appreciated the cooperation. Consequently, in 2005 we took the opportunity to honour him and, in commemoration of his 25 years of professorship, we decided to organize a colloquium in the proper sense of the word. We invited a number of scholars in this area of research and many of them were able to accept the invitation. The editorial board of *European Review of Private Law* (*ERPL*) was prepared to publish the papers read during this colloquium and *Russell Advocaten* is hereby happy to present the results. For the central theme of the colloquium we chose one of the main areas of Eltjo Schrage's scholarly research: the comparative legal history of unjust enrichment. This choice deserves an elucidation.

It is widely assumed that Western civilization has bred two major legal traditions: the civilian form, modelled upon Roman law, and the common law form, which derived from a hotchpotch of practices in the royal courts of England. Even the programme of the conference was built upon this highly reductive generalization, which has about it a good measure of myth-making. It nevertheless has an aura that remains fairly strong. Scottish and South African law are generally qualified as being mixed legal systems, a sort of go in-between the common law and the civil law, and that qualification seems to confirm the assumption of two major legal traditions. Hector MacQueen (Edinburgh) read a paper on unjust enrichment in mixed legal systems, which unfortunately could not be submitted to *ERPL*. It has been published in the 2005 volume of the *Restitution Law Review,* p. 21-34.

The way the law of unjust enrichment has developed in different countries, the different extent to which countries recognize a unified law of enrichment, and the differences in its shape and doctrines seem to confirm the assumption of two different major legal traditions. Nevertheless, as Wouter Snijders (The Hague) showed, there is also much common ground between the two traditions. During the colloquium we have followed at least four areas in which the differences between the two legal systems have become obvious.

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Firstly, we have seen that in England there is an emphasis on the 'need' for a ground for restitution, which, as David Ibbetson (Cambridge) showed, is opposed to civil law systems, which tend to ask whether there was a 'cause' or a legal 'ground' for the benefit of the defendant.

Secondly, it turns out that civil law jurisdictions find it much more difficult to deal with situations in which the gains of the tortfeasor are greater than the losses inflicted on the victim, as James Edelman (London), Christian Filios (Trace and Athens) and Jacques Linssen (Breda) have pointed out.

Thirdly, serious problems of comparison also arise in deciding how to deal with three-party situations given the requirement of German law that the enrichment be 'direct', which problem was elucidated by Martin Schermaier (Bonn).

Equally cumbersome, fourthly, is the fact that in England some of the subject matter falls within the scope of what in the civil law jurisdiction would be the law of property. The boundary between property and obligation, between owning and owing, seems to be less sharply distinct in the common law than in the civil law's inheritance from Roman law. Not least among the reasons why this boundary is blurred are the elusive nature of the concept of 'title' within common law and the fact that its proprietary remedies are mainly tortuous in character and therefore belong in civil law terms to the law of obligations. Furthermore, Laurens Winkel (Rotterdam) has shown that tracing has no substantive counterpart in Roman law. In civilian legal systems it is an axiom that any remedy concerning money almost by definition falls outside the scope of the law of property.

The colloquium firstly dealt with the definition of unjust enrichment. Especially the contribution of Wouter Snijders (The Hague) deserves to be mentioned here. Steven Hedley (Cork) elucidated the way the idea of *unjust* is used, whereas Gerrit van Maanen (Maastricht) explored the borderlines of the remedy for unjust enrichment, more specifically the question whether the notion of *subsidiarity* of the action is an adequate tool to restrict the action between certain limits. Secondly, we discussed the borderlines between unjust enrichment and the law of contract (Jan M. Smits, Maastricht), respectively between the law of unjust enrichment and the law of property on which Hein Mijnssen (Amsterdam) read a paper that will be published in *WPNR (Weekblad voor Privaatrecht, Notariaat en Registratie)*.[1] Eventually, we discussed transitional problems of the law of unjust enrichment and the law of torts. Jeroen Chorus (Leiden, Amsterdam) dealt with illegality and restitution. Hugo van Kooten (The Hague) discussed the available defences against the remedy, notably the notion of change of position (*Wegfall der Bereicherung*). The contribution of Ted de Boer (Amsterdam) on private international law encompassed these studies. He had to perform a lot of pioneering, since similar studies are

[1] 'Weekly for Private Law, the Notarial Profession and Registration'.

extremely rare. There is an excellent German book, albeit of slightly older date, by H. Plassmeier,[2] there is the book by Panagopoulos, which has developed in the four years of its existence into the standard textbook of the common law,[3] and there are two recent articles, one by Joanna Bird, who wrote the closing chapter to Steve Hedley's and Margaret Halliwell's BCLS-volume on Restitution,[4] and an article by Stephen G.A. Pitel, which came out a few months ago.[5] We very much regret that Ted de Boer felt obliged to withdraw his contribution, since developments between the colloquium and the publication of the proceedings, namely the publication of the draft Rome II regulation at the beginning of this year, would require amendments to his text which exceed the time available.

In the colloquium we tried to delineate the genuine place of the law of restitution amidst the law of property and the law of obligations. We did not mention family law, nor did we discuss the European dimension of the problem. In his closing remarks Eltjo Schrage devoted some attention to these two gaps in the programme. We hope the participants look back on a very successful colloquium and we would like to thank the editorial board of *ERPL* to enable the publication of the proceedings.

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[2] H. PLASSMEIER, *Ungerechtfertigte Bereicherung im Internationalen Privatrecht und aus rechtsvergleichender Sicht* [Schriften zum Internationalen Recht Band 81], Duncker und Humblot: Berlin 1996.

[3] G. PANAGOPOULOS, *Restitution in Private International Law*, Richard Hart: Oxford and Portland, Oregon, 2000.

[4] J. BIRD, 'Conflict of Laws', Chapter 22 in S. Hedley and M. Halliwell, *The Law of Restitution* [Butterworths Common Law Series], Butterworths Tolley: London 2002, p. 537-582.

[5] S.G.A. PITEL, 'Characterization of Unjust Enrichment in the Conflict of Laws', in J.W. Neyers *et al.*, *Understanding Unjust Enrichment*, Richard Hart: Oxford and Portland, Oregon, 2004, 331-358.