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Editorial

The Impact of Community Law on Domestic Private Law

1. This is one of these issues of ERPL which nearly lives up to what we would like to present to our readers in every issue. We have an important doctrinal part. There are case notes galore. We have an *Erfahrungsbericht.* And we have book reviews.

2. From 1–3 October 2009, the Fifth European Lawyers' Forum took place in Budapest. On the agenda was the impact of European community law on domestic law. This theme was dealt with in various parallel sessions, one of which focused on civil law. ERPL is proud to publish the papers presented at this occasion. This Special Issue begins with the Introductory paper by one of the convenors of the Forum, Professor Attila Harmathy from the Eötvös Lorand University in Budapest and formerly of the Hungarian Constitutional Court. He provides us with an overview of the various papers as well as an introduction to the theme.

Professor Jürgen Basedow, Director of the Max Planck Institute in Hamburg, then analyses 'The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary.' Only fifteen years ago, the total number of cases before the European Court of Justice on substantive private law instruments of secondary Community law, in particular directives, and on civil procedure, not counting cases in which private law was a side issue, numbered no more than six. By 2007, this has risen to twenty-nine. The European Court of Justice has never been seen primarily as a civil law court but rather as a court for matters of administrative law and public international law. As private law cases are moving in, a certain restraint with the Court to handle them may be observed. Such matters are frequently left to domestic courts. Basedow pleads for a bigger role of the European Court of Justice in private law. He advocates a role for the *Draft common frame of reference*, for the establishment of specialized panels for private law with the Court of First Instance and for direct access for citizens to the European courts.

Professors Marek Safjan, also Justice in the European Court of Justice, and Przemysław Mikłaszewicz then examine the general principles of EU law of a substantive character. By way of example they analyse ECJ case law as to the collision between the principles of equal treatment and freedom of contract, between free movement of workers and contractual autonomy and between freedom of assembly and freedom of movement. They focus their paper on how fundamental rights and basic freedoms may be directly invoked in the context of relations between individuals.

Justice Guy Canivet, the former *premier président* of the French *Cour de cassation* and currently president of the French Constitutional council, signals that

the Council did not, at first, consider control of the correct transposition of European legislation as one of its functions. This was changed by the ratification of the Treaty of Maastricht. Inspired by other constitutional courts in Europe, the *Conseil constitutionnel* as of 2004 has started to exercise a limited control. Canivet foresees that, after the example of the Italian Constitutional Court, the *Conseil constitutionnel* may in the future pose prejudicial questions to the European Court of Justice. Professor Hugh Beale, whose involvement in the Principles of European Contract Law and the Draft Common Frame of Reference are well known, concludes that English private law has only been influenced to a very small extent by Community Law. He attributes this to three elements: the manner in which European legislation has been transposed in England, the English view as to the construction and interpretation of legislation and a strong resistance to civil law notions among English practitioners. The latter think they stand to profit from English law, as an elective law for foreign contracting parties, remaining as much separate as possible.

Professor Arthur Hartkamp, the former *procureur-général* of the Dutch Supreme Court and presently affiliated with the Radboud University Nijmegen, argues that the EC Treaty has acquired a much greater significance in private law than would correspond with the limited mention of private law in the Treaty. He signals two lines for intervention by the Court: by interpreting Treaty provisions in such a way that they have become directly applicable to relationships between individuals and by the general principles of community law which the Court has developed on the basis of Article 220 EC. The Dutch Justice in the European Court of Justice Christiaan Timmermans finally analyses the impact of European Law on International Company Law. A major flaw in his view is the lack of uniformity in the area of Private International Law. Two standpoints are competing in this matter: the method of incorporation and the notion of the *siège réel.* On the basis of well-known cases such as *Segers* (C-81/87), *Daily Mail* (C-212/97), *Centros* (C-208/00), *Überseering* (C-167/1), *Inspire Art.* (C-411/03) and *Cartesio* (C-210/06), Timmermans concludes that this case law has led to a certain competition between domestic legislation, as has been the case in the United States.

As the President of Hungary, László Sólyom observed in his opening speech: 'the volumes, gathering the text of the lectures and addresses of the conferences have become documentations of a time-period, similar to the volumes of jurist meetings of the individual countries which will be examined and quoted even one hundred year later'.

3. The last case mentioned by Timmermans is the *Cartesio* case of the European Court of Justice. This is the subject of our first case note, by our Editor Walter Cairns.

4. One of the last cases of the House of Lords to be reported in ERPL – last year the judicial functions of the House were taken over by the Supreme Court of the United Kingdom – is the *Corr* case. An employee became depressed after a work

accident and committed suicide. Is the widow entitled to compensation? The various case notes, coordinated by Miquel Martín-Casals, demonstrate not only the different approach to this question in EU Member States but also how tort law, despite converging trends, still differs in many respects. We are glad that we can again – after the two paternity cases coordinated by Professor Lurger in ERPL 2010/2 – publish a case with a number of annotations, which one of the members of our Advisory Board, Professor Hein Kötz, once called the trademark of ERPL.

5. We finally have a case note by Ruud Jansen and Vincent Sagaert under the French case involving the Estate of Arsène X, which contains references to Belgian, Dutch, German and Swiss law.

6. An *Erfahrungsbericht* as to the Fifteenth Meeting of the Common Core of European Private Law project – formerly known as the Trento project, which currently meets in Torino – is presented by Emanuele Ariano and Marco de Morpurgo.

7. We conclude this issue with three book reviews. In the near future, the number of such reviews will probably soar, thanks to the fact that our Editor Rolf Jox has accepted the position of ERPL's Book Review Editor.

8. The one thing which admittedly could have been better is the linguistic division: two French language contributions apart, this is an all-English affair. Where are the German language contributors – *wo sind sie geblieben*? *Deutschsprachige, vereinigt Euch!*

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