

Editorial

Exercises in Legal Pharmacology

While the European Commission is in the process of proposing further measures to enhance the free movement of judgments and of official documents relevant to the citizen (14 December 2010 Proposal for revision of Regulation 44/2001), this Journal, for its part, continues to promote the free movement of ideas. I will refrain from discussing here the stringent restrictions and threats to such free movement imposed by the EU itself, in regulations covering legal areas as diverse as copyright, privacy and discrimination. We can, however, give the assurance that no secret documents have been leaked in this issue.

As far as I am aware, the reader will not be confronted with any shocking opinions either, even if a prominent role is played in this issue by the most famous of all ‘legal irritants’ (Gunther Teubner, ‘Legal irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences’, *MLR* 1998), namely Good Faith (*bona fides*). Whereas many of us treat it as a trusted possession, others take the view that the beast remains in need of domestication. Interestingly enough, I am not aware of any tendency among Continental lawyers to regard traditional common law institutions such as trusts as legal irritants – indeed, if anything emanating from the common law countries is perceived as irritating, it tends to be the insufficient regulation of certain activities which give rise to toxic financial or legal products. True, there was a famous moment during the last meeting of the Study Group preparing Book X of the Draft Common Frame of Reference, held in Athens, when Prof. Carlo Castronovo explained to us that the trust is a wild animal which must be ‘civilized’. However, is it not a fact that the role of the civilian good faith concept is to civilize?

At all events, civilizing by way of good faith does not equate to uniformity. Nicola Gundt & Aline van Bever examine the manner in which good faith has civilized the process of adapting the content of individual labour contracts, and reach some interesting conclusions on the differences between the legal systems in question. In her study of the ‘average consumer’ as featured in EU law, Chantal Mak concludes that this notion remains multi-faceted, and that national differences can continue to be accommodated despite the identity between the terms used. In addition, Mel Kenny, in his analysis of the manner in which the courts assess the fairness of bank charges in retail banking, demonstrates how fragmented the nominally uniform consumer law can prove to be. Yvonne Delfos then discusses the rules on the duty to disclose when concluding insurance contracts, as contained in the proposed Restatement on Insurance Contracts of the Project Group on European Insurance Contract Law, and compares these rules to certain national laws on this subject – the topic in question being yet another descendant of the good

faith concept. Five other authors, in an excellent sequence of annotations, comment upon a decision of the Belgian Supreme Civil Court which avails itself of the marginal reference to good faith in Article 7.1. CISG (Vienna Sale of Goods Convention) to enable the rule on renegotiation in the event of changed circumstances, as contained in the Unidroit Principles, to dilute the hardship of Article 79 CISG. As is the case with the Greek word *pharmakon*, the good faith concept appears as both a remedy and a drug, a medicine as well as a poison. Paracelsus's phrase *dosis sola facit venenum* is probably appropriate here too – whether it becomes an irritant or not will depend on the dosage.

As an antidote for our readers to this *pharmakon*, we have added to our special issue on Chinese law with a paper on liability for environmental pollution by B. Pozzo and Lebing Wang. Is the *crux* here, however, not equally the way in which the rules will be applied in practice?

In another series of case notes that follows in the next issue, however, the authors will again engage intensely with the concepts involved, with elements of contracts, torts and the law on personal status coming together in a discussion on liability in the event of negligent destruction of sperm stored in a sperm bank. Although these banks seem to stop well short of repackaging their products into toxic products, it may still be a risky business.

Matthias E. Storme
Joint Editor-in-chief
Wishing you a fruitful 2011.