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Editorial

Towards a European Palandt*

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1. Domestic versus Euro-Wide Interpretation

The private law in Europe is increasingly manifesting a dichotomy – that between domestic rules and the regulation emanating from Brussels and Luxembourg. This is at its most obvious in those EU Member States which, for various reasons and to the extent that it was possible for them to do so, have incorporated the relevant Community rules in their Civil Codes. Incorporation has its advantages. Under the original conception on which codification is based, organizing the private law as a closed body of rules has a systematic and didactical purpose. It also serves to introduce new paradigms inspired by European regulation, such as protecting the weaker party, into domestic law. On the other hand, incorporation presents at least some negative aspects, one of which is that the user will not readily identify the various origins of the provisions contained in the Civil Code, unless the legislature in question highlights them by using different colours – black for domestic and blue for European rules, as has sometimes been suggested.

Why could the various origins of these rules be relevant? One of the main reasons will be that, whereas nationally enacted rules will be interpreted in accordance with national rules of interpretation, European rules will or will need to be interpreted in conformity with European interpretation standards. These rules of interpretation can vary considerably – witness, for example, the various ways in which legislative materials are used as a source of interpretation. In the common law jurisdictions, this remains a contested method of statutory interpretation, which should only be used in exceptional circumstances. In the civil law jurisdictions, on the other hand, consulting legislative history is one of the most common methods of interpretation, especially in relation to recent legislation. More fundamentally, rules of European origin will have to be applied and interpreted the European way, whereas national rules will have to be applied and interpreted in accordance with national standards.

In this Editorial Note, I will restrict myself to dealing with the former category, that is, rules of European origin. The thesis which I wish to defend for

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this category is that, when seeking out sources aimed at assisting the application and construction of these rules, we should not limit ourselves to national sources but, in addition, consult sources of other EU Member States. This in itself is by no means an original suggestion. However, what may well be original is the idea to *do something* about it. We academics should start constructing a new European-wide commentary or – and here the Darwinists can show their true mettle – several such commentaries. The newly established European Law Institute could act as a sponsor for such an initiative.

2. The Presumption of a Lack of Conformity: The Example of Animals

Let me give an example of where the problem lies. A not infrequent question which arises in EU Member States is to what extent animals are covered by the exception clause in Article 5 of the Consumer Sales Directive. Under paragraph 3 of this Article, subject to evidence to the contrary, any lack of conformity which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery 'unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity'. In Germany, the question to what extent – if any – animals are exempted from the presumption, has been intensely debated by legal authors, and has given rise to an abundant case law, including various decisions by the *Bundesgerichtshof* (Supreme Court). Similarly, in the Netherlands, this question has not only prompted a number of decisions by the lower courts but has also been debated in the legal literature, and has even been discussed in Parliament. What is remarkable is that the German sources take no account of that which other jurisdictions have to say on this matter. Likewise – but perhaps even more remarkably – Dutch legal writing fails to engage with the German sources. A German author who has advocated a new approach is Giesela Rühl, currently at the University of Jena.[1] In her view, it would be helpful for the German courts and practitioners to establish how the scope of the exception clause is tackled in other EU jurisdictions. A question that remains to be discussed is whether courts are under an obligation to perform such research or whether it is just something which is useful but not mandatory.

3. Who Are to Blame?

The point I am trying to make here is that national courts and practitioners are not to blame for the absence of comparative research in relation to European-inspired domestic legislation. Such research is time consuming, assumes a knowledge of other legal systems in the EU which few judges or practitioners possess, and

[1] G. RÜHL, 'Die Vermutung der Mangelhaftigkeit beim Verbrauchsgüterkauf: Die Rechtsprechung des BGH in rechtsvergleichender Perspektive (The Presumption of Non-conformity in Consumer Sales Law: The Case-Law of Germany's Federal Court of Justice in Comparative Perspective)', 72. *RabelsZ (Rabels Zeitschrift für ausländisches und internationales Privatrecht)* 2009, 912–934.

presents even the experienced comparative lawyers with a number of pitfalls. Those who should shoulder the blame are the comparative lawyers. It is they who should be providing the courts and practitioners with the necessary knowledge and expertise. How? By restructuring their domestic commentaries on the private law. We should discard our copies of Palandt, Chitty, Malaurie-Aynès, Rescigno and Domínguez Luelmo and gradually start to build up a new generation of European-wide commentaries. By 2015, the courts and practitioners all over Europe should be equipped with the European equivalents of the German *Palandt* series.

4. Some Policy Issues To Be Decided First

Creating a new series of pan-European commentaries will require that some policy issues be decided first. The various domestic commentaries are based on different traditions. Which areas of private law should be covered – should family law, company law, procedural law, and international private law be included? Should this Commentary focus on discussing the relevant case law, engage in debate with other authors, and tackle the historical background to these rules? Should the facts underlying the court decisions be cited? In which language(s) should the European *Palandt* be written? Should all EU jurisdictions – and perhaps even other jurisdictions – be dealt with? Many more practical questions of this nature will need to be settled before a definite format of a European-wide commentary can be issued. In so doing, lessons may be drawn from those national commentaries which have already taken account of European law, as well those which have a tradition of taking a comparative approach in some form or other. An example of this is the Dutch *Asser* series, which has recently decided to include European developments in its commentary and has a long tradition of involving the French and German law in its narrative. The example of the *Asser* series demonstrates that the Big Bang advocated in this Editorial has a competitor when it comes to a policy of gradually raising the current domestic commentaries to a European level. A third way would be for national commentaries to form alliances, as indeed like law firms have been doing in the past few decades.

5. A Role for the European Law Institute

On 1 June of this year, the newly established European Law Institute held its first plenary meeting in Paris. In the presence of some 400 academics, judges and practitioners, speakers such as Louis Vogel, President of the University of Paris II, Michel Mercier, *garde des sceaux* (French Minister of Justice), Vassilios Skouris, President of the European Court of Justice, and Reinhard Zimmermann, Director of Hamburg's Max Planck Institute, stressed the importance of this initiative. They all did so in English (!).

On the agenda was the selection of appropriate research projects. One of those in which the Institute could engage in is the future of the legal commentary in Europe and a discussion of the various issues raised in this Editorial. One

theoretical question to be considered is to what extent the courts are under an obligation to take into account the application of European-inspired rules in other Member States. At the national level, most Member States now have free on-line access to court decisions, but this is not the case everywhere. Financial considerations and copyright issues will also have to be considered.

One major practical question is that of identifying the linguistic skills and knowledge of comparative law which may be lacking among the authors of the current commentaries on domestic commentaries. It is here that the European Law Academy, rather than the European Law Institute, could have a role to play. This Trier-based organization could organize meetings aimed at remedying at least some of these shortcomings and to start up networks tackling practical issues.

6. ERPL *and Legal History*

One of the issues to be faced in relation to the planned European *Palandt* will be whether to include an examination of the historical background to the area under scrutiny and whether this analysis should be merely superficial or be intensive. In my view, this is not a real issue. Of course, this background should be taken into account in order to provide the reader with an understanding of the reasons why rules developed in different ways in the various parts of Europe. At least this is *ERPL* policy, as can be seen from our recent publications. In our previous issue, we published Sarah Worthington's exquisite inaugural lecture on 'The unique charm of the common law'. This issue presents Jean-François Gerkens' paper on 'The impact of superior force on the debtor's delay from a non-Roman rule to a quasi universal success' and Dave De Ruysscher's 'Innovating financial law in early modern Europe'. Gerkens argues that, in the light of historical developments, the position of the *Draft common frame of reference* that delay merely amounts to a form of non-performance is a little too superficial. De Ruysscher argues that in the seventeenth and eighteenth centuries, Dutch rules on negotiable credit instruments transformed financial law throughout the European continent. We hope to publish more of such historical papers, provided they are relevant to the current law, and invite the community of legal historians to support this initiative by suggesting subjects and authors.

7. Divergences in Interpretation, Optional Instrument, Property Law, and Family Law

This issue encompasses six more papers. Sheffield University's Séverine Saintier discusses divergences in interpretation of two EU directives – that on self-employed commercial agents of 1986 and that on unfair contract terms of 1993. Two papers deal with the Optional instrument. Jan-Jaap Kuipers discusses the various articles of the European Treaty, which could serve as the legal basis for an Optional instrument. If this instrument could be chosen as governing law for both domestic and cross-border contracts, Article 352 would be the appropriate provision. Marie-José van der Heijden and Anne Keirse from Utrecht University discuss some more

general issues that need to be addressed before implementing a new model of European contract law. These relate to the formal and substantive scope of the instrument and its incorporation in the current legal and social context. Two of the papers focus on property law. Héctor Simón-Moreno from the University Rovira i Virgili in Tarragona argues that it is feasible to construct a European system of property law on the basis of the principles of *numerus clausus,* specificity, publicity, the separation between property law and the law of obligations, priority, the faculty to recover, *nemo dat quod non habet,* and acquisition and loss of property rights. This could be done by way of regulation. Dewi Hamwijk from the University of Amsterdam criticizes the public filing system proposed in the *Draft common frame of reference*, opining that the contrary view taken by various scholars is inconsistent with reality.

On 24 July of this year, same-sex marriage became legal in the State of New York – a memorable event which has definitely caught the media headlines everywhere. New York's *Marriage Equality Act* illustrates the rapidly changing background in the field of family law. 'Same-sex marriage, same-sex cohabitation, and same-sex families around the world: why "same" is so different' is the title of the paper authored by American University academic Macarena Saez. The paper is based on her General report to the 2010 Washington conference of the *International Academy of Comparative Law,* which has proved to be a rich source of manuscripts for *ERPL*, with more to come. In the paper, the author warns us that an analysis of the position of same-sex couples in various jurisdictions reveals a certain malaise in this area: the relentless march of change in this field will continue, and with it are the tensions that prevail both within and among the various jurisdictions on this subject.

8. Book Reviews

This issue contains a single book review, but in his review, Larry A. DiMatteo manages to review a fair number of European and American books dealing with European and comparative law. In his review, the author from the University of Florida categorizes contract law texts in various ways.

9. *Erfahrungsberichte*

This issue carries reports of three conferences on European private law. In some countries, Comparative Law Associations are thriving; in other countries, they are far from active. Italy now can boast of *two* comparative law associations, witness Nadia Coggiola's report of the founding meeting of the new comparative law association in Milan. France has been lagging behind somewhat in the process of harmonization in this field. One effective medium that enables France to catch up in this process has been the foundation in 2010 of *Trans-Europe Experts* (TEE). On 1 April 2011, TEE held its second annual meeting in Paris. The report of the conference by Chiara Perfumi is preceded by a more general paper on the aims of TEE by its two leading officers, Bénédicte Fauvarque-Cosson and Judith Rochfeld.

Rufus F. Abeln and Tom G. Abeln report on a one-day conference on the future of the European Insolvency Regulation, held in Amsterdam on 28 April of this year.

10. An Obituary: Franz Bydlinsky (1931–2011)

In our work, the *ERPL*'s Editorial Board is assisted by its Advisory Board. One of the latter's original members was Franz Bydlinsky, who passed away earlier this year. Professor Bydlinsky was one of Austria's leading civilists. However, his reputation extended well beyond his own country, especially in the German-speaking countries. He was only one of two non-Germans whose work and life are featured in a recent volume of the leading twentieth century German-speaking civilists.[2] We are grateful to him for his contribution to the work of *ERPL*, especially during our early years. We are pleased to report that we have already found an excellent successor for the late Prof. Bydlinksy's country in Brigitta Lurger.

11. An Outlook to the Future: Fatal Attraction II

In the Editorial accompanying our previous issue, my Joint Editor-in-Chief Matthias Storme fiercely criticized the 'Feasibility study for a future instrument in European contract law' in that the latter appears to lack a general apporach to remedies. Should this 'feasibility study bashing' be continued in our next issue? There will be ample opportunity to do so, because we hope to publish a collection of papers on this document, which was issued by the European Commission on 3 May 2011. We have pledged these articles by issuing a call for papers that we published in June of this year at *inter alia* the Paris conference organized by the European Law Institute. This feasibility study is of considerable interest, because it may well be the precursor to an Optional instrument, that is, a Code of European Contract Law, which the contracting parties may select as part of their legal system (the '28th legal system' of the EU). Because European Commissioner Viviane Reding and the European Parliament have both given their endorsement to this project, it is not inconceivable that, by next year, an optional contract code will have come into existence. Then again, is the feasibility study's proposal as bad as some critics argue? Let us consider the matter further in *ERPL* 2011/6.

[2] S. GRUNDMANN & K. RIESENHUBER (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts*, De Gruyter, Berlin 2010, at pp. 18–29 (by Peter Rummel).