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Editorial

A Call for Modesty and Comity

In this first issue of the 27th volume, we deal mainly with contract & consumer law and the eternal tension between national diversity and uniformization. But other recent events also oblige us to reflect on this tension more generally. Comparative law is the study of similarities and differences in law; it may lead to the conclusion that different nations, regions or communities reach the same result through different ways, but also that problems can be tackled with really different solutions, sometimes hidden under appearances of similarity. One of the most important things it teaches us is a sense of pluralism and a form of modesty. Not that comparative law necessarily implies some form of non-judgmentalism and forbids us to evaluate different rules and solutions and deem some better than others – or at least better for a given society where a solution is more appropriate than another, without imposing it on others. *Jeder soll nach seiner Fasson selig werden*, as Frederick the Great taught us, but every comparatist may evaluate these different ways to salvation. International private law is by its very nature accepting this pluralism and accepts, at least within certain limits, the application of the rules of other legal orders and promotes different forms of cooperation between these orders. Whatever the precise positive meaning of role of *comitas gentium* may be (see the contribution of Schultz and Mitchenson in issue 3 of the ERPL of 2018), the general idea of comity is the essence of international private law. It is a central idea of modern conflict of law doctrine that courts apply and interpret foreign law when its application is indicated by their conflict of laws rules. It is an equally central feature of contemporary international private law that courts of one jurisdiction recognize and enforce decisions by courts of another jurisdiction, even if those courts interpret the law of the first juridiction – and this 'however good, bad or ugly' the interpretation is (to quote judge Elena Kagan in a Supreme Court decision on recognition of arbitral awards, *Oxford Health Plan* v. *Sutter*).

However, this idea of comity seems increasingly suppressed in the European Union. When the Rome Convention on the law applicable to contractual obligations was converted in a Regulation, the possibility to apply foreign mandatory rules out of respect for what another country regards crucial to safeguard its public interests, was strictly limited (in Art. 9 para. 3). Most EU countries reject *ex ante* the choice of a foreign court unless it is clear that such court is bound to apply the first country's overriding mandatory provisions (see e.g. the Virginia agency case, BGH 5 September 2012) whereas American law shows more comity. The rejection even amounts to paranoia in several opinions and decisions of the ECJ in recent years, in which it tries to assert an absolute monopoly on the interpretation of EU

law: in Opinion 2/13, the ECJ rejected an accession of the EU to the European Convention in Human Rights; in C-62/14, the dialogue with the German Constitutional Court was laughed away (*Gauweiler OMT-case*); in C-284/16 (*Achmea* v. *Slovakia*) the ECJ rejected Investment arbitration where an EU Member State is involved; in C-619/18R (Commission/Poland), the fact that Polish Courts also apply EU law has been abused to dictate a coup d'état on Poland, treating the Polish Constitution as a rag-paper. In all these cases, the idea that other institutions may ever have a different interpretation of EU law seems unbearable for the Court. 'EU law first' seems to overtrump 'America first'. Rather than this entrenchment in unassailability, not unsurprisingly leading to forms of counter-entrenchment as Brexit, we need a renewed sense of comity, dialogue between judicial and parliamentary institutions, and acceptance of the idea that in fundamental questions no single institution should have the last word.

Let the reader meanwhile enjoy the contributions on the notion of consumer contracts, information duties in consumer contracts, remedies for inequality on contracts, enforcement of consumer law, new trends in the regulation of the legal profession, and on extraterritorial jurisdiction on merger control (dealing i.a. with comity as an appropriate instrument to balance jurisdiction).

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