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Editorial

On Various Shades of Multi-level Law

We are certainly not the first journal to publish contributions on the impact of the covid-19 pandemic on contract law. But as time goes by – more than two years of pandemic have passed – an analysis of the response in legislation and case law gets more rewarding and we can thus offer in this issue two excellent comparative law articles on the topic. The first by Vanessa Mak deals mainly with English and Dutch contract law applied to long term contracts, especially tenancy contracts and gym subscriptions. Tom Hick includes also French, Belgian and German law and deals mainly with cases of frustration of purpose, i.e., where the debtor can still perform but performance is of no use to the creditor. Bob Jennekens, in a third covid-related contribution, deals with the regulation of state support for export credit transactions, as restrictions to such support came under pressure in the crisis.

The latter article is also an exercise in dealing with various levels of regulation – WTO, OECD, and EU. And in the last two contributions to this issue, the relationship between EU law and national law is at stake.

In his article on the interplay between general principles of EU law and directives, more specifically in the field of non-discrimination in horizontal relations, Mustafa Karayigit illustrates very well the judicial activism of the ECJ, combining directives with general principles to further expand EU law and creating legal effects in many cases where directives do not have direct effect.

Grigorios Bacharis and Szymon Osmola, in the article 'Rethinking the instrumentality of European private law', challenge the commonly held view that European private law is instrumental due to its role in achieving the EU treaties' goals. This is denied based on two lines of argument. First, the common view would forget that European private law is not self-standing but needs to be complemented by national private law. Secondly, many provisions of the European private law can be interpreted as aiming to enact non-instrumental considerations such as justice between the parties in a transaction, and the ECJ would also use such non-instrumental concepts when interpreting them.

The development of this argument is interesting. Nevertheless, there is still another aspect which must be taken into account to complete the image. There is evidently nothing new in the fact that lawyers, and especially judges, have to combine – in adjudicating private law disputes – a 'common' law (*ius comune*) and a particular law (*ius particulare*). It is also not new that common law is interpreted extensively and particular law restrictively: *statute stricte sunt interpretanda* is an age-old maxim. However, in the past, that always took place in a context where the law that has priority was interpreted restrictively and the law

that is interpreted extensively did not have priority. Under the case law of the ECJ, however, what's left to the Member State law is merely those things where no rule can be deduced from EU law, even not when interpreted extensively, and this is equally true in the field of procedural law (where not much is left of the so-called autonomy of national procedural law, although there are also more prudent decisions of the ECJ as most recently in *Hoffmann-La Roche/AGCM* of 7 July 2022). In such a situation, national law survives by default. One must admit, however, to Bacharis and Osmola, that this interpretation of EU law is not only focused on achieving the internal market. Safeguarding an absolute pre-eminence of EU law and the authority of the ECJ may even constitute a more important goal (see my Editorial in ERPL 2019 no.1). Maybe after all, European private law could be developed more meaningfully by doing the opposite: consider it as the common law, in relation to which national law is seen as merely particular law, a law that has to be interpreted restrictively but nevertheless has priority over the common rule (*lex specialis derogat legi generali*)? Given the actual state of European private law and its harmonization, thinking out of the box may make some sense.

Enjoy reading!

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