SOME THOUGHTS ON THE FUTURE OF THE COMMON LAW WITHIN THE EUROPEAN UNION AFTER BREXIT*

MEETING OF LAW COMMISSIONS

JUNE 28TH AND JUNE 29TH 2018

SOME NOTES FOR A LECTURE

Present position

- On the whole the 60/43 years of European Union law has not changed the fabric of the 27 legal systems: they remain recognisably either civil law or common law jurisdictions.
- Common law: system of precedent, little statutory regulation of key areas of private law[1], case law oriented.
- Civil law: code based, albeit with differences ((German Civil Code (BGB)(1901)(Pandectist) or simpler general principles (Swiss Civil Code (1907); not precedent oriented.
- This is reflected in the CJEU's doctrine of national procedural autonomy, subject only to the twin principles of equality and effectiveness. Some inroads into the fabric of the common law[2] and (to a lesser extent) civil law principles in specific areas.
- But could this change, especially after Brexit?

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[1] Although this is changing, especially in Ireland: see Binchy, "Tort Law in Ireland – A Half Century Review" (2016) 56 *Irish Jurist* 198, 200-201.

[2] E.g., the demise of the anti-suit injunction in Case C-159/02 *Turner v. Grovit* [2004] E.C.R. I – 3578.

Some inroads to date

- There have been some inroads to date into the fabric of the common law: Some examples -
  - Brussels Regulation system (Regulation No. 1215/2012) and the abolition of *forum conveniens* doctrine and the anti-suit injunction.
  - Distaste for discretionary time limits as inconsistent with legal certainty (e.g., *Commission v. Ireland* [2009]).
  - Threat posed to jury system before ECHR: *Lhermitte v. Belgium* [2016] 1060: whether it was duty of a jury to give reasons for its decisions under Article 6(1) ECHR. The general view now is that a jury does not have to give such reasons since a finding as to the accused's guilt."necessarily implied that the jury found that she had been responsible for her actions at the material time. The applicant cannot therefore maintain that she was unable to understand the jury's position on this matter."[3]
- Contributions to the common law from EU general principles/Charter of Fundamental Rights: proportionality, abuse of rights, legitimate expectations, effective remedy.
- Few examples the other way, but major example is the requirement in Article 5 of the Damages Directive that discovery be made available in

[3] *Lhermitte v. Belgium* [2016] ECHRR 1060 (GC).

competition law cases – big change for civil law countries with no tradition of discovery (e.g., Germany).

But could all of this change after Brexit: the case of the draft Common European Sales Law?

- Suspicion that federalist leaning lawyers/politicians want a European Civil Code – President Macron speech at the Sorbonne in September 2007 called for unified civil law for both France and Germany.
- Commission proposal for Common European Sales Law ("CESL") (2010-2012): Proposal for "optional" European Contract Law (but optional for whom?).
- "Esperanto" or Franco-German in style?
- British Government response to CESL proposal:

> "It may be difficult to quantify but it is clear that a 29th regime[4] of contract law would "belong to no one in particular" and would not reflect any particular legal or cultural heritage. Indeed a fundamental first question for the authors of such an instrument might be whether to base it more on the common law perspective, which is currently probably the most commercially attractive approach, or the civil law position, which may be more familiar to EU citizens, The 'Esperanto' approach must at least raise the

[4] I.e., 28 Member States plus Scots law.

possibility that it will feel comfortable and familiar to no one and consequently will be rarely used."

- City of London cries foul and asserts little evidence of "Esperanto" approach and sees this as a civil law take-over of the common law of contract.

Four fundamental conflicts with the common law from CESL

- CESL Article 1 no damages for distress.
- CESL Article 2: "Each party has a duty to act in accordance with good faith and fair dealing".
- CESL Article 69: pre-contractual statements could be incorporated into the terms of the contract.
- CESL Article 89 duty on parties to enter into negotiations where the performance of their obligations under the contract became "excessively onerous".

Possible objections include the de facto abolition of the parol evidence rule by CESL Article 69. CESL Article 89 reflected provisions of the German Civil Code introduced after the hyper-inflation of the 1920s[5], but which could play havoc with the common law rules as to frustration and party autonomy in business to business transactions.

[5] Article 138 and Article 157 of the BGB respectively.

CESL Article 2 reflected similar provisions in civilian codes, *e.g.*, Article 1134(3) of the French *Code Civil*, Article 2 of the Swiss Civil Code and Article 242 of the BGB.

Different views as to potential role of good faith in common law business to business contract law. While the idea of a general duty of good faith in contract law was rejected by my colleagues in *Flynn v. Breccia*[6], I nonetheless stated:

> "If one looks further into our general law one can find instances of specific doctrines and concepts which correspond to civilian concepts of good faith: the rule against a self-induced frustration of a contract, the equitable doctrines of unconscionability, fraud on a power and the principle that he or she who comes to equity must come with clean hands are all in their own way at least potential examples of this. The fact that the Irish courts have not yet recognised such a general principle may over time be seen as simply reflecting the common law's preference for incremental, step by step change through the case-law, coupled with a distaste for reliance on overarching general principles which are not

[6] [2017] IECA 74, [2017] 1 I.L.R.M. 369.

deeply rooted in the continuous, historical fabric of the case-law, rather than an objection *per se* to the substance of such a principle…"[7]

Response of UK Government to CESL Article 2:

"….Respondents raised considerable concerns about this [duty to act in good faith] provision, in particular that:

(a) it is uncertain and unpredictable in its effect, given the width of the concept. Little guidance is, however, given on how it should apply. This is likely to lead to divergent interpretations in 27 Member States and one respondent at least thought that it would be impossible for the Court of Justice of the EU to comprehensively define it so as to control that divergence;

(b) despite the assertion of the principle of freedom of contract in Article 1, Article 2 undermines the contractual agreement of the parties, making reliance upon what has been agreed and the remedies they otherwise have unpredictable;

(c) it imports considerable scope for argument between the parties about whether each acted in good faith, which benefits neither."

Potential impact on the common law within the EU after Brexit

[7] [2017] 1 I..L.R.M. 369, 402

- *de facto* isolation of Ireland (and, to some extent, Cyprus and Malta).
- UK will no longer be around to block potentially far-reaching developments such as any proposed CESL 2.
- What will happen to EU contributions to common law (proportionality, duty to give reasons, effective remedy, legitimate expectations) in the UK after Brexit? Will the EU common law systems be pulled apart in opposite directions with one (or, if you prefer, three) small common law states within and one giant state (and home of common law) without?
- Prospect of further Europeanisation of commercial and contract law, so that in future a new CESL will effectively create a EU codified contract law supervised by the CJEU.
- If that happened, would Ireland over time cease to be a common law country in any true sense of that term? Or would it perhaps become the inverse of Louisiana, which is arguably an island of civil law which is vulnerable to being swamped by 49 other common law states? What would be next: would a tort version of the CESL follow in turn?
- And would the UK continue to be cut off from such potentially far-reaching changes at EU law affecting the fabric of the common law?

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