PROTECTING THE COMMON LAW IN THE

POST-BREXIT EUROPEAN UNION*

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The present standing of the Irish legal system

While we are all intellectually prepared for Brexit – if and in whatever form it may occur – the impact for the Irish legal system over the long term is likely to be considerable, if yet unpredictable. The UK was one of the key players in shaping EU law and, as might be expected, led the way in accommodating the common law to the requirements of EU law and, conversely, helped the civilian Member States to understand the separate thinking of the common law method.

All that will change after Brexit. Whatever Irish legal nationalists such as the late Mr. Justice Brian Walsh might have thought,[1] the close ties between the common law legal systems are impossible to deny. It is also quite unrealistic to deny the huge influence which English jurisprudence continues to wield, especially in core areas of private law. While this influence has waned somewhat over the last twenty years or so as the explosion of written judgments and changes in statutory law have all contributed to a developed Irish jurisprudence in areas such as contract, commercial law and company law, the emergence of two jurisdictions, one subject to EIU law and the other not, is likely to prise apart – perhaps even rupture – centuries long ties in a far reaching way. For a start, what is to happen in the English common law to all these principles borrowed (or, if you prefer, required) by EU law, ranging from legitimate expectations, duty to give reasons to the abolition of the *forum conveniens* doctrine? Will we have quite separate conflict of laws rules between the two jurisdictions, one fully within the Brussels System, with the other tied loosely at most to the Lugano system?

[1] Hogan, "Irish Nationalism as a Legal Ideology" (1986) 75 *Studies* 528.

If, then, we are destined to remain a common law island surrounded by a civil law sea, will we be able to manage? Only time will tell, but judged from the standpoint of Luxembourg, I think it fair to say – at the risk of self congratulation and complacency – that the standing of our legal system has never been higher. There is everywhere I go a consciousness of the implications for our legal system post-Brexit. And there is universal praise for the quality of our references and the impact they are having, whether it be in the field of data protection[2], environmental law[3], horizontal direct effect and Directives[4] or judicial protection in EAW matters[5].

Dialogue with the Court of Justice

If that reputation is to be maintained, it will, I think, require the Irish courts to remain in constant dialogue with the Court of Justice via Article 267 references. There is, of course, a sort of "Goldilocks" median point here: neither too many nor yet too few. I think that there is little doubt but that in the past – even the recent past – there were too few references. And there were, I suggest, examples of where even the Supreme Court was later embarrassed by dogmatic statements about EU law in circumstances where no reference was made.

Two come to mind. The statement in *L & O v. Minister for Justice*[6] to the effect that there was no legal barrier to the de facto deportation of young citizen children along with their non-citizen parents was quickly shown to be hollow by the subsequent decisions of the Court of Justice in both *Chen*[7] and *Zambrano*[8]. The second example is *TD v. Minister for Justice*[9] where a majority of the Supreme Court held – reversing the High Court - that the 14 day time limit contained in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 did not infringe the EU principle of effectiveness. There was no Article 267 reference in that case, but just three years later the Court of Justice held in *Danqua v. Minister for Justice*[10] - another Irish

[2] See, *e.g.., Digital Rights Ireland Ltd*. EU: C: 2014: 238, *Schrems* EU: C: 2015: 650.

[3] See, *e.g., North East Pylons Ltd. v. Sheehy* EU:C: 2018: 185.

[4] See, *e.g., Smith* EU: C: 2018: 631.

[5] See, *e.g., Minister for Justice and Law Reform v. LM* EU: C: 2018: 517.

[6] [2003] 1 IR 1.

[7] EU:C: 2004: 639.

[8] EU: C 2011: 124.

[9] [2014] IESC 29.

[10] EU:C: 2016: 789.

asylum case - that a separate 15 day time limit in respect of asylum claims did infringe this principle.

The recent statistics on Article 267 references are, however, very interesting indeed. There have been a total of 115 references between 1973 to 2018.[11] There were no references at all in the following years: 1973, 1974, 1975, 1981, 1982, 1988, 1992, 1996, 2002 and 2009. Prior to 2011 the highest number of references in any given year was 4, which was the figure for 1986, 1990 and 2010. Since then the figures have been impressive:

2011 – 7

2012 – 6

2013 – 4

2014 - 5

2015 – 8

2016 – 8

2017 – 12

2018 – 12

Why have these figures increased? Part of the reason of course reflects the expansion of the Union's field of competence into new areas such as asylum, EAW and data protection. But that is not the full story and much of the increase must also reflect a greater willingness on the part of the Irish judiciary to engage with EU law. Such engagement is absolutely vital if Ireland is to remain fully engaged with the EU legal system.

To put all of this in perspective, the Irish figure for 2017 was greater than the figure of 11 for 2017 for the UK and it also matched the UK figure for the pre-Brexit referendum year of

[11] Court of Justice, *Rapport Annuel 2018*, pp. 146-147.

I understand that the High Court has made 3 references in the first three months of 2019.

2014. It is perhaps not surprising that in a review of the references from 2010 to 2017 per head of population the UK was last, whereas Ireland was ranked 11th.[12]

Present position

Despite the increase influence and reach of European Union law, one can nonetheless broadly observe that the last 60 or so years of European Union law has not changed the fabric of the 28 legal systems: they remain recognisably either common law or civil law jurisdictions. How does one define these terms?

Some generalisation is, of course, necessary but a common law system is generally regarded as one in which there is little statutory regulation of key areas of private law[13] and which is case law and precedent oriented. A civil law system, on the other hand, is code based and is one in which, in particular, the substantive rules regarding the application of private law are contained in codified form. One may additionally say that the civil law systems are all to one degree or another influenced by Roman law, specifically the Justinian codes, whereas with the exception of particular areas of the law such as probate, areas of commercial law (*lex mercatoria*) and the law relating to prescription[14], the common law otherwise betrays few Roman law influences.

It is nonetheless probably true to say that there is more of an overlap between the two systems than is generally realised. Some modern statutes in the realm of private law haver code like qualities: the Succession Act 1965 and the Occupiers Liability Act 1995 come to mind. The key point here is that it is the actual words of the statute which are the starting

[12] Behind (in reverse order) Denmark, Hungary, Estonia, Bulgaria, Lithuania, Netherlands, Austria, Belgium, Latvia and (in 1st place) Luxembourg. I am very grateful to Dr. David Reichel of the EU Agency for Fundamental Rights, Vienna for this information.

[13] Although this is changing: see Binchy, "Tort Law in Ireland – A Half Century Review" (2016) 56 *Irish Jurist* 198, 200-201. While the law of tort has been generally thought of as a (virtually) pure common law domain, it is nonetheless striking that even here there have been significant inroads into the common law by the enactment of legislation. Examples include the Civil Liability Act 1961, the Occupiers Liability Act 1995 and the Defamation Act 2009. While one might say that these items of legislation have had the effect of largely codifying the law (and modernising in it in the process), the fact that the Oireachtas has legislated to replace particular common law rules is significant, because it means that what heretofore would have been regarded as a standard common law tort problem then becomes essentially *either* one of statutory interpretation (see, *e.g., Speedie v. Sunday Newspapers Ltd*. [2017] IECA 15) *or* the application of a general principle set out in the legislation to the facts of the case (see, *e.g, Byrne v. Ardenheath Co. Ltd.* [2017] IECA 293). A comparative lawyer would probably say that these examples show that there has been a small shift in the direction of a quasi-civil law approach in these discrete areas of private law.

[14] See the discussion of this in *Zopitar Ltd. v. Jacob* [2017] IECA 183.

point for the court and that earlier court decisions serve principally to illustrate the application of the statutory rule. At the same time, the civil law jurisdictions have taken on more of the characteristics of the common law, with greater attention being paid to earlier court decisions and according them a form of de facto precedential status, even if the civilian systems do not recognise a system of precedent as such.

Respect for the essential fabric of the different systems of law is reflected in the key doctrine of the Court of Justice, namely, that of national procedural autonomy, subject only to the twin principles of equality and effectiveness. There have, admittedly, been some inroads to date into the fabric of the common law and (to a lesser extent) civil law principles in specific areas of law. But could all of this this change after Brexit if a major state – which is naturally a traditional guardian of the common law heritage – were to leave the EU, so that far more changes might be on the way?

Some inroads to date

There have been some inroads to date into the fabric of the common law and some examples may be given of past and likely future changes.

First, some of the biggest changes have been in the sphere of private international law via the abolition of *forum conveniens* doctrine[15] and the anti-suit injunction[16] as being inconsistent with the Brussels Regulation system. Second, there is a clear distaste for discretionary time limits as being inconsistent with legal certainty.[17] You might well think that the changes to date have been relatively modest. But other significant changes may be on the horizon.

One may be a pressure to ensure that juries deliver reasons for their decisions. It is true that the pressure in this regard may be thought to have ebbed in the light of the ECHR's decision in: *Lhermitte v. Belgium*[18]: That case raised the question of whether it was duty of a jury to give reasons for its decisions under Article 6(1) ECHR. The Court concluded that the jury did 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

[15] See, *e.g.*, Case C-28102 *Owusu v. Jackson* [2005] E.C.R. I -1383.

[16] Case C-159/02 *Turner v. Grovit* [2004] E.C.R. I – 3578.

[17] See, e.g., Case C-458/08 *Commission v. Ireland* [2010] ECR I-859.

[18] [2016] ECHR 1060.

this matter."[19] The facts of *Lhermitte* were, however, tragically straightforward: the accused had murdered her five children and she had, in any event, admitted her actions and confessed to the crime. Other future cases may require a more nuanced response.

Other changes are likely to be brought about in the realm of consumer protection and contract law by the increasingly important Unfair Contract Terms Directive, Directive 93/13 EEC. In the context of mortgage deeds, the Court of Justice has already held, for example, in *Verein fur Konsumentneinformation*[20] that the unfairness of a mortgage term "may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5" of that Directive. A host other similar cases are currently pending before the Court of Justice. The potential here for re-shaping key aspects of the common law of contact is clearly quite considerable.

Commission v. Ireland

In many ways the differences between the civil law and common law systems is, perhaps, as much one of cultural attitudes as anything else. In this context, the approach of the CJEU in *Commission v. Ireland*[21] is quite revealing. Here the objection was to the provisions of Ord. 84A, r. 4 which governed the time limits for challenges to public procurement decisions. This prescribed a time limit of three months, but also imposed a separate obligation on the challenger to move promptly. It was said that this enabled the High Court to dismiss proceedings which were otherwise brought within time by reason of the failure to move promptly.

This case does reveal, however, the civilian distaste for the discretionary features of the common law, especially where the *application* of these discretionary features is simply governed by the previous-case-law and is not directly based on a written text. This is well explained in Advocate General Kokott's opinion:

> "Ireland further objects that its national law *is a common law system. It says that in such a system not only statutory provisions but also decisions of the*

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

[20] Case C-326/14 EU:C: 2915: 782.

[21] Case C-458/08 [2010] ECR I-859.

courts are determinative. Tenderers and candidates should obtain legal advice if necessary.

On this point, it must be observed that a directive leaves it to the national authorities to choose the form and methods for achieving the desired result…. The transposition of a directive into national law therefore does not necessarily require the adoption of express and specific legal provisions, and a general legal context may also suffice in this respect. What matters, however, is that with such a method of proceeding the full application of the directive actually is ensured with sufficient clarity and precision.

If the position in national law derives from the interplay of statutory provisions and 'judge-made' law, that must not take place at the expense of the clarity and precision of the provisions and rules concerned. That applies all the more where a directive is intended to confer rights on the individual and an unclear or complex legal position with respect to limitation periods could lead to the loss of rights in the present case the loss of the right to review of decisions taken by contracting authorities. Foreign tenderers and candidates in particular could be deterred from seeking public contracts in Ireland by a complex and non-transparent legal situation.

……It is not compatible with those requirements for a national court to apply the limitation period laid down by law for the right to apply for review in this case Order 84A(4) of the RSC by going beyond its wording and applying it by analogy also to the review of decisions for which the legislature has not prescribed such a limitation period. The legal position is thereby made less transparent. The tenderers and candidates affected run the risk, in view of the preclusive effect of the limitation period, of losing their right to the review of certain decisions. The objective laid down in Article 1(1) of Directive 89/665 of effective review of the decisions of contracting authorities is thereby undermined. " (emphasis supplied)

This is, I think, a clear instance of where civilian values – with a preference for legal certainty and for rules to be written down - in essence trumped the common law method of where key principles emerge from and are developed by from the case-law.

This development, however, is not something which we should necessarily fear – rather we have, I suggest, much to learn from such an approach. On the other hand, the great attraction of the common law – especially in the sphere of contract and commercial law – is that it is flexible, fact based and develops only incrementally. This has the merit that it works in practice and avoids the multiple abstractions which have long since been thought to be one of the chief weaknesses of the German Civil Code ("BGB") even from the outset.

At all events the legal certainty/written rule leitmotifs of *Commission v. Ireland* may indeed be contrasted with the subsequent approach taken by the Supreme Court in two cases, *Minister for Justice v. Olsson*[22] and *Minister for Justice v. O'Connor*[23], in respect of the right to legal aid in European Arrest Warrant cases. Article 11(2) of the EAW Framework Decision provides that the accused is entitled to legal aid in accordance with national law. As it happens, there was no national "law" (in the sense of an actual enactment by the Oireachtas) providing for such legal aid in EAW cases, but the evidence was that such assistance was automatically and routinely provided as a matter of practice under a non-statutory scheme. The plaintiff nonetheless maintained that Ireland had failed to transpose the Framework Decision properly.

The virtual automaticity attending the grant of legal aid, coupled with the fact that the plaintiff had in fact been accorded legal aid was sufficient to dispose of the argument and the judgments of the High Court, Court of Appeal (by a majority) and seven judge Supreme Court reflect perhaps the traditional and practical approach of the common law which was to reflect an impatience with purely theoretical arguments of this kind where it was clear – or so they thought – the accused person could have suffered no prejudice as a result.[24] One might equally say in response that a civil law lawyer might object that the

[22] [2011] 1 IR 384.

[23] [2017] IESC 21.

[24] I should record that I found myself as the sole dissentient in the Court of Appeal ([2015] IECA 227), saying:

> "Judged from the perspective of national constitutional law, it is all too plain that the only method whereby the Scheme could be established in accordance with law in this State is where the Oireachtas enacted legislation for this purpose in accordance with Article 15.2.1 and Article 20 of the Constitution. It is true that Dáil Éireann has voted supply by means of a financial resolution and this appropriation doubtless appears as a line item in the annual

putative foreign accused facing an EAW charge would not be able to find anything written down in law guaranteeing the right to legal aid in such cases. But for a clear majority of the Irish judiciary the fact that such a right was always afforded in practice was *in itself* sufficient and the objection based on the absence of national law (in the sense of legislation) was regarded in the circumstances as a purely theoretical objection.

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

There is clear evidence that the presence of the United Kingdom served to thwart ambitious plans to bring about significant changes in the fabric of the common law. A good example here is supplied by the European Commission proposal for a Common European Sales Law ("CESL") (2010-2012).[25] This was a proposal for what was described as an "optional" European Contract Law (but, it might be asked, optional for whom?). The Commission had described the proposal as "Esperanto" in style, but not everyone agreed with this characterisation. The British Government rather pointedly responded by saying:

> "It may be difficult to quantify but it is clear that a 29th regime[26] of contract law would "belong to no one in particular" and would not reflect any particular legal or

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> Appropriation Acts. But the Scheme nonetheless lacks the quality of publicly accessible and generally applicable legal principles, standards and rules which are the hallmark of a public general Act enacted by the Oireachtas.
>
> The fact that Article 20 of the Constitution proscribes the method whereby legislation is to be enacted - or, for that matter, amended - is not something which can be blithely ignored. The deliberative process involved in the entire parliamentary system was plainly regarded by the drafters of the Constitution as an essential pre-requisite in a democracy to the legitimacy of legislation. The extra-statutory nature of the Scheme is not, of course, illegal and nor does it render it in any way unlawful as a matter of domestic constitutional law. It is nonetheless not one provided "in accordance with national law" in the sense in which that term is used in Article 11(2) of the Framework Decision. "

This approach may reflect the more civilian approach as reflected in the opinion of Advocate General Kohott in *Commission v. Ireland*.

[25] *Procedure File of Regulation on Common European Sales Law 2011/0284* (COD).

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

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

The City of London additionally cried foul and asserted that there was little evidence of "Esperanto" approach. It objected this proposal as a form of a civil law take-over of the common law of contract, which, of course, was and is one of the big attractions of the City of London as a major world financial and legal centre.

Three fundamental conflicts with the common law from CESL

Quite apart from the fact that to suspicious eyes the CESL proposal at least *looked* like a version of civil law code, there were at least three individual provisions with implications for substantive contract law. First, CESL Article 69 envisaged that precontractual statements might be incorporated into the terms of the contract, with obvious implications for the survival of the parol evidence rule. Second, CESL Article 89 provided for a duty on parties to enter into negotiations where the performance of their obligations under the contract became "excessively onerous". This reflected provisions of the German Civil Code which were introduced after the hyper-inflation of the 1920s[27], but which, if adopted, could nonetheless play havoc with the common law rules as to frustration and party autonomy in business to business transactions.

The other major proposed change was contained in CESL Article 2 which provided simply that:

> "Each party has a duty to act in accordance with good faith and fair dealing"

CESL Article 2 reflected similar key 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. There are, at least, also shades of this in Article 3(1) of the Unfair Contract Terms Directive:

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

> "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer."

The British Government was not, however, enamoured of this CESL proposal either::

> "….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."

There are, of course, different views as whether there is any such general duty of good faith in our contract law. While the idea of a general duty of good faith in contract law was rejected by my colleagues[28] in the Court of Appeal in *Flynn v. Breccia*[29], I nonetheless stated in a concurring judgment:

> "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

[28] Finlay Geoghegan and Peart JJ.

[29] [2017] IECA 74, [2017] 1 I.L.R.M. 369.

> change through the case-law, coupled with a distaste for reliance on overarching general principles which are not deeply rooted in the continuous, historical fabric of the case-law, rather than an objection *per se* to the substance of such a principle…"[30]

The Court of Appeal subsequently had to deal with this very same point in *Morrissey v. IBRC*[31]. Here the argument was that as the IBRC had overcharged the amount of interest due on a loan of some €33m., it had thereby acted otherwise than in good faith, so that in turn it had forfeited the right to collect the sum which had been lent. Dealing with this point the Court took the view that *Flynn v. Breccia* amounted to a:

> "….tacit recognition that specific doctrines developed in common law jurisdictions - ranging from the "clean hands" doctrine, estoppel, constructive notice to fraud upon a power - are but particular instances of legal principles that in civilian jurisdictions have been subsumed into the wider and over-arching principle of good faith.
>
> One thing, however, is clear. Even if our common law system were to recognise a general over-arching principle of good faith, such a principle would simply operate in aid of the general law of contract by precluding conduct which was overbearing, oppressive, abusive, unconscionable or unfair, in much the same way as equity has leavened the rigours of the common law. It would not, however, authorise the courts to undermine the very substance of the rights and obligations of the parties to the contract in reliance on such a general principle of good faith. Yet such would be the case if the courts were to hold that a creditor were to be deprived of his right to demand repayment under contract of that which was *lawfully due*. Naturally, I stress these latter words because the creditor has no right to recover that which is not properly due, such as the sums which were overcharged in the present case. "

Perhaps *Morrissey* is therefore an example of how the introduction of a general principle of good faith would not be quite as novel or dangerous as some judges (and others) might fear. But irrespective of whether the common law already recognizes a doctrine of good faith or whether such has been introduced in a consumer context by Article 3(1) of the Unfair Contract Terms Directive, there is no doubt but that a proposal along those lines would represent a major *cultural* shift in our entire private law because now courts would be

[30] [2017] 1 I..L.R.M. 369, 402.

[31] [2017] IECA 162.

required to rely on overarching general principles embodied in a statutory provision which principles were not themselves deeply rooted in the continuous, historical fabric of the case-law.

Potential impact on the common law within the EU after Brexit

And so we return to the question of the potential impact on the common law within the European Union after Brexit. It is hard to avoid the conclusion that Ireland (and, to some extent, Cyprus and Malta) will de facto be isolated, at least to some extent. Certainly, the United Kingdom will no longer be around to block potentially far-reaching developments such as any proposed CESL 2. A wider question is what will happen to EU contributions to the common law (such as proportionality, duty to give reasons, effective remedy, legitimate expectations) in the UK after Brexit? Will the common law systems in Europe be pulled apart in opposite directions with one (or, if you prefer, three) small common law states within the EU and one giant state (and home of common law) without?

There is, of course, the prospect that without the United Kingdom there will be further proposals for the Europeanisation of commercial and contract law emanating from the Commission, so that in future, perhaps, a new CESL will effectively create a EU codified contract law supervised by the CJEU. If that were to happen, would a tort version of CESL be far behind? In these circumstances 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 overwhelmed by the presence of 49 other common law states? 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? Irrespective of the form which Brexit may take, these are the enduring questions which we will be obliged to confront in the coming years.

- Gerard Hogan, Advocate General of the Court of Justice of the EU. My thoughts on this issue were first stirred by hearing two scintillating papers given by Conleth Bradley SC and Dr. Catherine Donnelly, Barrister at a meeting of the Society of Legal Scholars in University College, Dublin in September 2016. I am indebted to both of them.