SOME THOUGHTS ON THE FUTURE OF THE

COMMON LAW WITHIN THE

EUROPEAN UNION AFTER BREXIT*

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SOME NOTES FOR A LECTURE

Present position

- On the whole the 61/45 years of European Union law has not changed the fabric of the 27/28 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
- There have been 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?

Some inroads to date

[1] 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 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).

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

- 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* [3]: 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."[4]

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

Commission v. Ireland

In this context, the approach of the CJEU in *Commission v. Ireland*[5] 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 an 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

[3] [2016] ECHR 1060

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

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

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 courts are determinative.* Tenderers and candidates should obtain legal advice if necessary.
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> 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.
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> *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.*
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> ……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 simply from the case-law.

This development, however, is not something which we should necessarilyfear – 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 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*[6] and *Minister for Justice v. O'Connor*[7], in respect of the right to legal aid in EAW 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.

That fact alone 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. The approach of the sole dissentient may in contrast reflect more civilian-style thinking reflecting the Advocate General Kokott approach:

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[6] [2011] 1 IR 384.

[7] [2017] IESC 21.

> "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 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.
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> 25. 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.
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> 26. 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. "[8]

One might equally say that the 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.

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

[8] *Minister for Justice v. O'Connor* [2017] IECA 227.

- President Macron speech at the Sorbonne in September 2017 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[9] 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 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: precontractual 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

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

hyper-inflation of the 1920s[10], but which could play havoc with the common law rules as to frustration and party autonomy in business to business transactions.

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*[11], 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 deeply rooted in the continuous, historical fabric of the case-law, rather than an objection *per se* to the substance of such a principle…"[12]

The Court of Appeal subsequently had to deal with this very same point in *Morrissey v. IBRC*[13]. 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 this sum. 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.

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

[11] [2017] IECA 74, [2017] 1 I.L.R.M. 369.

[12] [2017] 1 I..L.R.M. 369, 402

[13] [2017] IECA 162.

47. 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.

Note, however, the 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."

<u>Potential impact on the common law within the EU after Brexit</u>

- *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?

- Gerard Hogan, Advocate-General of the Court of Justice of the EU