Europeanisation of Private Law
and English Law

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Summary

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The Influence of European Ideas on English Private Law

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Conclusion

To what extent is English Private Law being affected by the United Kingdom’s membership of the European Union? I think we can try to answer this at three levels: (i) The United Kingdom’s compliance with EU legislation; (ii) the influence of European ideas on English Private Law; (iii) the attitude in England towards greater harmonisation or possible unification of European Private Law.

Compliance with EU Legislation

To my knowledge, the United Kingdom has a good record of compliance with EU legislation, in the sense of implementing Directives correctly. Of course, sometimes very little is required because our law already contains, in substance, what is required by the Directives. Indeed some Directives, for example those on consumer credit, have been very heavily influenced by English law.

Our implementation has not always been by the deadlines set by the legislation. For example, the regulations which implemented the Directive on Unfair Terms in Consumer Contracts came into force 6 months after the deadline, and we have not as yet implemented the directive on certain aspects of the Sale of Consumer Goods and Associated Guarantees although this should have been implemented by the 1 January 2002. In part the delay may be the result of a very cautious approach on the part of the Government Department (in these two cases, the Department of Trade and Industry (DTI) took responsibility for implementation) to make sure that the legislation did indeed implement the Directive fully.

It is my personal view that the British Government’s approach to implementation is actually over cautious, and our experience has not been altogether a happy one. The Unfair Terms in Consumer Contracts Directive was implemented by a set of regulations that, for the most part, simply reproduced the Directive word for word. This method of implementation is known as “copy
out" or, less favourably, as "cop out". The original Regulations[6] were replaced in 1999.[7] The principal reason was that the 1994 Regulations, in purporting to implement article 7 (which requires member states to ensure that effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers) had given preventive powers only to the Director General of Fair Trading. This had been challenged by, among others, the Consumers Association, as not fully implementing the Directive; and, rather than fight the case, the new Labour Government decided to extend the preventive powers to the Consumers Association and various other bodies. At the same time the opportunity was taken to align the wording of the Regulations even more closely to the wording of the Directive.

This has caused two problems. The first is that we already have legislation dealing with certain types of unfair term. The Unfair Contract Terms Act 1977 applies to almost any kind of exclusion or limitation of liability clause in a contract. In consumer contracts it makes many exclusion or limitation of liability clauses completely invalid, even if they have been 'individually negotiated';[8] other exclusions or limitations of liability in consumer contracts, and in many cases also contracts between two businesses, it requires that the clause be fair and reasonable before it will be enforceable.[9] This Act was not affected by the 1994 or the 1999 regulations. The result is that there are two regimes, which to some extent overlap, which have different scopes of application and use different terminology and concepts. The result has been considerable confusion. Both consumers and businesses have complained about the unnecessary complexity to the DTI; and the DTI have referred the question to the Law Commissions (there are separate Commissions for England and Wales and for Scotland; this was a joint project). The Law Commissions have been asked to consider producing a unified piece of legislation which will both implement the Directive and preserve the additional elements of consumer protection which were granted by the 1977 Act.[10] In an ideal world, that would have been done in 1994.

The other problem with the "copy out" method of implementation is that it simply imposes on English law concepts and terminology which do not form part of English law and which are not easy for English lawyers to understand. The most obvious example is the test of fairness used by the Unfair Terms Directive, article 3(1): namely, that a 'contract term... shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' English law does not have an equivalent concept of good faith. Good faith of course is relevant in certain other contexts (for example, whether somebody is a bona fide purchaser of property, and in insurance contracts) but its meaning there is very different to the one that appears to be used here. The result has been a great deal of discussion as to the meaning of "good faith" in this context. In fact, the general conclusion seems to be that "good faith" means very much the same thing as the test of "fair and reasonable" which is used in the Unfair Contract Terms Act 1977.[11] It might have been a great deal easier to have used the terminology with which English lawyers were familiar in the first place.

The Department of Trade and Industry seems determined to avoid making the same mistake twice. The Directive on Consumer Sales is to be implemented by amendments to the Sale of Goods Act 1979. However, these will be relatively slight, technical amendments; they will not involve a thorough going revision of the Act. And again the department is being rather cautious. For example, article 3(2) of the Directive requires that "in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement...". English sales law does not know a right to repair or to replacement of the goods as such. This is probably because of the general reluctance of English Contract Law to provide the remedy that we call "specific performance". Specific performance will be ordered only if damages would not be an adequate remedy for the claimant, and this means that specific performance is awarded in sale of goods cases only when the goods are completely irreplaceable because they are entirely unique. The case law is very strict about this requirement.[12] English law allows the buyer to achieve the same result in other ways. If the buyer wants the goods repaired, he may have the repairs done at his own expense and then reclaim that expense in an action for damages. If he wants the goods replaced, he may reject the goods and terminate the contract, and then buy replacement goods from another seller and claim any additional cost involved from the original seller. The question is whether it is necessary for English law, in order to implement the Directive, to introduce a specifically enforceable right to repair or replacement; or do the existing remedies form a "functional equivalent" to specific performance in these cases? At an early stage representatives of the European Commission indicated that they thought that it would not be necessary for the United Kingdom to change its rules on specific performance; we already had the
“functional equivalents”. However, it seems from the draft regulations circulated for comment that the Department for Trade and Industry is likely to play safe and to give consumer buyers (but only consumer buyers) specifically enforceable rights to repair or replacement. This strikes me as excessively cautious and to cause unnecessary disruption to the structure of our law.

The influence of European Ideas on English Private Law

The second question is the extent to which the concepts and terminology from the continental European systems, or indeed from European Community Law, are actually influencing our private law. For example, it might be thought that the directives which (particularly if they are implemented by “copy out”) may be a way in which continental legal concepts and terminology will infiltrate English law. Thus, the Unfair Terms in Consumer Contracts Regulations refer to “good faith”, since they effectively copy out article 3(1) of the Directive. Will this result in the notion of good faith spreading into English law?

I think there are few signs of this happening as yet. What I think may happen is that there may be references to good faith when perhaps they would not previously have been those, but the substance of the law will be little affected. It is often recognised that English law has many rules which are functionally equivalent to the rules that in a continental system might be ascribed to the concept of good faith. As Bingham LJ once put it:

'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith... English law has, characteristically, committed itself to know such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. [13]

There is some evidence that, when court judges are referring to doctrine which is functionally equivalent to good faith, they may occasionally describe the doctrine as reflecting the principle of good faith. An example seems to be from Contracts of Employment. There have been some recent developments indicating the growth of an implied term that the employer will do nothing to bring about a loss of trust and confidence between the employer and the employee. [14] In some judgments one finds references to good faith in this context. [15] But it has to be said these references are only occasional, and amount to little more than ‘re-branding’ of existing concepts.

It is perhaps not surprising that legislation has had a limited influence on our private law. This is consistent with the judicial attitude to legislation in the English system. Statute law is not seen as a base on which further common law development may be built. Rather legislation is seen as completely separate. It applies only when it expressly or by necessary implication deals with the situation, and otherwise it leaves the common law entirely untouched. Indeed, the existence of a limited form of legislation is sometimes given by the judges as a reason for not developing the common law in an area any further; they say that Parliament has indicated the limits to which the law should go and it is for Parliament to decide whether to go further. [16]

New legislation, other than that required by our membership of the EU, also shows relatively little influence of continental systems. Certainly continental systems are considered by the Law Commission when it is preparing its reports. For example, the recent reforms which allowed third party beneficiaries rights in English law for the first time [17] were preceded by the Law Commission Consultation Paper that referred to continental legal systems. However, the notion of giving third parties rights in contracts was not solely derived from continental influences and the references to continental law provided little more than confirmation that what was proposed would be a good idea.

It is sometimes thought that English law has been completely separate from continental legal thinking for many years. In fact, I do not believe that to be true. In the 19th century, for example, English law was definitely not cut off from continental thinking. It is of course the case that the vast majority of our private law was then and remains now judge-made law. We have no civil code; and although some areas have been covered by legislation, so that they are largely ‘statutory’, this is only true in certain areas. Family law, real property and sale of goods are covered in large part by statute; but the majority of the rules of contract and of tort (civil responsibility) remain governed by the common law. During the 19th century at least, the judges,
and probably the counsel who argued the cases before them, were much influenced by Roman and continental legal ideas. If you look at the classic cases dealing with, for example, mistake or impossibility, you will find direct citations from the Digest. If you look at the famous case on the amount of damages recoverable for breach of contract, Hadley v Baxendale, you will find that it applies of principle exactly parallel to that of the French Civil Code, article 1150 (though without the special rule on fraudulent performance). It appears that this came to English law more or less directly from the writings of Pothier.

In the 20th century, however, the English legal system became more enclosed. Possibly this was because fewer of the judges and practitioners had studied Roman law, which was then being replaced by common law as the subject of study at university. Possibly it was because there was a more rigid approach to following previous precedent. There was even a marked reluctance to rely on any authority other than previous cases. For example, when I was a student I was taught that it was not permissible to cite the views of an author in court, however well respected the author or his or her book might be, unless the author was dead and therefore incapable of changing his or her mind. Possibly it was simply due to the fact that there was much more material from the English legal system itself to put before the court, and other things were squeezed out or found not to be necessary. Cases from the other common law jurisdictions, even from the United States, were frequently cited but there was very little use of any other sources.

This has begun to change. In the number of cases, Lord Goff, in particular, has cited German law quite extensively, though as yet German law has not yet formed the basis of any rule adopted in English law.

Part of the reason that this is so rare is caused by rather curious and peculiar difficulties. First, English judges are suppose to confine themselves to matters which have been argued before them, so they are thus dependent to some extent on counsel. Thus they may have to suggest to counsel that the court should consider foreign law, and invite argument on it. Counsel may not be willing to do this. Secondly, foreign law (whether it is the law applicable, or it is merely being argued that the court should adopt the same solution as does a foreign law) is technically speaking treated as a question of fact. The judge should not rely on his known knowledge of it; the parties are expected to prove what the foreign law is by bringing witnesses to give evidence of it. There is no equivalent of the service provided in Germany by the Max-Planck Institute of providing information to judges about foreign law. This rule has always been taken with something of a pinch of salt, particularly where decisions from the common law systems are concerned, and judges in practice are fairly flexible about considering foreign law when it is being cited simply as persuasive authority on how they should decide a case, rather than as the applicable law. Indeed I think the rule is beginning to break down. It is an open secret that Lord Goff, when he needs to know a point on German law on which he is not certain, rings up Professor von Bar.

There is also of course a linguistic problem. Most English lawyers are as bad as I am at other languages. I would expect that as more information about other legal systems becomes available in English, continental laws will be considered more regularly. Also text books, even by living authors, are now cited very regularly in court and text books will often refer to continental systems.

Interestingly, this has turned out to be the field in which (to date) the Principles of European Contract Law prepared by the so-called Lando Commission have proved most influential in England. They provide a statement of what is thought to be the common core of the different European legal systems. I have received several requests from judges for copies of this or information about the Principles, and they have been cited in the House of Lords on at least one occasion.

Thus English law, and perhaps the common law system as a whole, is rather a closed world on which continental legal thinking has limited influence. However, it is far from being hermetically sealed and I think that the influence of continental thinking is growing. The actual outcome in terms of cases and legislation to date do not reflect the degree of interest that English practitioners and English judges are showing in the laws of our fellow Member States. Judges are regularly now attending seminars with judges from other countries and colloquia on comparative law. Some of them are extremely knowledgeable.

Nor can we rule out Law Reform based on continental models. One of the issues being
considered at the moment is whether the Law Commission should review those parts of English contract law that, in the light of the Principles of European Contract Law, appear to be seriously out of line with the laws of the majority of Member States – either in terms of substance or in terms of the concepts used. A prime candidate would be the area of mistake, misrepresentation and non-disclosure. Here many English lawyers find our law to be unclear and unsatisfactory; but in addition it has a very different conceptual structure, since the doctrine of mistake is of very limited importance, its work been done by ‘misrepresentation’, an outgrowth of the doctrine of fraud; and sometimes it produces startlingly different results, as we have no general duty to disclose facts known to one party but not to the other. To this I will return.

**English attitudes towards greater harmonisation or unification of private law**

I think we can best judge the typical English attitude towards the greater harmonisation or unification of European Private Law, perhaps by the adoption of a European Civil Code, by considering the reactions in England to the European Communication on European Contract Law of July 2001. Some respondents from England pointed out that there are still specific barriers to trade created by national legislation, for example in the area of financial services. But otherwise the reaction to the Commission’s paper can at best be described as cool. I think it is fair to say that the response of the UK Government itself is fairly representative. It welcomes the proposed Option III, improving the quality of existing EC legislation. But it rejects Option IV, a new comprehensive legislation, “in any of its forms”. It is even very sceptical about Option II, promoting the development of common contract principles. The response states that the UK Government ‘sees some potential value in comparative legal research aimed at identifying, and disseminating information about, common principles that may already exist between national laws’. However, it states explicitly that the Government ‘does not agree with the suggestion in paragraph 52 of the communication that the objective of this option is to achieve more convergence of national contract laws. It considers that convergence should only be pursued when there is a demonstrable need and after careful consideration of the net effect.’ In other words, the UK Government does not see harmonisation of law across Europe and as an end in itself. I am sure that many others in the United Kingdom share this point of view.

Why is this? I think there is a number of reasons.

First, there is general hostility to codification. I have explored this issue elsewhere, and today there is not time to do more than make a few brief points. Much of English law is “codified” in the sense that it is now in a statutory form. I have mentioned Family Law, Property Law and the Sale of Goods Act; the latter formed part of a widespread statutory codification of Commercial Law in the late 19th century. However, these are not codes in the continental sense. They are statutes that the courts apply in a strict fashion. When a point is not covered by the statute then the common law applies just as it did before the Act. The statutes are interpreted narrowly in the sense that one may not apply them by analogy but only if they are directly applicable upon the wording by necessary implication.

Codification in the continental sense has been tried on one occasion but failed. In the 1960s the Law Commissions in England and Scotland were engaged in a joint project to codify the Law of Contract. A great deal of work was done, including the preparation of a complete draft by Dr Harvey McGregor. However, in the 1970’s the project was abandoned, first by the Scottish Law Commission and then by the English Law Commission, so that they could concentrate instead on areas which needed particular reform. There appear to have been a variety of reasons for this abandonment. One of them seems to have been a problem of legislative style. Dr McGregor produced a text with an accompanying contrary. The text was fairly general in style and reasonably brief. When the draft was passed to Parliamentary Counsel, the specialisation kind of lawyer employed in the United Kingdom to produce Bills, the commentary was abandoned and the draft became much more detailed and closer to the traditional style of an English statute. One of the Scottish Law Commissioners at the time told me that the problem was ‘the Scots wanted a code but the English appeared to want a statute’.

The difference between a code and a statute is really rather important. The English judges are rather wary of statute because, when it is interpreted as they do, it is rigid and inflexible. It may well prevent the development and refinement of legal concepts to deal with new situations. One often hears the phrase “statutory cement”. By contrast, the development of the common law is one of constant refinement and (hopefully) improvement. English judges and indeed English lawyers
generally think that this is one of the great strengths of our system. It means of course that the law is, at its edges, a little uncertain; it all depends on how the next court will interpret the existing precedents. That however should not be taken to mean that there is great uncertainty. Usually not only the basic rules but the application of the rules to the majority of cases are very clear. I would suspect that the English common law is no less certain in this sense than is any continental system, though the law in a code system may be a bit easier to find.

The second reason for hostility to a European Code relates to the history of English law as the law of choice of parties who may have very little other connection to England. In certain markets – for example, the charter and commodity markets – it is very common for non-UK parties to agree that their contract should be subject to English law, frequently coupled with arbitration in London and sometimes insurance through Lloyds. The choice of English law may be partly because of the fairly effective court system that we have in the United Kingdom and the expertise of our lawyers. They are very expensive but they are usually regarded as knowing their business rather well. There is a fear that if English law were to be replaced by some European or international scheme, that unique expertise would be lost. The effect might be that legal business would move away from London.

There is also a fear that a change in the substantive law itself might result in a loss of business. Even though English law is not always easy to find, and though inevitably there are areas of uncertainty, it is a law which tends to produce fairly certain outcomes and to leave rather little to the judge. Indeed its rules sometimes seem draconian. For example, it is still the case that an insurance company may refuse to pay a claim made by the insured if the insured has committed any “breach of warranty” in the insurance policy, even though the breach had no causal connection to the event giving rise to the claim. Our law is also rather individualistic. For example, it is well known that, outside the field of insurance contracts, there is no duty to disclose facts to the other party, even if the first party is aware that the second party is ignorant of some absolutely crucial fact and that, if the second party knew the truth, it would never enter the contract. [28]

I have argued elsewhere [29] that they may reflect the type of case which typically comes before the English courts. English contract law in particular is driven by a diet of commercial cases often involving parties of very great sophistication who are doing their best to compete in highly fluctuating markets. There to make advantage of knowledge that you have and the other party does not is considered to be good business. In those circumstances the English rule seems quite justifiable. I think it is frequently acknowledged by English lawyers that our rule is over broad; it would apply equally to somebody who sells a house without telling the buyer that a pig farm is about to be opened next door. But there clearly is a fear that any European Civil Code might contain law that in terms of substance was less attractive to commercial parties, and that they might turn to other systems as their ‘law of choice’. [30]

Conclusion

So I think it is fair to say that at present English Private Law remains relatively immune to “Europeanisation”. It is of course subject to the EU legislation but, compatibly with the tradition of treating statutes as affecting only the area of law directly covered by them, EU law is seen as somehow separate and the degree of infiltration of European ideas is rather limited. However, as I have said things are on the change. I hope that in 20 years time the picture may look very different.

NOTES

[1] Any views expressed in this paper are purely personal.


Made under the European Communities Act 1972, section 2.


For example, a business selling to a consumer cannot exclude or limit its liability for the goods failure to correspond to the description or sample, or to be fit for the purpose: section 6(2).

Thus any other clause which would limit or exclude the business’s liability when in breach of contract to the consumer is valid only if it is fair and reasonable: section 3(2)(a). The same applies to a clause that would allow the business to perform in a way that is substantially different to that which the consumer reasonably expected, e.g. to change the hotel in which a holiday maker is to be accommodated: s. 3(2)(b). The same controls apply to business-to-business contracts, but only if the party adversely affected is dealing ‘on the other party’s written standard terms of business’: s. 3(1).

The Law Commissions have recently published a Consultation Paper (LC no 166) on Unfair Terms in Contract. Copies may be downloaded from the Law Commission website: http://www.lawcom.gov.uk


See Cohen v. Roche [1927] 1 KB 169 (Contract for sale of set of antique chairs; specific performance refused.)


See Malik v. BCCI [1998] AC 20, HL.

See University of Nottingham v. Eyett (No. 1) [1999] 2 All E.R. 437, 440; and the speech of Lord Hoffmann in Johnson v. Unisys Ltd [2001] UKHL 13; [2001] 2 All ER 801, at [46]. In each case the claim that the implied term had been broken failed.


See Royal Panama Mail case (citation to find) (mistake);Taylor v. Caldwell (1863) 3B @ S 826 (impossibility).

(1854) 9 Exchequer 341.


The principal example is White v. Jones [1995] 2 AC 207, in which Lord Goff reached the same result as German law but via different reasoning.

Director General of Fair Trading v. First National Bank Plc [2001 UKHL 52,] 2002 1 AC


[26] See also Bills of Exchange Act 1882 and Partnership Act 1890.


[28] The famous French Poussin case, in which the seller of a painting was able to avoid the sale on the grounds that he did not believe it could possibly be by Poussin whereas the buyer, the National Gallery, knew that it was very likely to be by that painter, would be inconceivable in English law. (See Civ. 13.2.1983, D.1984.340, JCP 1984.II.20186; Versailles 7.1.1987, D. 1987.485, Gaz.Pal. 1987.34.)
