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Common Core, PECL and DCFR: could they change shipping and transport law?

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PREFACE

Common core, PECL and DCFR, could they change shipping and transport law? This question was included in the call for papers for the 8th European Colloquium on Maritime Law Research (ECMLR) that was hosted by the Rotterdam Institute for Shipping & Transport Law of the Erasmus University Rotterdam. Even though this question goes beyond traditional transport law research, 23 scholars from 18 Universities went outside their comfort zone and answered it, all from their own field of expertise. With this, this conference created a unique cross fertilization of sometimes very specialist areas of shipping and transport law and general contract law. As we are convinced that this fruitful conference can contribute to the debate on future harmonisation of shipping law, but also on general contract law harmonization instruments, speakers were invited to submit an article for this book.

The great response to the call suggests that even though harmonization of shipping and transport law has a much greater tradition than harmonization of general private law, still shipping and transport law could be impacted by and even benefit from the harmonization instruments. This should come as no surprise. First of all, if these harmonisation instruments would *de lege ferenda*, result in an (optional) European instrument, this can also have a great impact on harmonisation of shipping and transport law. Secondly, these harmonisation instruments could possibly bring solutions to fragmentation that still exists in many fields of shipping and transport law.

However, there is also a possible indirect impact, as (inter)national rules could get 'contaminated' by the rules underlying such European instrument.

A great number of contributions allow to assess the possible impact of such optional instruments, as answers to specific questions are compared under (national) shipping and transport law on the one hand, and the harmonisation instruments on the other. For example the contribution of professor TETTENBORN specifically investigates the potential impact on English shipping law of the introduction of a universal idea of good faith through the medium of possible European contract harmonisation. Similarly the possible impact on third party rights under shipping documents under English law is investigated by professor LAMONT-BLACK. Finally professor THOMAS investigates agreed damages clauses in charterparties under both regimes. While professor TETTENBORN is rather pessimistic about the possible impact of the harmonisation instruments, professor LAMONT-BLACK comes to the conclusion that implementation of the DCFR third party rules throughout, including the whole of shipping and transport

law, would have potential for welcome simplification of English law. These diverging opinions can also be found in dr. ORRÙ's contribution on unexpected circumstances in shipping contracts, professor PELLEGRINO's contribution on general principals and dr. GARCÍA ALVAREZ's contribution on liability for other persons with a focus on the differences between (inter) national law and the harmonisation instruments on these specific points. Dr. OSANTE introduces the Principles of European Insurance Law and investigates whether they can impact marine insurance. Finally mr. CONSTENLA argues that the EU should not (ab)use harmonisation instruments to navigate around international conventions.

A second possible impact lies in the fact that despite the long standing tradition, unification of shipping and transport law didn't go as far as would be desirable from a trade perspective as on many points there are cracks in uniformity. Further unification of private law aspects of shipping and transport law seems therefore highly desirable. Nevertheless, some legislative fatigue has crept into unification of private law aspects of shipping and transport law. To remedy these shortcomings, a two-fold role can come to the harmonisation instruments. First of all from a methodological point of view, the grassroots perspective taken by harmonisation instruments could offer an example for shipping and transport law. Second, the provisions of the harmonisation instruments could be useful when developing future European shipping and transport law instruments, but could also be very beneficial as a tool for gap-filling. Thus, contractual incorporation of one of these instruments could for example create a neutral gap-filling mechanism. In this book it is examined, for three prominent causes of fragmentation in shipping and transport law, whether the harmonisation instruments could contribute to uniform shipping and transport law.

A first cause of fragmentation is that some important areas of transport law are still excluded from uniform law. The lack of such uniform rules in these fields is often also detrimental for uniformity in unified fields of law. For example, the lack of uniform rules on transport intermediaries impacts the qualification by national courts of a service provider as a carrier or rather as a transport intermediary and creates therefore also a crack in uniform carriage law. The possible impact of the harmonisation instruments on the law of transport intermediaries is addressed by dr. KOZUBOVSKAYA PELLÉ and dr. VERHEYEN. While these authors are relatively sceptical about the possible role for the harmonisation instruments in this field, dr. MAGKLASI's contribution illustrates how the harmonisation instruments could be a useful help in the interpretation of volume contracts under the Rotterdam Rules. Finally dr. INGRATOCCI's contribution investigates the impact of the rules on non-contractual liability on the classification societies extra-contractual liability, a matter that is likewise not governed by uniform legislation.

Secondly, even in fields that are unified, there is often only a partial unification, addressing only specific questions. Consequently other questions are left outside the unification. Again, fields that are left outside unification can strongly impact the uniformity of decisions in cases subject to uniform law. For example, the lack of uniform rules on contract interpretation and validity of the contract will obviously

impact the interpretation of contracts subject to uniform law in different member states, and will can also lead to diverging court decisions in these member states.

Finally, even for subjects falling within the scope of uniform law, uniform rules are often nonetheless interpreted in a different way by national courts, as these courts read their national law concepts into the uniform rules. This prevents these uniform legislations from resulting in uniform law. Therefore professor LEGROS examines whether the harmonisation instruments could be useful to interpret shipping law.

Even though the future and eventual impact on shipping and transport law of the harmonisation instruments is uncertain, after reading this book, the reader should be able to answer the research question himself: Common core, PECL and DCFR, could they change shipping and transport law?

CONTENTS

Preface	v
Common Core, PECL and DCFR: Could They be Used to Interpret Shipping Law?	
Cécile Legros	1
I. Introduction	1
II. Scope of Application of PECL & DCFR	3
2.1. Material scope	3
2.2. Geographical scope	4
2.3. Recipients	6
III. PECL & DCFR Interpretation Provisions	6
3.1. Content of the provisions	6
3.2. Application to shipping contracts	12
IV. Conclusion: May Common Core, PECL and DCFR be Useful to Interpret Shipping Law	13
Principles and Rules of European Contract Law between the PECL and the DCFR	
Francesca Pellegrino	15
I. Introduction	15
II. What are the PECL and the DCFR?	16
III. What is the Legal Nature of these Texts?	17
IV. When was the Project for a European Private Law Launched?	17
V. Who Created the PECL and the DCFR and How did They Do It?	19
VI. But What are the Differences between the PECL and the DCFR?	19
VII. What Sort of Rules do These European Documents Contain?	20
VIII. Are Good Faith and Fair Dealing General Principles or Model Rules?	23

Can PECL Help with Vexing Issues of Maritime Law? Critical Reflections from the Example of the Rotterdam Rules	
Ioanna Magklasi	27
I. Introduction	27
1.1. Introduction to PECL	27
1.2. Benefits and objectives of PECL	28
II. From Contract Law to Maritime Law	30
2.1. Forms of harmonisation of maritime and trade laws	31
2.1.1. Sets of standard trade terms	31
III. Fusion of Legal Sources	33
3.1. Main underpinnings of international commercial law	34
IV. Can PECL Promote the Smooth Application and Efficient Integration of the Rotterdam Rules in Europe?	35
V. Suggestions and Final Recommendations	39
Good Faith, the DCFR and Shipping Law	
Andrew Tettenborn	41
I. Introduction	41
II. Background: English Law, Civilians and Good Faith	42
III. The PECL, the DCFR and Good Faith	45
IV. The Effect on English Shipping Law	47
4.1. Starting-point: in many ways, change may be surprisingly limited.	47
4.2. Moving on: some significant effects of a requirement of good faith	50
4.2.1. The law of contract: formation and formalities	50
4.2.2. The right of withdrawal	52
4.2.3. The effect of a change of circumstances	55
4.2.4. Exclusion of liability and similar clauses	57
4.2.5. Other matters	62
V. Conclusion	66
Unexpected Circumstances in Shipping Contracts	
Elena Orrù	67
I. Premises	67
II. Unexpected Circumstances in Shipping Contracts	68
III. Unexpected Circumstances Within Forms	69
IV. National Law. English Law	73
4.1. The doctrine of frustration	73
4.2. The doctrine of impossibility of performance	76
V. Unexpected Circumstances in Civil Law	77
5.1. Shipping law	77
5.2. General contract/private law	80
5.2.1. Italian law: the juridical and economical balance of the parties' obligations	80

5.2.2. French law	83
5.2.3. <i>Wegfall der Geschäftsgrundlage</i> and the doctrine of assumption (Germany, Denmark and Sweden).....	83
VI. Unexpected Circumstances in PECL, DCFR and UPICC	84
VII. Conclusions	88

**Liability of the Maritime Carrier and the Shipper for Other Persons: Uniform
Maritime Transport Rules vs. European Contract Law**

Belén García Álvarez	91
I. Introduction	91
II. Notion and Types of Auxiliaries	92
III. Liability of the Maritime Carrier for Other Persons in Maritime Conventions.....	94
IV. Liability of the Shipper for Other Persons in Maritime Conventions	95
V. Liability of the Debtor for Other Persons in European Contract Law.....	96
5.1. General rule.....	96
5.1.1. Liability to the creditor	96
5.1.2. Liability to third persons.....	97
5.2. Special rule: The intervener.....	98
VI. Special Situations. In Particular, in Relation to Loading, Handling, Stowing, and Unloading of the Goods	98
6.1. Preliminary remarks	98
6.2. Liability of the debtor in case it is the other party who performs some of the obligations	99
6.3. Liability of the party not bound to perform the obligations in case of giving instructions.....	103
VII. Conclusions	103

**Could the DCFR be an Answer to the Lack of Harmonization in the Field of
Forwarding Law? – Legal Qualification**

Anastasiya Kozubovskaya Pellé	105
I. Introduction	105
II. Freight Forwarder as a Carrier.....	107
III. Freight Forwarder as an Agent.....	108
IV. Conclusion.....	110

Harmonisation Instruments: the Way Forward for Forwarding Law?

Wouter Verheyen	111
I. Problem Statement	111
1.1. Uniform forwarding law is lacking	111
1.2. Can the harmonisation instruments unify forwarding law?.....	112

II.	Different Interpretations: Status Questionis	112
2.1.	Wide variety of parameters are taken into consideration:	
	discretionary margin	113
2.1.1.	Contract interpretation based on broader context	113
2.1.2.	Broad interpretation context creates wide discretionary power and unpredictable outcome disputes	115
2.1.3.	Applying <i>accessorium sequitur principale</i> adds on to the uncertainty	116
2.2.	Predominant weight specific elements and different division burden of proof create diverging qualifications	117
2.2.1.	Dominant weight specific elements in case law	118
2.2.2.	Legislative development: liability as carrier	119
2.2.3.	Praetorian presumption: qualification as carrier	121
2.2.4.	Conclusion	122
III.	Can the Harmonisation Instruments Eliminate Different Interpretations of the Same Contract?	122
3.1.1.	Wide catalogue with open rules inappropriate for unification of case law	122
3.1.2.	<i>Accessorium sequitur principale</i> rule inappropriate to solve discrepancies	124
3.1.3.	<i>Contra proferentem</i> rule can avoid some discrepancies	124
3.1.4.	Technical hindrance to substantial role harmonisation instruments	125
IV.	Conclusion: Harmonisation Instruments cannot Eliminate Different Interpretations of the Same Contract	126

**Could the DCFR Change Shipping Law? The Potential Impact of the DCFR on
Third Party Rights under Shipping Documents – A UK Perspective**

	Simone Lamont-Black	129
I.	Introduction	129
II.	The Fragmented Position in the UK	131
2.1.	The framework in the UK	131
2.2.	Scottish reform discussions	131
2.3.	Excluding shipping law?	132
2.4.	The fragmented UK position under transport documents	134
2.5.	An artificial or necessary distinction?	135
III.	Comparative Analysis of the Different Regimes	137
3.1.	Scope	138
3.2.	Requirements	138
3.3.	Remedies provided for third parties	139
3.4.	Conditions and limitations on conferred benefit	142
3.5.	Jurisdiction and arbitration clauses as a condition on the conferred benefit	143
3.6.	Time of transfer/conferral; modification and revocation of benefit.	148

3.7. Performance rights of the contracting party (promisee)	150
3.8. Defences	150
3.9. Transfer of obligations	151
IV. Conclusion	152

The Effects of Principles of European Law on Non-Contractual Liability of Classification Societies

Cinzia Ingratoci	153
I. Introduction	153
II. Case Law of the European Courts of Common and Civil Law	156
III. Contribution of the Reference Principles and Model Rules of European Private Law to the Debate on Non-Contractual Liability of Classification Societies	160
IV. Conclusion: Classification Services Market Efficiencies and Purposes of General Interest	163

Towards a Euro-Maritime Contract Law?

Pablo Constenla	167
I. Introduction	167
II. The Roots for a Complete EU Maritime Law Arose Incidentally	168
III. EU is Supported by the Law and the Industry to Achieve Its Foundational Aim	169
IV. The Complexity of Shipping Business	169
V. Suitable Method to Regulate Private Maritime Law	170
5.1. PECL and DCFR as voluntary private rules	170
5.2. Choice of law as an option	171
5.2.1. Uncertainty remains	171
5.2.2. Rome I Regulation and the Rotterdam Rules	172
5.3. Mandatory and uniform system	173
5.3.1. International agreements concluded by the EU have preference over EU secondary law and Member States national law	173
5.3.2. EU institutions are competent in regulating EU transport	174
5.3.3. The transport of goods as the “mirror image”	175
VI. Conclusion	178

Principles of European Insurance Contract Law and Marine Insurance

José Manuel Martín Osante	179
I. Introduction	179
II. Principles of European Insurance Contract Law	179
2.1. Scope of application	179
2.2. Mandatory application versus freedom of contract	181
2.3. Form of the contract	181

2.4.	Obligations of the parties	181
2.4.1.	Duty of disclosure	181
2.4.2.	Payment of the premium.....	182
2.4.3.	Notice of insured event	182
2.4.4.	Payment of the indemnity	183
III.	The Spanish Law 14/2014 of Maritime Navigation	183
3.1.	Introduction	183
3.2.	Legal sources	184
3.3.	Form of the contract.....	185
3.4.	Obligations of the parties	186
3.4.1.	Duty of disclosure	186
3.4.2.	Payment of the premium.....	187
3.4.3.	Notice of insured event	187
3.4.4.	Avoidance or mitigation of the damage	188
3.4.5.	Payment of the indemnity	188
3.5.	Special provisions for certain types of marine insurance	188
3.5.1.	Ship insurance	188
3.5.1.1.	Voyage or time insurance	188
3.5.1.2.	Collision	189
3.5.1.3.	Seaworthiness	189
3.5.1.4.	Maximum limit per claim	190
3.5.1.5.	New for old deductions	190
3.5.1.6.	Subrogation and crew.....	190
3.5.1.7.	Indivisibility of the premium	191
3.5.1.8.	Subsidiarity.....	191
3.5.2.	Cargo insurance	191
3.5.2.1.	Time limit of the cover	191
3.5.2.2.	Floating policies.....	192
3.5.2.3.	Civil liability insurance	192
IV.	Conclusions	193

The Perspectives of English and European Contract Law to Agreed Damages Clauses in Voyage Charterparties

	Rhidian Thomas	195
I.	Introduction	195
II.	Draft Common Frame of Reference	196
2.1.	Relevant provisions of the DCFR.....	196
2.2.	Comments on the DCFR.....	198
III.	English Common Law	200
IV.	Comparative Summary of DFCR and the English Common Law	204
4.1.	General.....	204
4.2.	Application to demurrage clauses in voyage charterparties	205