5. Shifting Power from Legislation to Judges and from the Central Level to the National Level

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It is important to understand the way in which European Community law intervenes in national contract law.

Contract law is essentially a matter of private law. In some countries it is codified but whether codified or not it has been developed over many years by the judges of the civil and commercial courts. Clauses of general application may be the result of case law particularly in the common law countries. They may be imposed by a code or statute. They may be the result of commercial practice, or there may be a combination of all three.

The approaches of national courts and legislators have differed. They have done so because the social and economic attitudes, perspectives and priorities of states have themselves differed. The common law has generally favoured freedom of contract. *Caveat emptor* is the standard example but, in general, the common law considers that parties to contracts should be in a position to look after themselves and should accept what they have agreed to. By contrast, in the so-called civil law countries there has been a tendency to be more protective of the parties to contracts – a tendency to be more concerned to ensure, not simply that contracts are observed, but (for example) that they are carried out in good faith.

Over the last half century there has been a growing tendency (in the common law countries as much as elsewhere) to recognize the inequality of bargaining power of contracting parties. Judges have become more protective of parties in the weaker position – particularly but not exclusively of consumers, and particularly but not exclusively as regards non-negotiable standard form contracts. The legislator too has restricted the right of manufacturers and suppliers to rely on clauses in small print which, even if consumers could read them, they would hardly be able to understand.

The consequence has been legislative intervention in a field of private law where the courts also play a leading role in developing the law. Nevertheless, the norms introduced by the national legislator are intended to become norms

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of domestic private law to be applied by the judges of the civil and commercial courts.

The peculiarity of the European Community dimension is that it introduces into this familiar field of private law political, social and economic considerations – especially, but no longer exclusively, those related to the creation of the internal market. The norms introduced by Community law, if one needs to categorize them, are more akin to norms of public law or even of constitutional law, than of private law. At any rate, they involve a public or constitutional element which the norms of private law do not.

The judges of the civil and commercial courts in the member states have, like all other national judges, become *juges communautaires de droit commun*. They can no longer operate exclusively in their familiar national domain of private law. The difficulty for them is that the intervention of Community law in the field of private law tends to be concealed.

Community norms will normally enter domestic law through national legislation whose purpose is to implement Community Directives. From the point of view of the national lawyer, including the national judge, the form of the new legislation will appear to be no different from any other national legislation that affects the norms of private law. The difference is that the new norms of national law are intended to implement, not simply the *terms* of a Community Directive, but also its *purpose*. The purpose can only be understood in the wider context of the treaties.

The purpose of Community Directives in the field of contract is normally to realize the aims of the internal market. Lack of uniformity in the law of contracts is not necessarily a barrier to cross-frontier activity. Indeed, for centuries, divergences in national law and practice have been regarded as tolerable and, in general, they have been resolved satisfactorily by the traditional methods of international private law. Moreover, the United Kingdom has for centuries had a working internal market with significant differences in the law of contract as between Scotland and England.

Nevertheless, in the Community context, it has come to be recognized that divergences in national law, particularly in the field of contracts, create practical problems for the working of the internal market from two points of view. First, from the point of view of the economic operator, differences in the law to be applied may in practice discourage cross-frontier economic activity. Second, from the point of view of the consumer, divergences may lead to false expectations, particularly for those who are used to a more protective regime.

The problem, from the point of view of the Community legislator, is illustrated in the recitals (*considérants*) of the Council Directive on unfair terms in consumer contracts (93/13/EEC of 5 April 1993):

> 'Whereas the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise among sellers and suppliers, notably when they sell and supply in other Member States;
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> 'Whereas, in particular, the laws of Member States relating to unfair terms in consumer contracts show marked divergences; . . .
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> 'Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods or services; whereas this lack of awareness may deter them from direct transactions, for the purchase of goods or services in another Member State; . . .'

This statement of legislative purpose will not necessarily appear in the national law that transposes the Directive. Nevertheless, in deciding how to interpret the national law, the national judge will have to take account of the fact that the purpose of the legislation is to achieve a degree of uniformity of interpretation and application so as to ensure fairness and transparency in the working of the internal market. Although this type of legislation is generally called 'harmonization', the extent to which harmonization in the strict sense is necessary will differ from case to case. What matters is uniformity of result.

Against that background, I come to the topic assigned to me – 'the transfer of power from central to national level and the transfer of power from the legislator to the judge'.

As regards the transfer of power from the central to the national level, I think that, for the reasons already mentioned, the question at issue is not really about the transfer of *power* so much as the source of the norm that the judge is to apply at the national level. The national judge remains competent to deal with the case before him or her. What the national judge is not free to do is to disregard the Community dimension of the norm to be applied or to disregard the intention of the Community legislator to eliminate barriers to trade and to ensure uniform protection of the consumer.

Correspondingly, so it seems to me, it is not really a question of transferring power from the legislator to the judge. To the extent that the legislator is explicit as to the intention of the legislation, then the judge can simply apply it. As the first Advocate General before the Court of Justice, Advocate General LaGrange, said in one of the earliest cases (Case 8/55 *Fédéchar*) 'The essential question is whether the text is clear and requires no interpretation'. Judges only have to choose between interpretations where the text to be applied is not clear. This may be a play on the word 'interpretation' but it is nevertheless useful from the point of view of analysis.

As regards legislative rules that impose, or are analogous to, general clauses in contracts, it is useful to distinguish three possible situations. First, the legislator may impose a norm of general application. Thus, the Directive on self-employed commercial agents (86/653/EEC of 18 December 1986) provides:

> Article 3: 'In performing his activities, a commercial agent must look after his principal's interests and act dutifully and in good faith';
>
> Article 4: 'In his relations with his commercial agent a principal must act dutifully and in good faith'.

Second, the intention of the legislator may be to introduce a rule of interpretation rather than a norm to be applied. This is illustrated in the Unfair Contract Terms Directive:

> Article 3(1): 'A contractual term which has not been individually negotiated 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'.
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> Article 3(3): 'The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair'.

The text of the Directive lays down a rule of general application but, by referring to the list in the Annex, the legislator also says, 'This is the kind of thing that I regard as unfair and you are to look at contracts in the light of my non-exhaustive list in order to determine whether the contract is fair or unfair'.

In these two cases, the relationship between legislator and judge is what one would expect. The legislator lays down the norm or rule of interpretation to be applied and the judge applies it. But there is, I think, a third situation of

which we should be aware, although I have been unable to think of examples specifically relating to contract law. That is that the legislator may include a general provision because he cannot make up his own mind or wishes to achieve a political compromise, or because he needs to make a gesture towards a politically desirable goal. That is part of the reality of the legislative process in all member states and it is particularly true at the Community level.

Consider, for example, the original Directive on company accounts (78/660/EEC of 25 July 1978). The attitude to drawing up company accounts was very different in the Anglo-American world and in the civil law world. In general the Anglo-American world has said that the purpose of company accounts is to provide a true and fair view of the state of the company. What in general the continental countries have required is a clear statement of the assets and liabilities of the company at a given date.

Since the Community legislator could not decide which approach to adopt, he put in both. Article 2(3) of the Directive provides that 'The annual accounts shall give a *true and fair view of the company's assets, liabilities, financial position and profit or loss*'. Then Section 2 of the Directive goes on to prescribe in great detail how the balance sheet and profit and loss account are to be drawn up and what they are to contain.

Thus, we were presented in the Court of Justice with the case of a builder who built a number of houses and gave a guarantee that he would make good defects over a period of twenty years. Was he required to set down in his accounts a provision for this potential liability in respect of each house, enumerated separately, or was he entitled to make a general provision for all the houses collectively? If the latter, could he do so on the basis that, in general, if there are twenty houses, there are likely to be problems with two of them, or on some other basis? In reality the Community legislator had not made up his mind how the rules on company accounts were to be interpreted, so it became a matter for the judge to make up the legislator's mind for him. (See Case C-275/97, *DE + ES Bauunternehmung*)

This is not transferring *power* from the legislator to the judge, but transferring the *problem* from the legislator to the judge. The legislator always had, and continues to have, the power to prescribe how company accounts are to be drawn up. If he fails to use his power, the problem remains open and it is left to the judge to solve it. In so far as there is a transfer of power to the judge, the transfer is provisional, since the legislator can always decide to legislate.

In the years since the treaties were written, and particularly in recent years, the legislator has been faced with a bewildering array of desirable objectives – free movement, environmental protection, consumer protection and so on.

The Community treaties, which began as a programme for action in defined fields, have tended to become a wish list of politically desirable but often conflicting objectives – free movement of goods but also the precautionary principle in environmental protection, free movement of services but also preservation of cultural diversity. Each of these objectives is supported by lobbies and interest groups which the legislator cannot ignore. Indeed, they have almost become an integral part of the legislative process.

This has affected the work of the judge and will continue to do so. If the legislator or treaty maker does not specify which norm is to take precedence in a given case, the judge must decide. This does not transfer power to the judge. What is transferred is the problem which the legislator could not, or did not wish to solve.

In short, the judge – whether the Community judge or the national judge – is only as powerful as the legislator chooses to make him.