Editorial: Globalization, Comparative Law and Law Reform

I. Introduction

An increasingly globalized economy, the rapid advancement of new information technologies, international environmental concerns, the expansion of international governmental and quasi-governmental organizations and the universalization of human rights make study and research in international and comparative law essential — for law students, practicing attorneys, barristers and solicitors, business people, legal academics, legislators, law reform agencies and many other individuals and organizations.

Accordingly, the School of Law at Indiana University in Indianapolis welcomes the fact that the *European Journal of Law Reform* and its editor, Professor Frank Emmert, are now connected to our school. The emphasis that the journal has upon interdisciplinary debate and proposals for law reform in Europe and its express aim to highlight law reform initiatives in Europe and elsewhere perform invaluable roles. The rest of the world is interested, or should be interested, in developments occurring in one of the most significant economic and political unions in history. Legal, social, economic and political innovations in Europe can have major repercussions on other nations and organizations. For this reason alone a good knowledge of, and understanding of, law reform issues in Europe in areas such as international commercial contracts, international economic crime, civil procedure, international terrorism, war crimes, unfair trade and family law gives validity and strength to this journal and its aspirations.

In the commercial context the growth in multinational corporations, the rapid expansion of international trade and technological advances confront lawyers and others with increasing challenges and opportunities related to doing business in a global marketplace. As effective performance in this environment requires a thorough knowledge of commercial laws, regulatory structures and financial markets in numerous countries, it is no surprise that there are strong calls for codification and the creation of model laws to facilitate global business and trade. In the next section, I outline some of the arguments and issues arising out of proposals to codify or harmonize law with the specific illustration being European insurance law.

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II. Codification of Insurance Laws

Codification of insurance laws, or variations upon this theme such as harmonization,[1] is a very important and live issue. Advocates of codification point in particular to the economic benefits associated with this process. For example, Jürgen Basedow,[2] in presenting the case for a European Insurance Contract Code, points to the subsisting differences between national insurance contract laws as the principal impediment to market integration. He states the following:

> 'With regard to cross-border contracts, an insurer usually has to face two categories of special risks: First, the overall damages in a given sector may differ from domestic experience due to particular economic, social, and cultural conditions of the foreign environment. To obtain information on these differences requires time and depends on the volume of business contracted abroad. Second, the insurer has to deal with the foreign contract law of the policy-holder's country which is applicable under the relevant conflict of laws rules and which determines the interpretation and effects of the policy... Having to cope with 15 different insurance contract laws within the European Union might be as important for an insurance company as the accommodation of 15 different national foodstuff Acts for the producer of chocolate bars, tinned chicken soup or fruit yogurt. The producer of foodstuff must either adjust his products to the changing requirements of different foreign markets and their respective legal frameworks or must dispense with exportation of his products to these countries. In the same way, insurance companies operating from their home bases must either invest in the costly adaptation of their policies to the foreign insurance contract laws, or must abandon the idea of expanding their activities to the foreign markets if they are unwilling to incur such costs.'[3]

In addition to these economic and market integration arguments, it is contended in the context of globalization and the rapidly expanding e-commerce business environment where national boundaries are of less importance, that common approaches to jurisdiction, security and enforceability must be found to protect consumers of insurance products and services.[4]

Conversely, the opponents of Codes reject any need for uniformity or harmonization citing, in particular, the inflexibility inherent in codification and the inability of Codes to handle or address new circumstances and evolving business arrange-

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1 Hugh Beale, *Case for Codes of Contract*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001, at p. 10.

2 *The Case for an European Contract Code*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001.

3 Ibid, at pp. 5-6.

4 See, for example, M. De Zwart, *Electronic Commerce: Promises, Problems and Proposals*, 2 University of New South Wales Law Journal 1998, p. 305.

ments. Professor Malcolm Clarke,[5] in a paper carrying the appropriate sub-heading, 'The Cold Hand of the Past: Immobility and DVT in the Law', cites this inflexibility as the principal problem with Codes. This problem becomes more acute where Codes are detailed, as this is said to inhibit the freedom to maneuver to draft and design new insurance products to meet new market conditions and circumstances.[6] Added to inflexibility are charges relating to the seductive elegance and simplicity of Codes that do not 'reflect life in all its untidy complexity',[7] the dangers of ingraining inappropriate provisions[8] and the difficulties of structuring a Code in a way that is plain and accessible to readers, even legally trained readers, from different countries.[9] Other practical difficulties in achieving uniformity across various jurisdictional boundaries are addressed below.

The *Marine Insurance Act* 1906 (United Kingdom) is used as an exhibit in this debate by persons both for and against Codes. This statute has had a long reign and has had a huge international influence with many countries adopting it into their own legislation[10] either in un-amended or only in slightly amended form. Sir Andrew Longmore, in the first Pat Saxton memorial Lecture entitled 'An Insurance Contracts Act for a New Century?' described the work of Sir MacKenzie Chalmers in drafting this Act, as 'a brilliant synthesis of a maze of common law decisions.'[11] Conversely, its critics point to a litany of complaints with inflexibility again the key problem. C. Croly and R. Merkin[12] comment that not only has the *Marine Insurance Act* 1906 (UK) failed to achieve the supposed benefits of certainty and accessibility but that

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5 *Doubts from the Dark Side – The Case Against Codes*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001, at pp. 4-5. See also Dame Mary Arden, *Time for an English Commercial Code?*, 56 Cambridge Law Journal 1997, p. 516; Lord Mustill, *Convergence and Divergence in Maritime Insurance Law*, 31 J. Mar. L. & Com. 2000, p. 1.

6 See Lord Goff in B. Markesinis (ed.), *The Clifford Chance Millennium Lectures*, Oxford 2000, chapter 1, pp. 243-244.

7 Lord Goff, *Proceedings of the British Academy*, London 1983, p. 169, at p. 174.

8 Professor M. Clarke, n. 5 above, at p. 6, observes that 'Codification acts like French polish, if blots are ingrained by codification, they are hard to remove'. He cites also Professor Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice*, 13 Uniform Law Review 2000, at p. 19, who refers to 'well seasoned ... fossilisations.'

9 Professor M. Clarke, *Policies and Perceptions of Insurance*, Oxford 1997, pp. 121 ff.

10 Examples of statutes modelled on the British *Marine Insurance Act* 1906 include marine insurance legislation in Australia, Canada, Fiji, Hong Kong, India, Kenya, Malaysia, New Zealand, Singapore and Thailand. The courts in the United States of America have accorded great weight to the *Marine Insurance Act* 1906 (United Kingdom), and examples of the partial adoption of this Act can be found in numerous other jurisdictions. There are, of course, other very important sources of influence in the international setting such as the French marine insurance regime. However it is undoubtedly the *Marine Insurance Act* 1906 (United Kingdom) that has been the primary source of influence on the world stage.

11 Lecture sponsored by the British Insurance Law Association, March 2001.

12 *Doubts About Insurance Codes*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001.

inflexibility inherent in codified law means that the courts have spent an inordinate amount of time 'seeking to develop and reapply code principles to novel situations'.[13] As a result of these difficulties the *Marine Insurance Act* has been reviewed by organizations as diverse as the Comité Maritime International[14] and the Australian Law Reform Commission.[15]

Whatever the merits and demerits of the *Marine Insurance Act* 1906 (UK), there is a significant matter that is not sufficiently acknowledged. Professor Hugh Beale,[16] of the English Law Commission, cites the example of an attempt to codify the law of contract law in England and Scotland in the early 1970s. This effort floundered as the English Law Commission wanted a statute – 'a text which on the one hand was much more detailed and on the other would be interpreted much more strictly, than the code wanted by the Scots.'[17] Clearly the charges of inflexibility carry greater weight in the case of detailed statutes than in the case of codes that are less prescriptive and comprise more general statements of principle. At this higher level of generality there is greater scope to achieve common ground between different legal systems that will facilitate market integration while avoiding the stultifying inflexibility inherent in attempts to record and prescribe detailed rules governing every aspect of the insurance transaction.

It is therefore at this more abstract or general level that should be devoted to achieve a common set of principles applicable to international insurance transactions. Consistent with the position advocated by Professor Beale,[18] these general principles should be reproduced, in broad terms, by participating states in their own legal systems. The general principles would not need to be reproduced verbatim but each state could achieve the same result through their own concepts and terminology. This may be referred to as 'harmonization rather than unification'.[19] I concur in the view expressed by Professor Beale where he states:

> 'I think that a process of harmonization would be adequate and preferable. If, for example, an insurance company wishes to offer liability insurance across Europe, it seems to me that it would be adequate if, in addition to regulatory barriers being removed, the insurer can be assured that the principles of liability of the insured to third parties are broadly the same in each Member state. For most

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13 Ibid, at p. 8.

14 See, for example, proceedings of the Comité Maritime International (CMI), 37th Conference, Singapore, February 2001. See also P. Griggs, *Insurance Codes – A Middle Way*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001, at pp. 1-5.

15 See *Review of the Marine Insurance Act* 1909, Report 91, April 2001.

16 *Case for Codes of Contract*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001.

17 Ibid, at p. 1.

18 Ibid, at p. 10.

19 Ibid.

> policies, any small details in which the various legal systems differ will probably be entirely marginal in terms of the risk.'[20]

The process of achieving harmonization is, of course, complex and there are various approaches that may be adopted. It is beyond the scope of this short article to consider this in any detail, but the commonly adopted approach of achieving uniformity through Conventions and Protocols has the virtue of incorporating the general principles into the national law, thereby ensuring that they apply regardless of the wishes of the parties and whether they are in a contractual relationship or not.[21] Conversely, the process of model laws may be appropriate, with the UNCITRAL Model Law on International Commercial Arbitration being an excellent example.[22] Lord Goff comments:

> 'Providing businessmen with a set of unofficial rules which they can, if they wish, incorporate into their transactions, has many of the advantages of a code or codes without some of their disadvantages... Such model laws do not have to conform to national drafting technique and thus are likely to arouse less local opposition. And if they prove unworkable or with the passage of time are in need of fine tuning, that could be done in the unofficial way in which they were born in the first place.'[23]

Of course, model laws can only apply where the parties are in a contractual relationship and have the opportunity of incorporating the model law into their contract. Finally, brief mention should be made also of the possibility of achieving a gradual harmonization through the production of a persuasive Restatement, such as that produced by the American Law Institute, which national legislators and judges might follow. However as Professor Clarke notes[24] these Restatements have 'the force only of their prestige and inherent wisdom' and it is suggested that harmonization of insurance laws will require a more direct and coordinated strategy.

To conclude this section, therefore, it is submitted that the development of a model law governing insurance transactions would be the best way forward. A

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20 Ibid.

21 There are, of course, numerous problems with this approach such as the disproportionate amount of time and effort required to achieve an agreed text, the rigidity and inflexibility of the Convention, limited ratification or accession to a Convention and the consequential patchwork coverage. See International Institute for the Unification of Private Law (UNIDROIT), *Harmonization of Commercial Law: Co-ordination and Collaboration*, Rome 18 January 1997; *The Owners of the Ship "Herceg Novi" and the Owners of the Ship "Ming Galaxy"*, Court of Appeal 16 July 1998, 2 Lloyd's Rep. 1998, p. 454.

22 Adopted by the United Nations Commission on International Trade Law, 21 June 1985.

23 Professor B. Markesinis, *Why a Code is Not the Best Way*, in Basil Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Method*, Oxford 2001, at p. 108.

24 *Doubts from the Dark Side – The Case against Codes*, paper delivered at Cambridge University, Centre for Corporate and Commercial Law Conference, 5-6 April 2001, at p. 16.

model law approach, provided it was developed with extensive input from the insurance industry, possesses excellent potential to promote harmonization in this field while avoiding the pitfalls of other processes. Such harmonization would facilitate market integration and international trade and would, it is suggested, reduce costs in many ways. Not only is there potential to reduce search and compliance costs, but the ability to offer a common policy in different countries enhances the commercial feasibility of multi-state risk pools.[25]

III. Concluding Remarks

The participatory nature of effective law reform is evident from the comments above. Good law reform will take account of as many views and approaches as can be assembled or solicited to ensure that the prospects of a successful solution to a problem can be developed. From my experience as Chairman of the Law Reform Commission of the Republic of Fiji in the 1990's a strong emphasis was placed on taking 'law reform to the people'. To this end a newsletter Qolilawa,[26] disseminated through post offices throughout the Fiji islands informed the wider community of law reform proposals and solicited their input. This input augmented the consultations with specialists, professional bodies and other public and private interest groups. The *European Journal of Law Reform* similarly performs on a wider stage the role of dissemination to a world community who can also respond or contribute to the reform process. One of the greatest virtues of comparative law, and indeed comparative study of any kind, is the wealth of possible solutions to common problems afforded by such analysis. 'Reinvention of the wheel' is, of course, a much loved game amongst legislators, lawyers and others, but comparative analysis does have the virtue of eliminating some costly mistakes and, in many instances, of showing an efficient and just solution to a problem or issue. Therefore, in confronting some, if not all, of the issues and problems arising out of globalization, the new technologies, international human rights and global environmental concerns a comparativist approach to law reform is strongly advocated. In this regard the *European Journal of Law Reform* will play a significant role.

Anthony A. Tarr, LL.M, Ph.D.
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25 Good examples of existing efforts at codification include UNIDROIT, *Principles of International Commercial Contracts* (1994), and Commission on European Contract Law, *Principles of European Contract Law (Parts I and II)* (2000).

26 Derived from two words, Qoli (which means to fish) and lawa (which means a net or indeed the law) capturing the process of dissemination of information, consultation, and the gathering in of the views and opinions of as many as possible.