BOOK REVIEWS

B. Heiderhoff & G. Żmij (Eds.), *Interpretation in Polish, German and European Private Law*, Sellier European Law Publishers, Munich, 2011, ISBN (print) 978-3-86653-171-0, ISBN (eBook) 978-3-86653-930-3, € 39.

The book deals with an important topic. Interpretation is the juridical tool par excellence, be it with regard to legal rules, case law, contracts, or other legal acts. At the same time, interpretation is probably one of the most elusive of processes. However precise and 'logical' the developed methodologies of interpretation have been, there seem to be factors such as underlying values, interests involved, psychological processes and others that somehow disturb the doctrinal frame. Certainly, some interpretation methodologies avoid exactly those disturbing factors by allowing for subjective or value-based (or yet other) interpretations. This inevitably creates a system that is not only highly complex because of the multitude of coexisting, overlapping rules and because of a delicate rule/exception ratio, but that is also fraught with rules of conflicting or even contradictory content. The rigidity of the rules of interpretation is thereby weakened, and it is telling that, in several jurisdictions, courts have subscribed to a 'pluralism of methods', which affords them considerable leeway in interpreting the law.

Methodology of legal interpretation is thus a somewhat difficult terrain, and one might question the utility of a strictly logical, comprehensive, yet highly abstract system. At the same time, there are some questions in relation to legal interpretation that are also vital from a practical point of view. It is, for instance, important to define whether circumstances prior or subsequent to the conclusion of a contract may be taken into account when interpreting that contract. Regardless of whether some might qualify this as a matter of evidence and thus as an issue of legal procedure, it is, in any event, a practically important question. Similarly important is the question of the hierarchy of norms: does supra- or international law override national law, even constitutional law?

In the era of Europeanization and internationalization, those last-mentioned questions assume an even greater complexity: what has hitherto been controversially discussed among jurists within the same jurisdiction is now becoming a discourse of a global dimension. The book edited by Heiderhoff and Żmij was thus published at the right time. The Draft Common Frame of Reference has triggered a vivid discussion about the feasibility of a European contract law (and about other issues usually summarized in continental Europe as 'private law'). Should a European Civil Code become reality, it will indeed be important to agree on a common approach as to how, for example, to tackle the question of extrinsic evidence or of whether principles such as 'good faith' and 'contra proferentem' apply. In this regard, the Polish perspective depicted in Heiderhoff and Żmij's book is particularly interesting, since the law of Poland, despite the dimension and ever growing importance of the country, has not been in the limelight of European civil law jurisdictions.

The book contains seven articles, which were presented at a Conference in Katowice, Poland. The authors are Polish and German scholars who approach the question of interpretation from different angles. Ewa Rott-Pietryz notes the importance of discussing interpretation in the context of Europeanization. Probably the "most essential thing" would be to reach a consensus as to the very notion of interpretation (p. 9). This is definitely true. A broad approach to 'interpretation' is, for instance, taken by Marco Staake, who deals with interpretation of law in general. That the author's understanding of 'law' is German is obvious from the first few sentences, according to which "law consists of a variety of rules made for an indeterminate number of cases" and "is not directly focused on a specific case" (p. 32). It must be noted that a broader notion of 'law' has been adopted in Anglo-American jurisdictions, but indeed also in continental European jurisdictions, such as Switzerland, which includes case law (rendered on a specific case) in the definition of 'law'. Expectedly, Staake's work depicts the German traditional doctrine of methodology, and does so quite successfully, given the difficulty of describing specific legal concepts in another language.

Zygmunt Tobor and Tomasz Pietrzykowski approach the question of interpretation from a legal-philosophical and linguistic viewpoint. They essentially deconstruct the "old tradition of legal discourse" based on a dichotomy of subjective and objective interpretation (p. 16). The authors claim that the subjective method of interpretation, according to which the real intention of the parties is decisive, and the objective method of interpretation, in which the interpreter looks at the independent meaning from the viewpoint of a reasonable person, are not opposed to each other. Accordingly, they reconstruct the rules of interpretation around a new criterion, that is, the parties' "selection of linguistic tools" used to form the terms and conditions of the contract (p. 26). Without entering into the details of their argument here, this interesting idea is worth exploring further. The other contribution addressing the interpretation of contracts is made by Olaf Muthorst. He compares the respective rules under the German *Bürgerliches Gesetzbuch* and the Draft Common Frame of Reference and shows, among other things, that, although the German rules and those of the DCFR are different in structure (with those of the DCFR being considerably more detailed), the result of contract interpretation will be quite similar (p. 52). Equally interesting is the analysis of how the DCFR deals with merger clauses, that is, with contractual terms according to which statements by the parties before the conclusion of the contract do not become part of it. The relevance of circumstances under the DCFR is even more specifically dealt with by Grzegorz Panek. He comes to the conclusion that the relevant provision in the DCFR (II.-8:102), although it might be called "an organized mess" (p. 74), is definitely necessary, especially in cross-border transactions. Different topics from those of contract interpretation are dealt with by the last two contributions. Grzegorz Gorczyński analyses the question of how to determine whether a rule is mandatory or not. He explores the topic mainly under Polish company law but not without making reference to the DCFR and the Principles of European Contract Law. Heiderhoff addresses a specific question of the hierarchy of norms, that is, whether national law of the EU Member States must always be interpreted in conformity with the EU Directives,

even if the wording of the national law had to be violated. She argues that EU Directives do not have a horizontal effect in private law and that, therefore, "the borderline for European interpretation [...] is the clear wording of the law" (p. 118). One might disagree with this quite traditional approach, but it is concisely argued, in particular by dealing with the question of the consequences of infringement of an EU Directive (pp. 116/117).

As regards the book as a whole, one is tempted to ask what the idea of this particular order of contributions was. Would it, for example, not have been better to group the various articles dealing with interpretation of contract together rather than presenting them piece-meal? One might also miss a clearer interrelation among the German, the Polish and the European law, which would, for instance, show the similarities and differences between the German and the Polish approach and refer conjointly to the discussion of Europeanization of contract law.

Nonetheless, it is an elegant little book that makes a valuable contribution to an important issue.

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"Harmonization of private law in Europe is a multi-faceted notion, evoking different phenomena." Gómez and Ganuza begin the conclusion of their paper with those words (p. 55). And it is the impression one gains after reading the various contributions contained in this book. Harmonization and unification of the law of the European Member States raises many questions. This is all the more true with regard to that part of the law which, according to the continental European tradition, is called 'private', including, in particular, contract and tort law. How desirable, feasible, or efficient is it to have common or at least harmonized rules in Europe? What are the institutional or practical limits to this process of harmonization and unification? Which areas of law are most in need of common rules? Should those rules entirely replace existing national law, or should they be merely optional – a twenty-eighth legal system, so to speak?

These are the questions dealt with in this book, which has been edited by two of the most prominent German scholars in their field. The eleven papers and six panelist votes were presented by German, Belgian, Spanish, English, Dutch, Polish, and French jurists at the Third European Law Days which took place at Münster, Germany, in summer 2010. Most of the contributors are university professors, and some are members of the Acquis Group.[1]

1 The European Research Group on Existing EC Private Law (Acquis Group) targets a systematic arrangement of existing Community law; for details and activities *see* <www.acquis-group.org/>.