Addressing the inadequacies of private law in the regulation of contracts – during and post contract formation periods

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ABSTRACT

It has been argued that weaknesses inherent in Private Law rules, which contribute to its inability to effectively regulate contracts, are in part, attributed to its generality as well as inflexibility in adapting to individual situations. Whilst self-regulation, a constituent of the standard setting system which private law supplements, offers advantages which include proximity (in that self regulatory organisations are considered closer to the industry being regulated), flexibility, and a high level of compliance with rules, it will be highlighted in this paper that some other models of regulation, are capable of conferring greater flexibility, compliance, enforcement and accountability.

The setting of standards with „an adequate degree of specificity in order to provide effective guidance, as well as the lack of expertise in choosing between standards are amongst some of the challenges which the Private Law of Contract is confronted with.

This paper aims to highlight and demonstrate why an interaction with public regulation, as well as an incorporation of substantive equality principles, will be required to address these weaknesses of Private Law. Further, it illustrates how through the evolvement of self regulation, and the interaction of self regulation with public regulation, Private Law has also evolved in its interaction with public regulation.

Key Words: regulation, implied contracts, Equity, undue influence, economic duress, bargaining power, self regulation, accountability, legal certainty

Addressing the Inadequacies of Private Law in the Regulation of Contracts – During and Post Contract Formation Periods

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Introduction

It is a widely acknowledged fact that Private Law techniques aimed at addressing regulation, in particular, social and economic regulation[2], are flawed in their design. This paper aims to identify, as well as address major flaws inherent in the design of Private Law regulatory techniques.

In order to achieve this aim, the first section of the paper focuses on why contracts should be more effectively regulated, by way of reference to situations whereby the inequality of bargaining powers could arise, as well as emphasises the fact that such situations do not only arise during contract formation periods.

Traditional tools, legal and equitable doctrines which have been implemented in addressing situations whereby exploitation and unfairness in contract formation occur, will then be introduced and analysed. From this perspective, the role of courts in addressing the inadequacies of Private Law is not only highlighted, but also other considerations which should be taken into account by courts in arriving at decisions aimed at ensuring that an equitable, as well as fair settlement is achieved.

In highlighting challenges presented to Private Law in its regulation of contracts, the third section of the paper will then consider how Private Law is evolving in its efforts to effectively regulate contracts and other more modern mechanisms and actors which are now involved the regulation of contracts. From this perpective, challenges presented to Private Law in the effective regulation of contracts, will be considered as a means of highlighting why greater interaction with public regulation and other models of regulation is vital.

The fourth section will then incorporate a discussion on the role and contribution of courts in achieving legal certainty. The role of Parliament in providing greater legal certainty, as well as the need for greater parliamentary powers where limits in the exercise of courts' discretionary powers occur, will be introduced in this respect. An analysis of the roles of the Ombudsman as well as other actors in fostering accountability, will also constitute the focus of attention in this section.

The fifth section highlights why harmonisation which is based on a common European Code of Ethics and Conduct, and which is founded on substantive equality principles may achieve greater and more effective results than the Draft Common Frame of Reference. The final and concluding section will then follow.

To what extent should legal certainty prevail over flexibility and the ability to offer aggrieved parties the just and equitable results which they deserve? Should general rules which do not take into account the substance of transactions as well as individual peculiarities of a given situation take

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2 „Such a search for more effective regulatory techniques in implementing economic and social regulation, has resulted in the creation of modern styles of public regulation.“ See H Collins, *Regulating Contracts* (1999) Oxford University Press at page 69

precedence over more bespoke and particularistic rules which would accord greater justice to the victim?

A. Why Should Contracts Be Regulated at All?

If we lived in a perfect world, where ethical and moral principles were strictly observed, as well as the observation of one's conscious conscience, „the Golden Rule“[3], „Do unto others as you would have them do unto you“, would also be strictly applied – without the need for any external regulation. Further, given the reciprocal nature of numerous ethical and moral attributes, it would be expected that if both parties to a contract demonstrated and had mutual respect for one another, then the terms of a contract would mutually be respected. In such a perfect scenario, Private Law would probably suffice in the regulation of contracts between two parties. However and unfortunately, we do not live in a perfect world and to compound this fact, the world in which we live is subjected to various externalities as well as „surprises“ which also need to be incorporated and taken into account when designing a contract. As long as such uncertainties or externalities fall within reasonable boundaries and within what is to be reasonably expected, then such factors should be considered in the event that a party decides to act in a manner contrary to the terms and spirit of the contract.

The above stated „Golden Rule“, which also accords with maxims[4] of Equity, would also help in addressing situation where implied terms are incorporated into the contract. It is well acknowledged that traditions, cultures and norms differ across various jurisdictions. Whilst certain jurisdictions apply equitable principles – in addition to legal contractual principles, other jurisdictions apply other doctrines in approaching decisions related to implied terms in contracts. Irregardless of such differences, ethics and codes of conducts exist in every jurisdiction. In arriving at decisions which predominantly involve implied terms, and in every jurisdiction, the application of substantive equality rules and principles could constitute part of the basis on which the final decision is arrived.

Why Should Contracts Be More Effectively Regulated ?

An obvious answer to this would appear to be : Because parties to a contract, even though such parties are obliged under moral and ethical principles to uphold their side of the bargain, are human, and may be motivated by personal or self serving interests to act in a manner contrary to the spirit of the contract, after the contract has been entered into. Furthermore, a party to a contract may be induced under unfavourable circumstances to enter into a contract, may enter into a „newly designed“ contract unknowingly – that is, further terms may be inserted into the contract after the contract has been entered into. Such instances could occur for example, during the renewal or extension of a contract. The party, having been accustomed to terms of the original contract, may assume that such terms also apply upon renewal, and by the time such change is brought to his/her notice, it is probably too late to withdraw from the contract or to look for an alternative deal. Furthermore, „hidden terms“ may resurface in the form of extremely small and miscroscopic terms which have been inserted to the least conspicuous part of the contract.[5]

3 For further information on the reciprocity of moral and ethical values, see M Ojo, „Integrity, Respect for Others, and Ethics – Three Essential Leadership Qualities (April 2011). See also R Bigwood, *Exploitative Contracts* (2003) Oxford University Press at page 51

4 Amongst some of the more popular maxims which highlight the specificity of Equity, as well as its acknowledgement of the existence of common law , are:
- He who Seeks Equity Must Do Equity
- He who Comes into Equity Must Come with Clean Hands
- Equity Follows the Law
- Equity Acts Specifically
- Equity Regards Substance Rather than Form

5 No one is excused from adequately and thoroughly reading through small prints of a contract. However certain

In other situations, a party to a contract may be confronted with an offer during the duration of the contract – such an offer being made with the sole intention of exploiting the party's circumstances at the time. For example, the party making the offer may be aware of the „exploited" party's situation or financial circumstances. To elaborate, the party being exploited has no other option (owing to his lower bargaining power or the influential position of the other party) and may lose the chance of improving professional and future prospects where such an offer is rejected or turned down. The illustrated situations reflect the fact that contract related issues in regulation do not only occur during the contract formation periods.

For this purpose, it is vital to incorporate a form of „checks" in the Private Law regulation of contracts.

„The standards set by Private Law comprise both mandatory standards and self regulation."[6]

Self regulation confers benefits which include flexibility, a high level of compliance with rules, and the contribution to the generation of rules which are tailor made and suitable for the industry being regulated. Whilst certain benefits emanate from self regulation, one of its greatest weaknesses lies in the level of accountability which it is able to foster.[7] Further, in terms of flexibility, compliance, enforcement and accountability, a model such as that based on Enforced Self Regulation is considered to confer greater benefits than self regulation.

Ayres and Braithwaite infer that the greatest challenge encountered by regulatory design is probably not to be found at the apex of the pyramid of regulatory strategies "where a variety of well-tested punitive strategies exist" or at the base of the pyramid, "where there is experience of the successes and failures of the free market and of self-regulation in protecting the consumers."[8]

As well as the fact that Enforced Self Regulation is considered to facilitate a process whereby "more offenders would be caught often", "offenders who are caught are thought to be disciplined in a larger proportion of cases under the Enforced Self Regulation Model than under traditional government regulation".[9]

In serving as a supplement to self regulation, and probably owing to its acknowledgement of the deficiencies of self regulation, Private Law often „provides a model set of rules to govern a particular type of transaction."[10] However, such generality and standardisation also constitute the root cause of several challenges encountered by Private Law. The generality[11] inherent and peculiar

victims have been granted release from such contracts in certain court decisions. This situation however, is to be contrasted to a situation whereby no further exchange of documents occur and the term/duration of the contract is simply extended. In such situations, the contractual terms of the originally signed contracts, it would most certainly appear, should continue to apply where no further exchange of contracts/documents occur.

6 See H Collins, *Regulating Contracts* (1999) Oxford University Press at page 63

7 For further information on the benefits, weaknesses of self regulation, as well as other more favourable models of regulation, see M Ojo, Co-operative and Competitive Enforced Self Regulation: The Role of Governments, Private Actors and Banks in Corporate Responsibility (May 2010) Law and Pro sociality e Journals.

8 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* Oxford University Press at page 102; Also see P Grabosky and J Braithwaite *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, (1986) at page 101 Oxford University Press, Melbourne.

9 Ibid at page 114

10 See H Collins, *Regulating Contracts* (1999) Oxford University Press at page 64

11 „A systematic problem for the efficacy and efficiency of Private Law regulation is attributed to its traditional committment to generality in respect of both procedure and substance. With respect to the procedural aspect, Private Law tends to apply uniform procedural and evidential rules to govern litigation across the entire range of contractual disputes. This problem of inefficiency attributed to this approach, can partially be resolved through the differentiation of ordinary courts into specialized branches such as a commercial court, small claims courts or courts

to Private Law distinguishes it from Equity – which looks to the substance of transactions rather than the form. Even though it was realised that Equity was required in common law jurisdictions, as a supplement to address the inadequacies of common law in providing appropriate legal relief, Equity in itself, was not self sufficient. However it introduced, through its maxims and application, the individuality required in appropriately awarding what was just and appropriate – given the circumstances, to the claimant. In such a way, it mitigated and reduced the level of standardisation and generality that would have existed – had it not been introduced.

Focus, once more, will be reverted to situations whereby unfavourable and unfair contracts are likely to arise.

B. Exploitation and Victimization During and After Contract Formation Periods

Exploitation is regarded as „ a pervasive fact of the social life of human beings, which yet, is also a profound evil which tends to infect nearly all their relationships with one another.“[12] Even though the terms „victimization“,[13] „opportunism“ and „unconscientious use of power“ are often used synonymously with the concept of exploitation, a distinction can be drawn, as rightly argued,[14] between victimization and exploitation – particularly with respect to their scope. As well as being capable of occurring with or without exploitation, victimization constitutes „a wider concept than exploitation – including for example, „deception“, „extortion“, „oppression“, „entrapment“, „manipulation“, and „coercion“ - each of which may be distinguished, to a lesser or greater degree, from exploitation.“[15]

The Role of Legal and Equitable Remedies in Addressing „Exploitation Induced“ Contracts

Such precepts and remedies include:

i)Economic Duress
ii)Misrepresentation of or Mistake in Contractual Terms (this embraces the incorporation of small print terms or so called „hidden“ contractual terms)
iii)Unconscionable Dealing
iv)Undue Influence : Inequality of Bargaining Powers

Legal contractual exploitation is considered all the more objectionable when it „occurs within the scope of functions, tasks, or relationships that are „fiduciary“ in nature – such exploitation in this event being compounded by betrayal, which provides jusitification to administer it separately from those more „routine“ instances of exploitation policed by unconscionable dealing.“[16]

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with special expertise in particular types of transactions.

With respect to the substantive aspects of Private Law, the tendency towards generality in rules again presents problems for the efficacy of regulation.“see ibid at page 76

12 See R Bigwood, *Exploitative Contracts* (2003) Oxford University Press at page 1

13 „Especially when combined with self-seeking motives on the part of the alleged victimizer“;ibid

14 See ibid; For further information on compliance and punitive strategies, see also M Ojo, Building on the Trust of Management: Overcoming the Paradoxes of Principles Based Regulation, *SSRN eJournal LAW AND PROSOCIALITY and Banking & Financial Services Policy Report, Vol. 30, No. 7, Aspen Publishers/ Wolters Kluwer Law and Business, July 2011*

15 Interpersonal exploitation, „in abstract terms, is considered to involve the „unfair use“ of another person: taking „unjust“ or „unfair“ advantage of another person for one's own advantage or benefit.“ R Bigwood, *Exploitative Contracts* (2003) Oxford University Press at page 20

16 „Legal contractual exploitation involving betrayal attracts equity's *sui generis* jurisdiction to relieve against transactions that result from „relational“ undue influence. Parties able to plead legal contractual exploitation by way of relational undue influence are privileged by forensic and remedial advantages not afforded to victims of „mere“ unconscionable dealing.“ See ibid at page 24

Should Implied Contractual Terms Which Incorporate Sexual, Racial or other Forms of Discrimination be Incorporated into Contracts During or After the Formation Such Contracts ?[17]

Implied contractual terms, which are usually unknown to some parties to an agreement are in need of greater regulation than express terms of the contract. From this perspective, the courts have a vital role to play in applying the „Golden Rule"[18] of „doing unto others as you would wish to be done to you", as well as other equitable and substantive equality principles and rules applying the benchmark of what is considered to be reasonable.

C. Challenges Encountered by Private Law in the Regulation of Contracts: The Need for Greater Interaction with Public Regulation

Under Private Law, the monitoring of compliance with regulatory standards of Private Law is „assigned to the parties themselves, who furthermore, retain the discretion regarding whether or not the rules should be enforced or whether to negotiate a revision of such rules or standards".[19]

Even though the level of compliance which can be derived from such self- regulatory arrangements constitutes the basis of several debates, and even though the Enforced Self Regulation model is adjudged to be a better model when considered in terms of flexibility, compliance and enforcement, the issue relating to accountability is less contentious and provides robust justification for greater interaction between private and public regulation.

As well as questions relating to its ability to foster an adequate level of accountability, other identified challenges encountered by Private Law, in the establishment of effective monitoring and enforcement mechanisms of rules include:[20]

i)The problem of access to justice.

ii)Standard setting: The private law of contract, particularly, is lacking in its ability to „incorporate externalities[21] in setting standards; confronted with problems relating to the

17 For further reading on the extent to which considers the extent to which EC and UK equality law are „moving away from liberal notions of non-discrimination towards an approach based on substantive equality or equity, not only in the field of sex discrimination but also in respect of race and disability discrimination at a time when the EC is expanding its competence in these areas", see C Barnard and B Hepple, „Substantive Equality" The Cambridge Law Journal (2000), 59: 562-585.

18 The Golden Rule is also to be distinguished from that used in statutory interpretation. Statutory interpretation involves the application of the Literal Rule, Golden rule, the Rule in Heydon's case or the Mischief Rule. Whilst the Literal Rule offers greater legal certainty in comparison to other rules, there is less likelihood of achieving the level of legislative intent which could be attained by the other three rules.

19 „No policing and enforcement agency is involved – however, the parties to the contract have the discretionary power to enforce the standards through an ordinary court procedure." See H Collins, *Regulating Contracts* (1999) Oxford University Press at page 64

20 See R Bigwood, *Exploitative Contracts* (2003) OUP at pages 69-77

21 „A fundamental weakness of the private law regulation of contracts consisting in the subordinate role played by third parties whose interests may be affected by the self-regulated transaction. Unlike a regulatory regime imposed by an agency that is required to consider the interests of all affected parties and other externalities, under the rules of private law, the self regulation represented by the contractual agreement does not consider the need to incorporate

setting of standards with an adequate degree of specificity in order to provide effective guidance;

iii)Lack of expertise in choosing standards

D. The Role of Courts: The Need for Legal Certainty and the Reasonableness Test

As with statutory interpretation which involves an ascertainment of legislative intent or the remedying of a „mischief" or defect for which the common law could provide no redress, as well as where such legislation appears to be unreasonable, the courts can also play a vital role by „devising rules designed to protect interests of disadvantaged parties whilst disposing of the particular case – through for example, the exercise of discretion to imply a default rule as an implied term."[22]

In other words, the court could use its discretion in providing supplementary regulation – as regards what is to be reasonably implied. There are however limits to when and to what extent the courts can exercise discretion. In such situations the need for greater parliamentary powers, as well as the role of Parliament in providing greater legal certainty, are often brought to light.

The Need for Legal Certainty and Different Attributions to What is Considered to be Reasonable

The Equitable Case[23] highlights the different interpretations which a court could attribute to what is considered to be „reasonable."[24] In Equitable, the Administrative Court, following the stance adopted by the Court of Appeal,[25] adopted „an unusual definition of unreasonableness, equating it with an absence of "cogent reasons" - this being an easier test for a claimant to satisfy than the standard of outrageous illogicality propounded by Lord Diplock in the leading case of GCHQ [1985] A.C. 374."

Need for Legal Certainty: Why Should Certain Professionals Be Accorded Legal Professional Privilege Whilst Others are Not?

In R. (on the application of Prudential plc) v. Special Commissioner of Income Tax,[26] it was ultimately held that „if there were scope to extend Legal Professional Privilege (LPP) to

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any spill over effects. Private Law lacks a clear mechanism for the interests to be voiced." Despite these weaknesses, Collins is of the opinion that Private Law is evolving with the capacity to incorporate considerations of externalities in its formulation of regulatory standards and the application of its remedies.

22 See R Bigwood, *Exploitative Contracts* (2003) OUP at page 71

23 R. Equitable Members Action Group) v. HM Treasury [2009] EWHC 2495 (Admin)

24 „Except in human rights cases, the test for substantive unlawfulness remains that of Wednesbury unreasonableness —a notoriously high (if imprecise) hurdle for claimants to clear." See M Elliot, Cambridge Law Journal, 69(1), March 2010, pp. 1–40, and CASE AND COMMENT THE GOVERNMENT VERSUS THE OMBUDSMAN: WHAT ROLE FOR JUDICIAL REVIEW? at page 2. For further information on the Reasonableness Principle, see TR Hickman, „The Reasonableness Principle: Reassessing its Place in the Public Sphere" Cambridge Law Journal 14 April 2004 Volume 63 Issue 01 at pages 166-198

25 „The stance adopted in another Ombudsman case, R. (Bradley) v. Secretary of State for Work and Pensions [2008] EWCA Civ 36, [2009] Q.B. 114"; see M Elliot, Cambridge Law Journal, 69(1), March 2010, pp. 1–40, and CASE AND COMMENT THE GOVERNMENT VERSUS THE OMBUDSMAN: WHAT ROLE FOR JUDICIAL REVIEW? at page 2

26 [2010] EWCA Civ 1094

accountants, the courts would run into difficulties in determining the limits to LPP. Prudential offered a number of solutions.[27] However, Lloyd L.J. held that the claimant's arguments only served to illustrate the complexity of the matter, and that the extension of LPP must be a matter for Parliament to decide.“ [28]

The apparent confusion which arises where courts overrule previous decisions not only contributes to legal uncertainty, but provides further justification for consolidating Parliament's role in the legislative process. Another case which provides further argument for strengthening the role of Parliament, which relates however to accountability, as opposed to legal certainty, is highlighted by Elliot by way of reference to the case of R. (Equitable Members Action Group) v. HM Treasury [2009] EWHC 2495 (Admin)[29] where the Court, in adopting a „notably less interventionist approach“ is considered to have provided greater leeway for ministers to dodge their responsibilities.

Roles of the Courts, the Ombudsman and Legislative Bodies in Fostering Accountability.

In view of greater accessibility (to justice) offered by Ombudsmen to weaker bargaining parties, as well as the role they assume in fostering accountability (particularly in holding government/the Executive accountable), should courts easily dismiss their findings?

A „strict review of dismissals of the Ombudsman’s findings“, it is added, strengthens the proper role of the Ombudsman—it stops ministers from evading political responsibility by dismissing her conclusions—while recognising that whether such conclusions should be acted upon remains a policy question for government and Parliament. If the latter is unable to bring sufficient political pressure upon the former to do the right thing—which might or might not entail doing all that the Ombudsman recommended—then that is a further argument for strengthening the role of Parliament.“

27 „Prudential challenged notices requiring the production of documents relating to tax advice given by PricewaterhouseCoopers. The thrust of Prudential’s argument was that, as accountants routinely give legal advice regarding fiscal matters, Legal Professional Privilege (“LPP”) should apply. Its first argument was that LPP is concerned with the function of giving legal advice, not the status of the adviser. Its second argument was that as LPP is a common law rule the courts could extend it. Lloyd L.J. asserted that this depends upon whether Parliament has left that option open.Prudential’s last argument related to the Court of Appeal decision in Wilden Pump Engineering Co v. Fusfeld [1985] F.S.R. 159.“ K Hughes, Case and Comment ACCOUNTANTS ARE NOT LAWYERS: LEGAL PROFESSIONAL PRIVILEGE, ACCOUNTANTS AND THE TAX MAN The Cambridge Law Journal (2011), 70 at page 20

28 See K Hughes, Case and Comment ACCOUNTANTS ARE NOT LAWYERS: LEGAL PROFESSIONAL PRIVILEGE, ACCOUNTANTS AND THE TAX MAN The Cambridge Law Journal (2011), 70: 19-21

29 See M Elliot, Cambridge Law Journal, 69(1), March 2010, pp. 1–40, and CASE AND COMMENT THE GOVERNMENT VERSUS THE OMBUDSMAN: WHAT ROLE FOR JUDICIAL REVIEW? at page 3. R. (Equitable Members Action Group) v. HM Treasury [2009] EWHC 2495 (Admin): „The Ombudsman is empowered to make findings of maladministration and can recommend what should be done in the light thereof, but the Government is under no statutory obligation to accept what the Ombudsman says. Whether this means that, as a matter of law, ministers are wholly free to dismiss the Ombudsman’s reports was the question in this case.“

E. Why Harmonisation on the Basis of a Common European Code of Ethics and Conduct which is Founded on Substantive Equality Principles May Achieve More Effective and Satisfactory Results than the Draft Common Frame of Reference (DCFR).

This paper, whilst highlighting the confusion and lack of legal certainty which could be attributed to common law systems, might appear to infer a preference for the codification of rules. However as will be illustrated in this section, whilst common law cannot be regarded as the ultimate contributor to legal certainty, a common system of codified rules is also incapable of introducing an optimal level of legal certainty. If more superior and higher ranked legislation such as statutes are still capable of generating confusion, and if courts still have the liberty to refrain from following important legislations such as the Human Rights Act,[30] could legal certainty ever be achieved?

The Restatements were regarded by some to be a model for the Draft Common Frame of Reference (DCFR), a means of achieving a common background and benchmark in respect of different jurisdictional laws – given the fact that such Restatements were „ generally regarded as authoritative **reference** texts which provide the basis for law school courses and for doctrinal discussion, and which are applied by the courts as if they had the force of statutes.“[31]

The lack of clarity and confusion attributed to the DCFR, in its role to clarify the confusion attributed to common law, as well as its inability to contribute to legal certainty, have raised questions about its suitability to serve as a model which could provide the benchmark required in achieving the required level of legal certainty.[32]

30 „In R. (on the application of Prudential plc) v. Special Commissioner of Income Tax, Lloyd L.J. rejected the HRA argument – on the basis that whilst Article 8 of the European Convention on Human Rights protects communications with lawyers, it does not protect communications with other professionals providing legal advice, and even if it did, the limits of LPP could be justified under Article 8(2). He also rejected the argument advanced under Article 8 coupled with Article 14 ECHR, concluding that if there is any discrimination it "is not on the basis of the status of the person enjoying the right, but of the person to whom he wishes to turn to get advice" See K Hughes, Case and Comment ACCOUNTANTS ARE NOT LAWYERS: LEGAL PROFESSIONAL PRIVILEGE, ACCOUNTANTS AND THE TAX MAN The Cambridge Law Journal (2011), Volume 70 Issue 1 at page 21

31 See N Jansen and R Zimmerman, "A EUROPEAN CIVIL CODE IN ALL BUT NAME": DISCUSSING THE NATURE AND PURPOSES OF THE DRAFT COMMON FRAME OF REFERENCE Cambridge Law Journal, 69(1), March 2010 at page 101

32 „The Restatement project was about establishing authoritative texts contributing to legal certainty; and that means that it was about rule-making. At the beginning of the 20th century the common law was generally seen to be in a desolate condition. As a result of countless contradictory precedents and laws it had become completely unclear and confusing, even for professional lawyers.„See ibid. „According to Schulte-Nolke, the Restatements are supposed to provide "a method to establish commonalities against the background of diversity of laws" in Europe. Qualifications, as located by Jansen and Zimmerman, in Dicey's work, which are also considered, to a greater extent, to be necessary in the DCFR, were sought for in vain. See ibid at page 102

CONCLUSION

The Private Law of Contract would immensely benefit from an approach which involves greater interaction with public regulation as well as one which incorporates substantive equality principles. Whilst implied contracts are considered to present the greatest threats and challenges in the achievement of a greater level of legal certainty, the courts could assist in helping to mitigate ambiguities arising from such contracts by supplementing such contracts with rules which should not only be reasonably implied, but which should also take into account the principles of Equity or substantive equality. Furthermore, Parliament and other legislative bodies have a role to play in ensuring that a greater level of legal certainty is achieved.

As illustrated in the paper however, the reasonableness test is not so straightforward and may differ depending on individual cases and circumstances. Whilst this certainly doesn't introduce the degree of legal certainty which may be desired, it goes on to illustrate the fact that the achievement of a lower level or a lower degree of legal certainty may be the price for adopting more bespoke and individual based approaches to cases. Despite this, the overweighing justification to be considered when adopting such approaches, should be that justice has been served to whom it is due and to whom justice should serve.

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