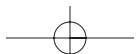


Comparative Contract Law



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A Transsystemic Approach

With an Emphasis on the Continental Law

Cases, Text and Materials

Tadas Klimas

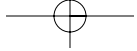
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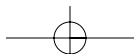
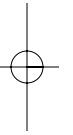
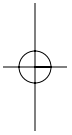
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Dedication:

To my son, *Markus Aurelijus Klimas*, and to *Jūratė Vaičiukaitė*.



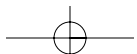
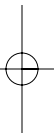
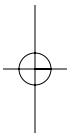
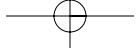


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- #61 *Olsona Co. v. Spauda, Inc.*
Lithuania: Supreme Court (1999), 238
- #62 *Guillory Corp. v. Dussin Investment*
Oregon: Supreme Court (1975), 244
- #63 *Scott v. Moragues Lumber Co.*
Alabama: Supreme Court (1918), 263
- #64 *Burgraff v. Ramond*
France: Cour de cassation (1983), 266
- #65 *Jalagier v. Société Immobilière Le Rabalais*
France: Cour de cassation (1963), 278

- #66 Chem de fer d'Orléans v. Vidal
France: Cour de cassation (1924), 278
- #67 Eden v. Whistler
France: Cour de cassation (1900), 278
- #68 De Bauffremont v. de Bauffremont
France: Paris Court of Appeals (1876), 279
- #69 Société X v. P
France: Cour de cassation (1959), 280
- #70 Weingarten, Inc. v. Northgate Mall
Louisiana: Supreme Court (1981), 281
- #71 Suchan v. Rutherford
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- #72 Hadley v. Baxendale
England: Court of Exchequer (1854), 306
- #73 Chem. de fer du Midi v. Bosquet
France: Cour de cassation (1913), 309
- #74 Chem. de Fer P.-L.-M. v. Barthe
France: Cour de cassation (1930), 310
- #75 Chem. de fer de l'Est v. Lamiroux
France: Cour de cassation (1910), 311
- #76 Daille v. Langon Racecourse (Lunus the Horse)
France: Cour de cassation (1962), 311
- #77 Jacob & Youngs v. Kent
New York: Court of Appeals (1921), 323
- #78 Marek v. McHardy
Louisiana: Supreme Court (1958), 335
- #79 Pittsburgh-Des Moines Steel v. Brookhaven Manor Water Co.
United States: Court of Appeal, 7th Circuit (1976), 339
- #80 Continental Forest Products, Inc. v. White Lumber Sales, Inc.
Oregon: Supreme Court (1970), 353
- #81 Wasserman's Inc. v. Township of Middletown
New Jersey: Supreme Court (1994), 361
- #82 Lake River Corp. v. Carborundum Co.
United States: Court of Appeals, 7th Circuit (1985), 368
- #83 Hurth v. Angelini
Italy: Supreme Cassational Court (2004), 394
- #84 Stankevičius v. Chadakavičius
Lithuania: Supreme Court (2000), 398
- #85 Roščin v. Persovskis
Lithuania: Supreme Court (2003), 402
- #86 Laurents v. Louisiana Mobile Homes, Inc.
Louisiana: Court of Appeal, 3rd Circuit (1997), 412
- #87 Board of Education v. Village of Hoffman Estates
Illinois: Court of Appeals (1984), 425
- #88 Fairbanks v. Tulane University
Louisiana: Court of Appeal, Fourth Circuit (1999), 429
- #89 Hazelwood Farm v. Liberty Oil and Gas
Louisiana: Court of Appeal, Third Circuit (2001), 436
- #90 Besse v. Protois
France: Cass.ass.plén (1991), 443
- #91 Evening News Association v. Peterson
United States: District Court (District of Columbia) (1979), 462
- #92 Shepard v. Commercial Credit Corp.
Vermont: Supreme Court (1962), 466
- #93 Salem Trust v. Manufacturers' Finance
United States: Supreme Court (1924), 469
- #94 Condominio Orquideas Owners v. Urban Renewal
Puerto Rico: Supreme Court (1993), 474
- #95 Eksperimentas Corp. v. Klaipėdos Laivų Remontas Corp.
Lithuania: Supreme Court (1999), 492
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- #97 First American Commerce v. Washington Mutual Savings
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- #98 Everett Lee Hundley v. United States of America
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- #99 Burkandt v. Company Laigebu
Lithuania: Supreme Court (1999), 511
- #100 Mitchell v. Lath
New York: Court of Appeals (1928), 520
- #101 Steuart v. McChesney
Pennsylvania: Supreme Court (1982), 529
- #102 Industrial Roofing v. J.C. Dellinger Memorial Trust
Louisiana: Court of Appeal, 2nd Circuit (1999), 534
- #103 Berwick and Smith Co. v. Salem Press
Massachusetts: Supreme Judicial Court (1954), 540
- #104 Pacific Gas v. Thomas Drayage Co.
California: Supreme Court (1968), 543
- #105 Angel v. Murray
Rhode Island: Supreme Court (1974), 558
- #106 Wisconsin Knife Works v. National Metal Crafters
United States: Court of Appeals, 7th Circuit (1986), 561
- #107 Brunswick Corp. v. Levin
Pennsylvania: Supreme Court (1971), 573
- #108 Procurator v. Sverida, Inc.
Lithuania: Supreme Court (1998), 590
- #109 Suburban Motors v. State Farm Mutual
California: Court of Appeals, 3rd District (1990), 597
- #110 Zhuravliova v. St. Petersburg Customs
Russia: Supreme Court (2000), 602
- #111 Central Bank v. Simmons
Louisiana: Court of Appeal, 2nd Circuit (1992), 617
- #112 Opelousas Credit Association v. B.B. & H., Inc.
Louisiana: Court of Appeal, 3rd Circuit (1991), 620
- #113 Forest v. Dion
Quebec: Cour du Banc du Roi du Québec (1943), 627
- #114 Rupinas & Co. v. Kauno Grūdai, Inc.
Lithuania: Supreme Court (1999), 641

Foreword

Goals

I wrote this book with several goals in mind. I wanted to write a text with the same comparative, “a-national” approach found in American textbooks, but globalized and for a global audience. The law of the U.S. is the law of the individual fifty states. American law schools teach a “trans-state” and inherently trans-systemic version of the law in order to provide their students with an education which would be useful in any state. Europeans and South Americans are coming aware of the necessity to have a view of the law which is trans-systemic, to appreciate the value of being able to bring to bear a perspective, obtained from familiarity with other legal systems, upon domestic legal questions. Indeed, it is increasingly being recognized that today’s lawyer must have such a perspective. Yet contract law textbooks, suitable for teaching at a graduate level and which would provide the student with a trans-systemic perspective are practically nonexistent. Hence the present volume.

Another goal was to provide a text suitable for the Socratic teaching method, and this meant that the book had to have specific type of form. The Socratic method is primarily used in North American law schools, and books used in such teaching are called casebooks. All casebooks contain cases which are supposed to be illustrative of the law and its application, and most also usually contain study aids, such as problems to be solved and the like. Casebooks also frequently have elements of the monograph in them as well; at least this one does.

The Socratic teaching method was introduced in the law school of Harvard University during 1867–70 by Christopher C. Langdell, Dane Professor of Law. It is the Socratic or inductive method as applied to law by means of the study of appellate court opinions; it is not the mere study of cases, which are studied to varying extents at all western European law schools. It is generally held that the goal of the case method of legal education is to maximize the engagement of students in the classroom; I, however, believe the chief value of the case method lies in its dramatization of the law for students, allowing them to some extent to live it, to experience it, which in turn allows them both to learn the law more effectively on a deeper level: e.g., it is hard to forget, once having formulated for classroom discussion the best argument for the surgeon in the famous case of *Hawkins v. McGee*, what the objective theory of assent is about.

Another goal of the book was to provide a casebook suitable for use for teaching the Continental law of contracts to law students in American law schools. I am not aware of any other such text; one can find articles and even books comparing aspects of the law of various European jurisdictions, but there just hasn’t been a casebook available, which is probably one of the reasons why the Continental law is not widely taught in American law schools. Such a text must illustrate the basic ideas of the Continental law in a com-

parative fashion, inasmuch as law school course offerings in the law of any specific continental European or South American state would probably be too narrowly focused for the needs of the American law school student; thus, this book has to be both a casebook and a treatise, and indeed, even contain elements of a study-aid, because none of these are available for the subject in the United States. Additionally, such a course-book must make frequent reference to Anglo-American law, both to make it more understandable, but also because such comparisons are most valuable—and indeed inescapable, given the ongoing drawing-together of European contract law.¹

Additionally, the book is suitable for an exploration of the newest civil codes, those of Eastern Europe. Many of these countries do not have long legal traditions, and much of their codes have been borrowed, often word-for-word, from other codes or conventions (“clip and paste”). Additionally, while there has been little or not time for domestic caselaw to illustrate the code provisions, it is often the case that the clause in question, “clipped and pasted” from another code, has been the subject of a good number of cases in the originating jurisdiction. Therefore a comparative perspective is quite useful to an intelligent analysis of the law pertaining to these new codes.

Methodology

Typically the chapters in this book begin with a selection of code provisions, followed by an essay on the topic at hand, usually supplemented by a comparative statement of the law in various jurisdictions. Then cases are presented, followed by exercises. The European student should note that the cases should not just be read, but diagrammed or outlined in a special way that American law students call a “casebrief” or a “brief.” Most courses on legal methodology in the United States go to great lengths in explaining how best to brief a case. The general idea is to “brief” the case so as to reduce the facts and the court’s actual holding down to its elements, distilling the pertinent facts of the case, refining the issue before the court, and determining the actual holding of the court. During class sessions, a law teacher using the Socratic method will call, usually at random, upon a student to present a case. The teacher, by asking questions, will guide the student in presenting the pertinent facts, in isolating the question of law, and in determining the rule of law pronounced by the court. The teacher will challenge the student to defend his position and to think critically. Often the teacher may ask the student to give the best arguments for the losing viewpoint as well. The teacher may also by changing the facts encourage the student to more critically examine the nature of the problem at hand, as well as to reason by analogy.

The American reader may find a good number of cases which are familiar to him. These should be studied anew in a comparative light, applying the laws of the various jurisdictions described in each chapter’s forepart to the facts of the case. This will result in a greater appreciation for the principles of contract law and a better sense of their interplay.

The Socratic, case-method, may sound like a lot of work. It is. Why go to all the bother? In the words of Professor Ernest Phillips of Thomas M. Cooley Law School, there really isn’t any substitute; nothing else works as well.² Learning law in the abstract is rather

1. An Academic Green Paper on European Contract Law *passim* (Stefan Grundmann & Jules Stuyck, eds., Kluwer 2002).

2. Conversation with Ernest Phillips, Prof. of L., Thomas M. Cooley L. Sch., (Jan. 2000, Kaunas, Lithuania).

like learning medicine without reference to patients; in order to understand the law, one must be able to apply principle to fact; this is the practicing attorney's principal skill. Furthermore, the exercise of dissecting the opinions of learned judges serves to sharpen the mind, to develop lawyerly instincts. Finding the issue and the holding is especially important. Indeed, it bears keeping in mind that a court is not a parliament—it can only decide, actually, that John shall win and Peter shall lose, and how much this is going to cost Peter, in the case before it. Its justification for that decision may be long or short. Determining just what indeed was decided is therefore rather important. Additionally, it is important for a course organized on the case method that the students prepare briefs for use in class—if they have one in hand both they and the instructor will find it much more easy to proceed.

The following case analysis form or something like it should be used to analyze the cases in this book. It's very important, after analyzing the case itself, to determine how the court might have decided the case according to the civil code of another jurisdiction.

The book does not seek to explain every case contained herein nor to provide the instructor with additional questions and explanations which he might use in teaching. Americans call such a book a "teacher's manual," available only to law teachers. I do intend to write one and hope to have it ready by the time the present book is published. There is nothing secret about the material in a teacher's manual, but its ready availability to law students would reduce the utility of the work as a whole, which, as earlier stated, is geared to enhance the learning of the law for students enrolled in regular courses, which itself depends upon the students solving the problems set out in the book and analyzing the cases, which goal would be frustrated by the ready availability of suggested answers and analyses.

Terminology

The legal system in the United States and the England is usually called that of the Common Law. This term is confusing for various reasons, one of which is that it is also used to describe a feature present in all jurisdictions. The legal system of continental Europe and South America is usually termed that of the "Civil Law," but that term can also be misleading.³ In this book we shall use the term Continental to refer in general to the law of the states of continental Europe and South America, and the term Anglo-American to refer to the law of England and the United States. Granted, this choice of terminology also has its drawbacks, but it is my conviction that on balance, especially from an Eastern European viewpoint, it is preferable in a work whose readers may be in large part be non-native English speakers.

Codes and Restatements

This book focuses especially upon the French "family" grouping of Continental jurisdictions. Thus unsurprisingly much French law is discussed herein. The French Civil Code

3. *Infra* 3.

of 1804 was the first codification of the Continental law and remains very influential. The French-influenced codes include those of Spain and thus Mexico and South America, as well as Quebec and Louisiana. Generally the post-Soviet countries can also be placed in this group, albeit tentatively.

The second focus of the book is on the Principles of European Contract Law (the PECL). The PECL is the product of the Commission on European Contract Law, which have since 1982 striven to identify the common core of European contract law and to restate it, along with explanatory comments, like the American Restatements. The current version was published in 1999. Their main goal is to become the “first draft” of a European contract code, which would be the law in all European Union member states. The European Principles are somewhat different from the American Restatements in that, in the interim, they are designed so that parties could choose to have their contracts governed by them, much like the Unidroit principles. The reasons for making frequent reference to the Principles in this book should be rather obvious.

Another code to which a lot of attention is given is the Civil Code of the Republic of Lithuania. There are a number of reasons why. For one, it is a recent code, having come into effect in 2001. For another, it draws together a number of influences which are important to the study of comparative contract law. For instance, many of its clauses repeat almost word for word sections of the Principles of European Contract Law or the Unidroit principles. The paramount influence upon its deep structure is the Civil Code of Quebec, placing the Lithuanian code firmly in the French-influenced family. It is also an example of a post-Soviet code (Lithuania having been occupied by the Soviet Union from World War II until 1990), and the code demonstrates efforts, not always successful, which seek to throw off the influence of Soviet law and legal theory.

The book is designed to give the student a fairly coherent, generalized picture of the features of a French-influenced system of contract law. Thus, Anglo-American law is noted essentially for comparative purposes; the book does not attempt to give an encompassing view of Anglo-American contract law. (It may be noted in passing that there are a good number of cases from the State of Louisiana, but Louisiana’s private law is derived from, and remains primarily that of, the Continental legal system.) The book identifies the main differences between the Continental and Anglo-American contract law, especially in regard to like-sounding terms.

Another reason why a good number of American cases appear in this book is that they are great cases, and are well-known beyond the borders of the United States. For instance, two of the American cases in this book appear in the commentaries to the Principles of European Contract Law as examples illustrating provisions therein.

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Case Analysis Form

Below I set out a case analysis form. The student “briefs” a case by filling out this form.

NAME OF CASE & CITATION: Case Number in Book

Civil Code §

Your civ.code §

Hornbook page:

WHO SUED WHOM and based on what reason or theory of law?

PROCEDURE (How did the case get to the Court issuing the opinion?) :

Relevant FACTS:

LEGAL ISSUE:

Whether the law is that ...

ARGUMENTS:

What is the best argument for the plaintiff?

What is the best argument for the defendant?

DECISION:

DECISIVE UTTERANCE:

DICTA:

COURT’S RATIONALE:

Would the court’s decision be different in your jurisdiction? Why?

