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Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships

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Keywords: Suretyships, European Constitution, Case-Law Harmonisation

Abstract: This paper explores the horizontal effect of European constitutional rights, freedoms and principles as an alternative method of harmonisation based on case-law convergence. The feasibility and the appeal of this method are illustrated with specific reference to the case of unfair suretyships. A comparison of the existing national instruments protecting vulnerable sureties from disproportionate obligations enables us to detect spontaneous convergences and ‘cryptotypes’, but also dramatically different levels of protection. This paper argues that to give equally effective protection to sureties’ (and lenders’) fundamental rights in all Member States, a new system of judicial harmonisation would be necessary.


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1 The European Constitution: Form and Substance

Continental lawyers, particularly private lawyers, may tend to associate the word ‘Constitution’ exclusively (or at least primarily) with a formally enacted, written constitutional document. They might therefore think that a European constitutional legal order will emerge only if and when all Member States have ratified the Treaty establishing a Constitution for Europe, in any case not before 1 November 2006.1

But as soon as we recall that legal systems which have not seen the need for written constitutional documents, such as those of England and Scotland, also consider themselves as governed by a Constitution,2 another meaning of the word comes into play: the Constitution as a set of fundamental principles, rules and rights, be they written or unwritten. In this regard, continental constitutional lawyers distinguish between a formal and a substantive Constitution.3 In the substantive sense of basic rules shaping government institutions, their powers and mutual relationships, and fundamental policy objectives, a European Constitution as applicable law already exists and is more than 50 years old.4

For much of the European Community’s first few decades of existence, the nature of its Constitution was unclear. On the one hand, the long-term objective pursued by the Member States through the institution of the Community was a poli-

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1 Cf. Art. IV-447 (2) of the Constitutional Treaty. The Treaty was signed by the representatives of the governments of the Member States on 29 October 2004 in Rome. The full text is available at <http://europa.eu.int/constitution/index_en.htm>.
3 In Germany, the distinction between formal and substantive constitutional law (‘formelles und materielles Verfassungsrecht’) goes back to G. JELLINEK (e.g. Allgemeine Staatslehre, 3rd edn, Springer, 1929). Cf. P. UNRUH, Der Verfassungsbegriff des Grundgesetzes, Mohr Siebeck, 2002, p 422 et seq. For the French concepts of ‘Constitution formelle’ and ‘Constitution matérielle’ see D. TURPIN, Droit constitutionnel, 4th edn, Presses universitaires de France, 1999, pp 87-88. In Italian literature, the two distinctions ‘Costituzione formale/Costituzione sostanziale’ and ‘Constituzione formale/Costituzione materiale’ are not always treated as equivalent: cf. G. DE VERSOTTINI, Diritto costituzionale, 3rd edn, Cedam, 2001, p 10 et seq.
tical one: to ensure peaceful and even closer political relationships between the people of Europe. On the other hand, however, some Member States were quite reluctant to accept the idea of a European Community as a political entity having supremacy over the governments of Member States’. As a compromise, the European Economic Community was born. In this context, it was perfectly understandable to speak of a ‘European Economic Constitution’.\(^5\)

During the following decades, Europe increasingly freed itself from being a mere economic alliance. In 1989 the word ‘political Union’ officially entered into the Community agenda.\(^6\) With the Treaty of Maastricht, the European Union was born and the adjective ‘economic’ disappeared from the European Community name.

In the meantime, fundamental rights had made their entrance into the European Constitution. In 1974 – 26 years before the Nice Charter! – the ECJ stated that ‘fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional tradition common to the Member States’, and from ‘international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories’.\(^7\) In 1992, the Maastricht Treaty codified and generalised these principles. They are now laid down in Article 6 of the EU Treaty in the consolidated version of Nice.\(^8\)

Hence, the European Constitution is no longer merely economic. The citizens of the European Union are granted not only economic freedoms, but also personal free-

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7 ECJ, Case C-4/73 (Nold v. European Commission).

8 (1) ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’. (2) ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.
doms and fundamental rights not necessarily related to economic interests. Besides being based on common economic interests such as the Internal Market, the contemporary European Union is founded first, and foremost, on common human values.

The fundamental rights and constitutional principles enshrined in Article 6 of the EU continue to be legally binding independently of the existence and the binding force of both the Fundamental Rights Charter of 2000 and the Constitutional Treaty of 2004.

2 A Paradigm Shift

What consequences are we to draw from the above scenario for the Europeanisation of private law? First of all, a paradigm shift is required:

The European debate on harmonisation of private law beyond the field of consumer protection could be described as having been hitherto dominated by three paradigms. The first one is the supposed necessity of private law harmonisation for the completion of the Internal Market. The second one is the supposed existence of a common core of principles of private law, deductible from the national legal systems and which could constitute the basis for further harmonisation. The third one is the highly controversial project of a European Civil Code, which is promoted increasingly as an optional instrument rather than as directly binding law.


All three paradigms permeate both scholarly writings and the Community’s official documents on private law harmonisation.\textsuperscript{12} Yet, none of these paradigms is commonly considered as having much to do with the European Constitution. Notwithstanding the Community institutions being the main actors in European constitutional development, there isn’t a single hint to the constitutional dimension of private law harmonisation either in the relevant Parliament’s Resolutions or in the Commission’s Communications. The constitutionalisation of Europe and the harmonisation of private law appear as strictly separate processes.

This is partially true also with regard to the academic debate. Only recently scholars have begun to bridge the gap and to recognise the European constitutional relevance of private law harmonisation.\textsuperscript{13} In general, public lawyers tend to prefer not to enter the minefield of EC private law. And the constitutional melody played by EC law since the 1970’s seems not to have yet reached the ears of private lawyers.

\textsuperscript{12} See in particular the first Communication of the European Commission on European contract law: COM(2001) 398 final, 11 July 2001. Thereafter, the Commission seems to have changed its understanding of the second paradigm. In the Communication of 2001, the common principles of contract law were presented as immanent in the law of ‘all Member States’ (p. 14), whilst in the Action Plan (COM(2003) 68 final, 12 February 2003) the Commission seems to have abandoned the ‘common core’ mythos. The Action Plan recognises (p. 16 et seq.) that every drafting of common solutions requires to choose, between different national models, the ‘best’ ones. On this new approach is based also the most recent Commission Communication on European contract law: COM(2004) 651 final, 11 October 2004, p 3 et seq.

although they are not insensitive to the music emanating from the national Constitutions and the Human Rights Convention.\textsuperscript{14}

Time has therefore come for a paradigm shift: the acknowledgement that both EC and national private laws as being embedded in and having to be permeated by a European constitutional legal order.\textsuperscript{15}

3 Constitutionalisation of Private Law in Europe: One Word for a Thousand Realms

‘European private law’ is a very popular expression, despite or perhaps even thanks to its vagueness. First, it often serves as a synonym for the body of EC private law legislation,\textsuperscript{16} which is not limited to consumer protection measures (as e.g. the Late Payment Directive\textsuperscript{17} shows). Second, the term designates the bundle of different national private law regimes in Europe, both gradually converging from the bottom


\textsuperscript{16} See e.g. R. SCHULZE & R. ZIMMERMANN (eds), \textit{Basistexte zum Europäischen Privatrecht}, Nomos, 2002.


\textsuperscript{18} On the importance of the Late Payment Directive for the whole system of EC private law see A. COLOMBI CIACCHI, ‘Die EG-Richtlinie über den Zahlungsverzug und ihre Umsetzung durch das Schuldrechtsmodernisierungsgesetz.’, \textit{EWS} (Europäisches Wirtschafts- und Steuerrecht) 2002, p 306.
up and being increasingly harmonised from the top down. A third use of the expression refers more specifically to the tricky interplay between EC legislation and national private laws, especially after the transposition of EC Directives. Further stratifications of meanings of ‘European private law’ arise from the multi-level and pluralistic nature of both national and EC private law, produced by legislators, courts, academic works, self-regulation of market actors etc.

All of the above private law contexts are embraced by the European constitutionalisation process. The extension and complexity of the latter is due to both its multi-level dimension and the plurality of constitutional norms relevant in the field of private law.

To entirely explore this phenomenon several books would need to be written. The more modest aim of this paper is to outline some initial ideas for further discussion on one single aspect: the horizontal effect of European constitutional rights and principles as a possible instrument of non-legislative contract law harmonisation, briefly illustrated by the example of unfair surety agreements.

4 The Horizontal Effect of Fundamental Rights and Constitutional Principles in Private Law

It is a settled principle in the constitutional theory of most Member States that fundamental rights and freedoms have effect not only in the ‘vertical’ relationship between private individuals and public powers, but also in the ‘horizontal’ relationships of

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private parties between each other. The same is true for constitutional principles such as non-discrimination, which confer rights upon individuals.\textsuperscript{23}

In EU law, the four fundamental economic freedoms and some principles of the Treaties (such as equal pay for men and women) have been applied horizontally by the ECJ since the early 1970s.\textsuperscript{24} The same happened to the fundamental right to freedom of expression in a case of 1991.\textsuperscript{25} This seems to be the only example of horizontal effect of fundamental rights in ECJ jurisprudence. Perhaps for this reason, in academic literature much attention has been paid to the horizontal effect of funda-


\textsuperscript{25} C-219/91 Ter Voort (1992) ECR I-05465.
mental freedoms, while the horizontal effect of fundamental rights in EC law remained almost unexplored.

In the academic debate at both national and EU level, the most controversial question about the horizontal effect of fundamental rights, freedoms and principles is whether it is direct or indirect. This distinction is usually referred to either the applicability of a constitutional norm (or a norm of the ECHR) in a private law case, or the binding force of this norm on private parties, or both.

As to applicability, scholars speak of direct horizontal effect when a fundamental right, freedom or principle is applied as the very, direct legal base of a private law claim. Consequently, horizontal effect is considered as indirect when the individuals’ claims need to be based on (ordinary) private law norms, which are to be interpreted and applied in the light of fundamental rights, freedoms and constitutional principles.

As to binding force, direct horizontal effect is associated with the idea of fundamental rights, freedoms and constitutional principles being directly binding not only for public powers but also for private parties. In other words, the question is whether the relevant constitutional (or Convention) norms confer upon private individuals the legal obligation to respect the fundamental rights and freedoms of

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If not, the horizontal effect is only indirect: those norms only bind public powers and require them to protect the fundamental rights and freedoms of individuals from detrimental behaviour of other private parties. This protection can be provided not only by legislative measures, but also by case-law.  

Whether direct or indirect, the horizontal effect of fundamental rights and constitutional principles is a matter of fact in the courts practice. In western continental Europe, it has been a powerful and effective means to develop and innovate private law. The supreme rank of fundamental rights, freedoms and constitutional principles has provided the courts with the legitimacy necessary to move away from established principles of private law no longer respondent to the spirit of the time. Through horizontal effect, courts have ensured contemporary private law offers higher levels of protection for weaker parties and stronger consideration of non-economic human values.

5 Harmonisation of Standards of Protection through Horizontal Effect

The academic debate about horizontal effect of fundamental rights, freedoms and constitutional principles in Europe has so far predominantly reflected the traditional boundaries between States on the one hand, and between legal disciplines on the other. The main point of reference has not been the European Constitution, but the individual national Constitutions. Comparative law studies on this topic are at their very beginning. And at EC level, except for the apparently separate, specific matter of the horizontal effect of fundamental freedoms, little debate has been sparked. Since the adoption of the Nice Charter, countless contributions have been written on the new European fundamental rights, but only few sensed a link between their horizontal effect and the approximation of private law in Europe.

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33 A thorough comparative analysis of the horizontal effect of fundamental and Constitutional rights in the law of eight Member States and in EC law is in preparation by the EC funded Research Training Network ‘Fundamental Rights and Private Law in the European Union’ (<http://www.fundamentalrights.uni-bremen.de>), co-ordinated by G. Brüggemeier, A. Colombi Ciacchi and G. Comandé.
34 See footnote 26 above.
Yet Article 6 EU demonstrates clearly that there is a set of common European fundamental rights, freedoms and constitutional principles, which are already in force as applicable law. These rights and principles are common not only to all Member States, but also - and in the first place - to all European citizens. This is confirmed by Article 17(2) EC: ‘Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby’.

The assessment of the due level of protection of the rights and principles enshrined in Article 6 EU cannot be entirely left to the discretion of the Member States. First of all, discriminations on the ground of nationality in the protection of fundamental rights are prohibited by both Article 12 EC and Article 14 ECHR. Second, the principle of uniform interpretation of Community law applies to the common European constitutional rights as well. Third, the function of the Union citizenship is ‘to strengthen the protection of the rights and interests of the nationals of its Member States’ (Article 2(1) EU). This objective can be reached only if European fundamental rights, freedoms and constitutional principles are provided with a common content of protection which transcends the different national interpretations. Without this, the Union citizenship would degrade to mere rhetoric.

The rights, freedoms and principles under the EC and EU Treaty have a horizontal effect, as the ECJ jurisprudence shows. Then, if they protect all European citizens without any discrimination in the vertical dimension, why should they not enjoy the same standard of protection also in their horizontal dimension, in the case-law of all Member States? For example, the freedom of information under Article 10 ECHR is undoubtedly one of the common European fundamental rights. So why are tenants in Italy and Germany protected by this right via horizontal effect when they want to install a parabolic aerial against the landlord’s will, while e.g. in the UK and in Spain they...


37 For further discussion on this topic see N. REICH, 'Union Citizenship – Metaphor or Source of Rights?', 7 ELJ (European Law Journal) 2001, p 4.

38 See footnotes 24 and 25 above.


are not? And why is this protection in Germany only given to immigrants,\textsuperscript{41} whilst in Italy also nationals can rely on it?\textsuperscript{42}

One may argue that these unequal treatments are unavoidable consequences of the plurality and diversity of private law systems in Europe, and no competence for elimination of such inequalities is conferred upon the EC by its Constitution.\textsuperscript{43} The following sections of this paper aim to confute this objection.

6 The Advantages of Non-Legislative Harmonisation

To plead for equal standards of protection of fundamental rights in private law does not mean that one favours legislative harmonisation. Harmonised statutory provisions are neither necessary nor sufficient to assure equally effective protection of the same rights in different legal systems: not necessary, because the same degree of protection of a certain interest can be achieved by applying the most different legislative provisions or case-law doctrines,\textsuperscript{44} as the example of unfair suretyships below will show; not sufficient, because even totally uniform rules can lead in their application to different degrees of protection from country to country, according to each different system of remedies and courts practice.

A more effective, sensitive and constitutionally legitimate way of harmonising the private law standards of protection of fundamental rights is convergence in the case-law of the Member States. It is more effective, because the intensity of protection of a certain right depends primarily on the law-in-action, not the law-in-books.\textsuperscript{45} It is more sensitive, because case-law convergence can operate even in a context of greatest diversity of legal cultures.\textsuperscript{46} All that matters is that the courts of different European States achieve the same practical results in the same cases, regardless of which norms, doctrines or procedures they apply in order to come to this end.

Furthermore, this method of harmonisation is in two ways more constitutionally legitimate than the traditional ones. First, because it does not require the EC to

\begin{footnotesize}
\begin{enumerate}
\item See the approach of the Common Core project (footnote 13 above).
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enact secondary legislation to harmonise the private law areas of horizontal effect of European fundamental rights, freedoms and principles. Thus it does not create ‘competence creep’. Second, because the assumption of a common core of rights and principles, having the same content and protecting all EU citizens with the same intensity, relies now on a constitutional base: Article 6 EU, to be read in the light of Article 2(1) EU, Article 12 and 17(2) EC, and Article 14 ECHR.

In the framework of this paper, the practicability of case-law convergence as an alternative method of harmonisation embedded in European constitutionalism will be tested on a specific factual pattern recurring throughout Europe: the disproportionate suretyships of non-professional guarantors.

7 An Example of Case-Law Convergence: Protection from Unfair Suretyships

Banks often give loans only on condition that close family members of the principal debtor stand surety. If the amount of the guarantee is disproportionate to the financial means of the family member, the principal debtor’s insolvency inevitably leads them to financial ruin. They are doomed to being highly indebted until the end of their lives. This result may appear unfair for many reasons.

First of all, family members often sign surety agreements without being aware of the risk they are running. They do so because their beloved family member and/or a bank employee ask them to put their signature on a form. Neither the debtor nor the bank has any interest in advising the potential guarantor about the financial risk of the agreement.

Second, these agreements may be unfair even when the family member is perfectly aware of the contractual risk while signing the form. Indeed, family members often have little choice, if any. Either they accept to stand surety, or they risk impairing their familiar relationship by refusing to do so.

Third, family members do not always have an economic interest in the personal guarantee. Even if they could have had such an interest at the time of the conclusion of the agreement, the family situation may have dramatically changed before the realisation of the surety risk, e.g. after a divorce.

47 The expression is borrowed from S. WEATHERILL, ‘Why Object to the Harmonisation of Private Law by the EC?’ 12 ERPL (European Review of Private Law) 2004, p 633.
48 See above, 5.
49 See e.g. in Germany BVerfG 19 October 1993, NJW 1994, p 36.
51 See in German case law e.g. BGH, 5 January 1995 NJW 1995, p 592; BGH, 25 April 1996 BGHZ 132, 328.)
For these and other reasons, since the 1970’s - and with particular intensity in the 1990’s - the courts of several Member States, such as the UK, France, Germany, Austria and the Netherlands, have looked for remedies in order to discharge vulnerable guarantors totally or partially from unfair surety obligations. Once the need for protection from such agreements was subsequently acknowledged by case-

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54 Although the first German cases in this field go back to earlier decades, the very starting point of the discussion was a judgement of the Federal Constitutional Court of 1993 (BVerfG 19 October 1993, NJW 1994, p 36), which forced the Federal Court of Justice (BGH) to overrule its prece-dents so as to ensure effective protection to vulnerable family guarantors. Cf. M. HABERSACK & R. ZIMMERMANN, ‘Legal Change in a Codified System: Recent Developments in Germany Suretyship Law’, 3 ELR (Edinburgh Law Review) 1999, p 272; Mr Justice KIEFEL, ‘Guarantees by Family Members and Spouses: Garcia and a German Perspective’, 74 ALJ (Australian Law Journal) 2000, p 692.


law in some countries, such as France\textsuperscript{57}, the Netherlands\textsuperscript{58} and Austria,\textsuperscript{59} the legislators also intervened.

The history of legal protection from unfair surety agreements is full of spontaneous convergences between the Member States. For example, the new Article 341-4 of the French Consumer Code states that if the surety is manifestly disproportionate to the guarantor’s capital and income at the time the contract was concluded, the lender cannot rely on the guarantee, unless the guarantor’s assets at the time the guarantee is called in, allow them to face their obligations.\textsuperscript{60} This straightforward rule is very similar to the ultimate result of long and extremely complex case-law.

\textsuperscript{57} In France, a specific rule on the invalidity of grossly disproportionate personal guarantees for consumer credits is included in the Code de la consommation since its enactment (loi 93-949 du 26 juillet 1993). Before the reform of 2003 (loi ‘Dutreil’), which entered into force on 5\textsuperscript{th} February 2004, this provision was Art. 313-10. Now it has become Art. 341-4. This article is embedded in a chapter of the Consumer Code entirely devoted to the protection of non-professional guarantors (livre III, titre IV, Art. 341-1 to 341-6). \textit{Cf.} S. REIFEGERSTE, R. SEFTON-GREEN et al., ‘Case 9: Nell v. Scrooge Bank’ (French report), in: R. SEFTON-GREEN (ed.), \textit{Mistake, Fraud and Duty to Inform in European Contract Law, The Common Core of European Private Law}, Cambridge University Press, Cambridge 2004, p 312 \textit{et seq.}


\textsuperscript{59} In 1997, four new provisions on consumer guarantees (§§ 25a-25d) were included in the Austrian Consumer Protection Act (‘Konsumentenschutzgesetz’). In particular, according to § 25 d, the courts are empowered to reduce the amount of the guarantor’s obligation or even fully set aside the guarantee if it is unfairly disproportionate to the guarantor’s financial capacity. In assessing this unfairness, the courts have to take into account: (1) the creditor’s interest in the guarantor’s liability, (2) the guarantor’s fault in relation to the above disproportion, (3) the advantages taken by the guarantor from the creditor’s performance, and (4) the guarantor’s thoughtlessly, inexperience, emotionality, their being under pressure and their dependence from the debtor at the time the contract was concluded.

\textsuperscript{60} ‘Un créancier professionnel ne peut se prévaloir d’un contrat de cautionnement conclu par une personne physique dont l’engagement était, lors de sa conclusion, manifestement disproportionné à ses biens et revenus, à moins que le patrimoine de cette caution, au moment où celle-ci est appelée, ne lui permette de faire face à son obligation’. 
developments in Germany. Yet the formal paths followed by the two countries towards this result are totally different. In France, before the enactment of the above provision, in exceptional cases the courts have denied validity to unfair surety agreements by applying the rules of the Civil Code on mistake. The German judges have relied instead on the general clauses of good morals and good faith in the German Civil Code.

Only few German decisions have based their reasoning on the good faith principle (§ 242 BGB), in its specific application known as the doctrine of ‘collapse of the underlying basis of the transaction’ (‘Wegfall der Geschäftsgrundlage’). In these judgments, the divorce between the main debtor and the guarantor was considered a ground of collapse of the underlying basis of the suretyship, which empowered the court to reduce the amount of the surety obligation. Except for these few cases, the remedy granted by German courts to vulnerable sureties since 1993 has always been the nullity of the contract on the grounds of immorality (§ 138 BGB).

Since 1995, Austrian judges have followed the path of their German colleagues, although they haven’t seen the need for referring to constitutional principles. In both Germany and Austria, the nullity of grossly disproportionate suretyships of family members on the grounds of immorality has now become the rule, which is subject to very few exceptions.

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62 See footnote 57.


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The British law of family guarantees differs from the French, German and Austrian ones with regard to both the formal paths and the substantive results. In English law, the House of Lords has tackled the problem of unfair suretyships by relying on the equitable doctrine of undue influence, which empowers the courts to set aside a transaction which is the result of abuse of a relationship of trust and confidence.\(^{69}\) According to the current leading case in the field of spouses’ suretyships, *Royal Bank of Scotland v. Etridge (No. 2)*,\(^{70}\) undue influence can be presumed if a wife is able on the fact of the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not ‘explicable in the ordinary way’.\(^{71}\) Undue influence, however, is out of question when the lender fulfilled its obligation to ‘take reasonable steps to satisfy itself that she had understood and freely entered into the transaction’.\(^{72}\)

In Scottish law, the House of Lords has come to similar conclusions moving from the principle of fair dealing in good faith.\(^{73}\) Also the Dutch Supreme Court (Hoge Raad) deducted from the principle of good faith a duty of professional lenders to provide clear information to non-professional guarantors about the legal consequences of the surety agreement.\(^{74}\) The Dutch case-law of family suretyships presents also spontaneous convergences with the French jurisprudence cited above: according to the Hoge Raad, the creditor’s breach of his information duty gives rise to a surety’s mistake, which makes the suretyship invalid.\(^{75}\)


\(^{70}\) [2001] UKHL 44; [2002] A.C. 773

\(^{71}\) For which it must be shown that the transaction cannot ‘reasonably [be] accounted on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act’ (cf. *Allcard v. Skinner* (1887) 36 Ch.D. 145, 185).

\(^{72}\) In *Royal Bank of Scotland v. Etridge (No. 2)* [1994] UKHL 44; [2002] A.C. 773, the House of Lords has specified in great detail the steps reasonably to be expected of a lender. In relation to past transactions, it has to ‘bring home to the wife the risk she was running by standing surety, either a private meeting with her or by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and the effect of the transaction. In respect of future transactions the lender should contact the wife directly, checking the name of the solicitor she wished to act for her and explaining that for its protection it would require his confirmation as to her understanding of the documentation to prevent her from subsequently disputing the transaction (...).’


\(^{75}\) See footnote 63 above.

8 Unfair Suretyships and Inequality of Bargaining Power

The British and Dutch solutions outlined above do not quite go as far as the French, German and Austrian ones, which deny validity to surety agreements of family members when grossly disproportionate, notwithstanding whether or not the creditor failed to advise the guarantor. Yet an amazing spontaneous convergence can be found also between the English and German case-law on family guarantees:

In Germany, the decisive step towards a high protection of family members from disproportionate sureties was taken by the Federal Constitutional Court (Bundesverfassungsgericht) in 1993. A young woman stood surety for the immense business debts of her father. The bank employee had handed out the contract form to her and said: ‘Please madam, sign here, it’s just for our files’. The Federal Constitutional Court did not simply stress the evident unfairness of the creditor’s behaviour. It went much further.

First, the Court held that if a contractual party is so powerful that it can define unilaterally the content of the contract, this means heteronomy for the other party and in this case the fundamental right of private autonomy of the weaker party is affected.

Second, the Court assumed that if a contract is unusually burdensome for one party and there is a ‘structural inequality of bargaining power’, civil courts have a duty to intervene and correct the content of the contract by making use of the general clauses of private law.

Thirty years ago, a doctrine strikingly similar to the latter had also been recognised in English law. In a 1975 case concerning a father’s guarantee for his son’s debts, Lord Denning tried to unite the three doctrines of duress, unconscionable transaction and undue influence in a new principle of inequality of bargaining power:

‘There are cases in our book in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms – when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them ... [T]hrough all these instances there runs a single thread. They rest on “inequality of bargaining power”. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a


consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other’.

However, in 1985 the House of Lords rejected Lord Denning’s doctrine of inequality of bargaining power. It held there was no need to erect such a general principle, since Parliament would place ‘such restrictions upon freedom of contract as are necessary’ (such as in the Unfair Contract Terms Act 1977 and the Consumer Credit Act).

9 ‘Cryptotypes’ in Comparative Suretyships Law

A comparison between the law of suretyships in the UK, France, Germany, Austria and the Netherlands sheds light on what Rodolfo Sacco’s comparative law theory calls ‘cryptotypes’. Cryptotypes are implicit rules and patterns, which substantially shape the solution given by a certain legal system to a particular problem, although they are not explicitly formulated as legal rules. They remain cryptic, hidden behind the veil of other norms and doctrines explicitly applied to solve that problem. Sometimes certain principles are formal legal rules in some legal systems and cryptotypes in other. Moreover, within one and the same legal system certain principles may be born as cryptotypes and then, years later, become formal legal rules.

Both phenomena can be observed in the field of unfair suretyships. For example, in a French decision of 1977, the legal rule explicitly applied by the Paris Court of Appeal in order to annul the suretyship of a poor widow was Article 1110 Code Civil (nullity on the ground of essential mistake). In fact, however, the Court deducted the essentiality of the widow’s mistake from the manifest disproportion between her financial means and the amount of the obligation, after having taken into account her age and low education. Therefore it could be argued that in this case the decisive rule was a cryptotype: ‘invalidity of manifestly disproportionate suretyships of weak persons’. By the enactment of the French Consumer Code in 1993, this rule left its cryptotype status and became explicit.

81 Ibid., at 386.
The same rule seems to play a decisive role also in German case law, where the explicitly applied norm is the nullity of immoral contracts (§ 138 BGB). Since 1993, the spectrum of suretyships cases falling under this rule has progressively expanded year by year. The current standing of the law in Germany could be summarised as follows:

If there is a gross imbalance between the amount of the debt and the surety’s financial means, and the surety is a close family member of the debtor who does not have an economic interest in the suretyship, it may be presumed that the bank has taken unfair advantage from the surety’s lack of experience or affection to the debtor. In this case the contract is immoral.84

If the amount of debt is out of proportion to the surety’s means but the imbalance is not gross, the contract can be considered immoral only if there is positive evidence of particularly serious circumstances attributable to the creditor (such as the creditor’s unfair exploitation of the surety’s lack of experience or the debtor’s undue influence).85

Grossly disproportionate suretyships of other persons than family members, e.g. employees of the debtor, can be immoral if there is positive evidence of circumstances which prevented the surety from a free, self-determined conclusion of the contract.86

It could be argued that in German case-law the rule ‘invalidity of manifestly disproportionate suretyships of weak persons’ is a quasi-cryptotype. On the one hand, the BGH still refuses to link the immorality of suretyships of weaker persons directly to the quantitative criterion of gross disproportion. On the other hand, however, the indirect links between the two concepts are becoming even tighter, letting the cryptotype progressively move from the shadow to the light.

Even more important than the specific cryptotype ‘invalidity of manifestly disproportionate suretyships of weak persons’ is the general cryptotype ‘invalidity of severely imbalanced contracts concluded under structural inequality of bargaining power’. The German Constitutional Court made it explicit. Lord Denning tried to do the same, but failed because such a general doctrine does not fit into the picture of traditional English private law. 87

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84 See e.g. BGH 26 April 2001, ZIP 2001, p 1190.
86 See BGH 14 October 2003, XI ZR 121/02 on a surety agreement between the debtor and his employees.
87 However, equitable relief is possible in certain cases of harsh and unconscionable bargains. As H.G. Beale puts it, ‘the real question is the scope of the principles involved, particularly that of relief against unconscionable bargains with persons suffering from some form of bargaining disadvantage’ (H.G. Beale, ‘Duress and Undue Influence’, in: H.G.BEALE (ed.), Chitty on Contracts, 29th ed., Sweet & Maxwell, 2004, 7-111 et seq., at 7-111). On the advantages of a general doctrine of unconscionability see E. MCKENDRICK, Contract Law, Palgrave Macmillan, 2003, p 382 et seq.
10 Substantial Disparity of Surety Protection Standards in the EU

The spontaneous convergences in the suretyship law of France and Germany on the one hand, and the UK and the Netherlands on the other hand, demonstrate that an equally effective protection of the same human interests in the same situations can be achieved either by legislation or case-law, by applying the most different norms and doctrines.\(^8\)

However, a comparison of the national laws concerning family suretyships in Europe also shows that the degree of effectiveness of protection of the same classes of persons in most similar factual situations may vary notably from country to country. First of all, in some countries such as Italy no remedy is available to vulnerable guarantors, except for the ban of completely unlimited surety obligations (e.g. standard terms of guarantee ‘for all present and future debts’), which applies to professional sureties as well.\(^9\)

Second, the protection granted by French and German law is far more effective than the one provided by British and Dutch law. Indeed, even the most accurate and independent advice may be of no practical benefit to sureties, who frequently base the decision to guarantee loans on non-commercial grounds. As the British commentator David Geary put it, the ‘emotional tie involved often makes the guarantor feel obliged to consent to the transaction despite whatever reservations he or she may have about the financial wisdom of this course of action’.\(^9\)

To summarise the current standing of the law, at least three different standards of surety protection can be found in the private law of the Member States:

The highest standard is found in France and Germany: Non-professional suretyships of family members are, as a rule, invalid when grossly disproportionate to the guarantor’s income and assets.

An intermediate standard is found in Britain and the Netherlands: Professional lenders are under a duty to ensure that non-professional guarantors have been properly advised about the consequences of the suretyship before the conclusion of the contract.

The lowest standard is the absence of any special rule protecting non-professional sureties from disproportionate obligations. This is e.g. the situation in Italy.

The above comparison has clarified that the disparity in legal treatment of the same suretyship cases in the Member States is not just formal, but substantive. In


\(^{89}\) In the 1980’s, Italian courts did not remain insensitive to the problem of disproportionate family guarantees. Sometimes the lower courts declared the nullity of such contracts because of the indeterminacy of their object (Art. 1346 and 1325 Italian Civil Code). However, the Corte di Cassazione rejected this argumentation (see e.g. Cass. 15 March 1991, Foro it. 1991, I 2060). The 1992 Act on transparency in the banking sector (legge 154/1992) modified Art. 1938 of the Italian Civil Code. This provision now requires to indicate, in a surety agreement concerning future debts, the maximum amount guaranteed.

some countries vulnerable sureties are much better off than in others. Vice versa, in some countries banks are much better off than in others.

Spontaneous convergence is therefore not sufficient to ensure an equally effective protection of the same surety interests in the same cases throughout Europe. To render both the European citizens and the European banks more equal, top-down harmonisation – although a non-legislative one – would be necessary.

11 A Plea for Non-Legislative Harmonisation of Surety Protection Standards via Horizontal Effect of European Fundamental Rights

The mechanisms for ensuring top-down harmonisation of case law in the EU are available already. The judgments of the ECJ and the European Court on Human Rights form legally binding guidelines to be complied with by the Member States.

However, the competence to review private law cases decided by national courts is given to the Strasbourg Court only in so far as a violation of the ECHR is alleged, and to the Luxembourg Court only in so far as a breach of the Treaties or secondary EC law is at stake. Therefore the question arises whether unfair surety agreements concluded between a professional lender and a non-professional guarantor have a human rights and/or a EU law dimension. The answer in both regards seems to be ‘yes’.

Not only in Germany are private autonomy and freedom of contract considered to be a specific aspect of the fundamental right to self-determination and personal autonomy. Indeed, according to a consolidated jurisprudence of the European Court of Human Rights,91 Article 8 ECHR does not merely protect the private life in a strict sense, but also the personal autonomy in general.92

The whole discussion on unfair suretyships gravitates to the fundamental question of personal autonomy and freedom of contract. When someone is asked by both a beloved family member and a bank employee to sign a standard form of guarantee, her or his substantive self-determination is heavily restricted.93 The same is true for workers asked to guarantee a loan of their employer. In these and similar cases, the limitation of self-determination concerns both core aspects of freedom of contract: the freedom to enter or not to enter into the agreement, and the content of the latter.

92 The embedment of freedom of contract in Art. 8 ECHR has been convincingly demonstrated by H. SNIJDER'S, 'Privacy of Contract', paper presented at the 'Leiden-Munich-Oxford Joint Colloquium on Human Rights: Privacy', Institute of European and Comparative Law, Oxford, 7 & 8 January 2005 (on file with author).
One may argue that the personal autonomy of vulnerable sureties is even more severely restricted than the one e.g. of consumers willing to buy a certain product. Indeed, to renounce a certain product might be less difficult than refusing to help one’s own father, son, husband or employer whose small enterprise urgently needs a loan.

If it is true that in the context of consumer contracts ‘the idea of free negotiation is a myth’ and ‘(t)he bargain has lost its sanctity as an expression of individual will’, the same must be true also with regard to suretyships concluded between a bank and a non-professional guarantor for one of his or her close family members, employer etc.

Since personal autonomy, self-determination and freedom of contract are common European fundamental rights, the need to protect vulnerable sureties from contractual agreements substantively imposed upon them has a European constitutional relevance. Thus the constitutional dimension of the law of unfair suretyships is not a specific heritage of the German legal culture.

Nor is the right to a free development of one’s own personality, which the German Federal Constitutional Court considers affected by the denial of remedies against unfair surety agreements, a specific heritage of the German legal culture. This right is common to all European citizens. First, it is recognised by many national Constitutions. Second – and more important – it is protected by Article 8 ECHR. Indeed, according to the European Court of Human Rights, the concept of ‘private life’ extends to the ‘development, without outside interference, of the personality of each individual in their relations with other human beings’.

The lack of protection from unfair suretyships clashes not only with Article 8 ECHR, but also with Article 6 EU, because the latter provision acknowledges the Convention rights as general principles of Community law. Although Article 6 EU does not create a general competence for the EC (and the ECJ) in human rights matters, there may be an overlap of competence between the ECJ and the European Court of Human Rights wherever the interpretation of a European constitutional right or principle is at stake. Indeed, the fundamental rights and constitutional principles mentioned in the Treaties are European constitutional norms like the fundamental freedoms. Being part of EC law, they have to be interpreted uniformly in all Member States, and national law must comply with them. The institution competent to interpret EC law – and the European Constitution – in the last instance is the ECJ.

Of course, also the lender’s freedom of contract and property rights are constitutionally protected. The European Courts need therefore to strike a balance between competing constitutional rights, in order to assess the appropriate level of both surety’s and lender’s protection. Both the assessment of the required standards

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95 See European Court of Human Rights, von Hannover v. Germany, no. 59320/00, judgment of 24 June 2004, § 30, with references to earlier cases.
of protection, and the correspondent adaptation of national law by the courts of the Member States can be achieved via horizontal effect of European constitutional norms, such as Article 8 ECHR and Article 6 EU Treaty.

Bearing in mind the current trends in the case-law of the Member States moving towards an even stronger surety’s protection, one may predict that a future case-law convergence via horizontal application of European constitutional provisions is likely to enhance the average level of protection of vulnerable sureties and to promote an equal treatment of European citizens in the same factual situations. Thus once again, horizontal effect turns out to be a powerful means to develop European private law towards more social justice.\textsuperscript{96}

\textsuperscript{96} If the only issue at stake was to approve new, more socially sensitive interpretations of private law, the recourse to constitutional arguments to legitimise these interpretations would be unnecessary, because this goal could be also reached by reasonings based merely on ordinary private law instruments. However, the existence of European constitutional rights providing equal protection for all Member States’ citizens offers the necessary legitimacy to the request for equal levels of protection of the same contractual interests throughout Europe. Thus from the viewpoint of case-law harmonisation, the constitutionalisation of private law is in fact something new under the sun (\textit{cf}. O. CHEREDNYCHENKO, ‘The Constitutionalization of Contract Law: Something New under the Sun?’, 8 \textit{EJCL} March 2004, <http://www.ejcl.org/81/art81-3.html>, p 13 \textit{et seq.}).