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First, I wish to say how honored I am to be invited to say a few words at the opening of the Third General Meeting of the Project on the Common Core of European Private Law. The only qualification needed for my job is, in the words of Ugo Mattei, that I must be "more or less sympathetic with the philosophy" of the Common Core Project, and I think I pass this test with flying colors. It is true that I am not an aficionado of immediate codification. In fact, I am not at all sure whether a demonstrable practical need for a European civil code exists at the present time or whether the Commission of the European Union has the jurisdiction to undertake such a project. I do think, however, that a serious effort must be made to develop a common core of European legal principles and rules, to engage in the construction of a European legal *lingua franca,* to develop a common European legal literature, and thus, to lay the basis for what will be needed when the time is ripe to undertake the ambitious project of codifying the private law of the European States. I will try to distinguish between the various types of academic scholarship needed to encourage the growth of a common European legal culture and a European common law.

One type of academic scholarship must aim at the production of textbooks, treatises and casebooks based on a decidedly non-national point of view. This approach should discuss their subjects in a way which by no means ignores the rules of national legal systems but treats them as merely local variations of a European

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theme which in principle is unitary. Analytical literature of this type must begin to flow. The call for a European common law of contract, tort or business organizations will no doubt take some time to answer in full. However, the fact that this task seems to have caught the interest of jurists in many European countries means that books will multiply and compete. Competition between academic writings of this type will, I hope, not only reveal the existence of a European common law but contribute to its various fields a coherent structure, making them teachable, manageable, discussible and criticizable. The literature we need on the *droit commun european* will hopefully be seen by future lawyers as having paved the way towards a European civil code in the same manner as the French authors of the eighteenth century paved the way towards the Code Napoleon by their books on the *droit communftanvais.*

Another type of needed academic scholarship must aim at developing rules that apply uniformly over the territories of the various European States regardless of a particular legal system and intended to reflect the best solution offered by the laws of those States. One example of this type of scholarship is, of course, the work of the Commission of European Contract Law which produced the Principles of European Contract Law on Performance, Non-Performance and Remedies in 1995. Another example is the Common Core Project. Its distinctive feature is its *method*, which is based on the one used in the sixties by the Cornell Project under the leadership of Professor Schlesinger.[1] It is a method which is factual throughout in that it starts with a fairly large number of specific fact situations, and analyzes each solution jurisdictionally. As the Cornell Project itself showed, this method has its weaknesses, but it also has its strengths, and it is on its strengths that I wish to say a few words.

Take the so-called good faith clause. It is all very well to say, as in section 1.106 of the Principles of European Contract Law, that "in exercising its rights and duties each party must act in accordance with good faith and fair dealing."[2] However, it would be starry-eyed to assume that a red-blooded English commercial lawyer, having read section 1.106, will accept with enthusiasm that this is one of the

1. *See* PIERRE BONASSIES ET AL., FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Rudolf Schlesinger ed., 1968).

2. COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES (Ole Lando & Hugh Beale eds., 1995).

basic rules of contract law, nor will he be convinced if he is shown the two or three practical illustrations given in the comment on section 1.106. What is needed to allay the fears expressed by our English colleagues is a painstaking analysis of the fact situations to which French, German, Italian or Dutch lawyers would apply the good faith standard and of the solutions they would reach in each of these fact situations on the basis of that standard. This is, I think, the kind of information the Common Core Project might provide, and what I regard as one of its strengths.

Another strength of the Common Core Project is its awareness of the need to take into account all of the "legal formants" influencing the solutions reached in different jurisdictions. These formants include differences of values, attitudes and policies. For example, various explanations are offered to explain the differences between English and continental laws on pre-contractual disclosure and information. English law is said, "to tolerate a certain moral insensitivity in the interest of economic efficiency."[3] On the other hand, French law is thought to rank solidarity higher than individualism.[4] I would like to offer a more mundane explanation.

The doctrinal development of a country's contract law typically depends on the types of contracts litigated before that country's higher courts. In comparing Australian and English contract law Professor Ellinghaus argued:

> [A] law of contract devised by a court most often confronted with one type of contract will differ from that devised by a court most often confronted with another type of contract. A court of ultimate appeal which draws on its own precedents in the development of a particular body of doctrine will naturally be influenced by the data most often placed before it.[5]

Professor Ellinghaus reported that about two thirds of the contract cases decided by the Australian High Court concerned the sale of land. During the same period, most litigated contracts before the House of Lords arose from charter parties, contracts for the carriage of goods and contracts for marine insurance, and in many of those

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3. Barry Nicholas, *The Pre-Contractual Obligation to Disclose Information: English Report, in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 187 (Donald Harris & Denis Tallon eds., 1989).

4. Pierre Legrand, *Pre-Contractual Disclosure and Information: English and French Law Compared*, 6 OXFORD J. LEGAL STUD. 322, 349 (1986).

5. M.P. Ellinghaus, *An Australian Contract Law?*, 5 J. CONT. L. 13, 19-20 (1992).

cases one or both parties were large enterprises doing business on an international scale. Lord Goff said:

> [O]ne feature of our legal system which I find many of our continental friends are unable to understand or unwilling to accept is the worldwide importance of the English commercial court, of English commercial arbitration, and of English commercial law. Yet this is a fact of life.... I here refer not so much to London as a financial center, but to London as the center of the world's shipping, the center of nearly all the world's commodity trades, and the center of the world's insurance. One result of this is that more commercial arbitrations are held each year in London than in the rest of Europe put together.... Yet another is, of course, the English Commercial Court itself... which must, I imagine, be by far the most important court in the world for the resolution of international commercial disputes. Certainly there is nothing like it anywhere else in Europe. You can judge its international character by the fact that, in one year during which I had the honor to preside over the court, in every single case tried in the court either one or both parties came from overseas.[6]

Germany has no commercial court in the English sense. However, the number of cases arising out of contracts for the sale of land, used automobiles, other personal non-commercial relationships, and agreements between professionals and consumers is far greater in the Federal Court of Justice (the highest German civil court) than in the English appellate courts. A study of the 415 decisions dealing with contractual disputes rendered by the Federal Court from 1986 to 1994 revealed that there were only six cases in which one or both parties were residing abroad.[7] Yet, there were no less than twenty-nine cases in which a consumers' association sought an injunction restraining the defendant firm from using allegedly unfair contract terms. The types of contracts litigated were evenly spread over the whole spectrum, but there were only eighteen cases involving contracts for the carriage of goods and insurance policies covering the attendant risks. In 212 cases, i.e. slightly more than one half of the total sample, *both* parties were consumers in the sense that they had not entered into the agreements in the course of a business or exercise of a profession.

It would seem, therefore, that there is more than a grain of

6. Lord Robert Goff, *Opening Address*, 5 J. CONT. L. 1, 2 (1992).

7. ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [Supreme Court] vols. 95 to 127.

truth in the observation that "the English law of contract was designed for a nation of shopkeepers," while "the French system was made for a race of peasants."[8] If this assumption holds in the present circumstances (except that shopkeepers would be replaced these days with hard-nosed international business executives and peasants with consumers), then it should come as no surprise that the English rules on disclosure and good faith duties in the negotiation, performance and execution of contracts differ in form and substance from those on the Continent.

There may be what, in comparative law, has been called a "presumption of similarity."[9] It is a rebuttable presumption, however, and it must be rebutted when there is evidence for doing so. I would therefore urge the members of the Common Core Project to bring out the similarities, but not to belittle the differences between the laws of the European countries. Where such differences exist, the Project should speculate on their reasons. This is, after all, what makes comparative law an exciting discipline, and what is needed to lay a basis for European private law. I wish you good luck. Thank you.

8. *See* OTTO KAHN-FREUND ET AL., A SOURCE-BOOK ON FRENCH LAW: SYSTEM, METHODS, OUTLINES OF CONTRACT 318 (1979) ("It certainly seems that the English law of contract was designed for a nation of shopkeepers. If that be so, the common lawyer might retort, then the French system was made for a race of peasants.").

9. KONRAD ZWEIGERT AND HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 40 (Tony Weir trans., 3d ed. 1998).