Hastings International and Comparative Law Review

Volume 21
Number 4 *Summer 1998*

Article 5

1-1-1998

The Common Core of European Private Law and the Principles of European Contract Law

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The Common Core of European Private Law and the Principles of European Contract Law

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In 1968, Professor Rudolf B. Schlesinger published the results of his research project in the *Formation of Contracts: A Study on the Common Core of Legal Systems.*[1] His object was to find out to what extent the contract rules in a number of legal systems relating to offer and acceptance would yield common results. In his comparative analysis, he used problems and cases so that the different legal concepts and methods of the systems would not hide the similarities of the results. His idea was that it was only in viewing a legal system's treatment of a problem as illustrated by cases that the impact of the rule on that legal system could be analyzed and a common core discovered. This functional approach has since been approved and used by legal scholars as an appropriate method for comparative research.[2] The Common Core Project at Trento University is based on the same method.[3]

It is, therefore, not surprising that in his memorandum to the Trento project, Professor Schlesinger hailed it as a project of exceptional importance. He also mentioned that the methods chosen when adopting the functional approach are significant and advised the members of the Trento project to consider them thoroughly. The

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

2. *See* 1 KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 28, 33 (Tony Weir trans., 2d ed. 1987); RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS [GREAT CONTEMPORARY LEGAL SYSTEMS] 12 (10th ed. 1992).

3. *See* Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 339 (1997-1998).

material and debates at the third meeting of the Trento project in 1997 demonstrated that there is still an ongoing discussion on questions of method.

In this paper, I will address some of the methodological questions and, to some extent, draw on the experiences of the Commission on European Contract Law (CECL), which is preparing the Principles of European Contract Law (PECL). The primary objective of the PECL is to serve as a basis for a European Code of Contracts. First, I will describe the CECL, and then I will compare the similarities and differences in methodological approach between the CECL and the Trento project.

I. The Commission on European Contract Law

In 1980, a group of lawyers formed the CECL to draft general principles of contract law for the countries of what was then the European Community. The group is a non-governmental body of lawyers from the fifteen European Union countries. None of them are selected or appointed by any government, nor have they sought or received instructions from government or community institutions. Most of the members are academics, not practicing lawyers. They hope that the general principles will bring about a systematic harmonization of the contract law in those countries.

The CECL began by drafting rules on performance, non-performance (breach) of contracts and remedies for non-performance. These rules constituted Part 1 of the PECL and were published in 1995.[4] In 1992, the Second CECL worked on the formation, validity, interpretation and contents of contracts and on the authority of an agent to bind its principal. The Second CECL held its last meeting in May 1996, and Part 2 of the PECL is scheduled to be published in early 1999. In December 1997, the Third CECL began drafting rules on the law of obligations common to contracts, torts and unjust enrichment. These obligations include set-off, assignment of debts and claims, subrogation and prescription.

Like the American Restatements, the PECL has comments to explain the operation of the articles. In these comments there are illustrations and anecdotes that show how the rules will operate in practice. Furthermore, there are notes which tell the sources of the

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

rules and state the laws of the member States. The preparation of the notes for the PECL resembles, in some respects, the work to be done in the Trento project. Questionnaires were not sent out, but members were asked to report on the attitudes of their laws toward the problems which the articles are aimed at solving.

In 1989, and again in 1994, the European Parliament passed resolutions[5] requesting that the necessary preparatory work begin on drafting a European Code of Private Law. The preamble to the 1989 resolution states that "unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law...." In the beginning, the European Commission supported the work of the CECL, but it later stopped. So far the Council of the European Communities has not shown any interest in our work.

A. To Lay the Framework for a European Code of Contracts

The growth of trade and communication within the European Union makes the unification of the law of obligations, and notably the law of contract, more and more urgent. An example of this is Internet communications, which the enterprises and a large part of the private citizens in Europe can now access. Many enterprises upload their contract offers onto their websites and mailing lists in all the countries of a region. As a result, all of the Internet users in these countries have access to this information.

In many regions, the offeror does not have to (and often chooses not to) communicate his business address. As a result, when a person accepts an offer, he or she may not know the address of the offeror. If performance is rendered on the Internet, like a database or program, the buyer may not know the seller's address even when there is performance. A few years from now, when digital cash can be used for payment, even the seller may not know the address of the buyer.

Under the rules of the Rome Convention on the Law Applicable to Contractual Obligations, the question of which law is applicable to a contract cannot be solved unless one knows the seller's place of business, and in consumer contracts it is necessary to know the buyer's domicile. When making the contract, if the parties have not

5. *See* Resolution on Action to Bring into Line the Private Law of the Member States, EUR. PARL. RES., 1989 O.J. (C 158) 400; Resolution on the Harmonization of Certain Sectors of Private Law of the Member States, EUR. PARL. RES., 1994 O.J. (C 205) 518.

agreed upon the applicable law, there will be uncertainty as to which law applies. If one does not wish to impose on the parties using the Internet for their transactions that they inform each other of their respective places of business, the European countries could agree that contracts made on the Internet are governed by existing uniform instruments such as the CISG and PECL. While this may create problems in the short term, it is the better approach in the long run.

B. To Safeguard Uniformity

The existing unified and harmonized laws of the European Union dealing with contracts are fragmented and uncoordinated. Most of these laws were promulgated as directives and are a separate, autonomous body of law governed by its own principles of interpretation. One of these principles is safeguarding uniformity. To provide a uniform interpretation, however, a common legal environment is needed. When national authorities (legislators, administrations and courts) interpret unified law, they do not have this environment; they do not have uniform rules to help them. Therefore, the authorities tend to resort to their own law. They tend to solve questions governed by unified law, but not expressly settled by it, in conformity with their national law. This tendency impairs the uniformity at which this law was aimed. For this reason, a backbone of common principles should be created to provide the necessary environment for unified and harmonized law. Common principles, rules and terms should fill these gaps. With such rules and terms established, future European Union legislation on issues relating to contract law will be greatly facilitated.

C. To Serve Arbitrators

In recent decades, arbitration has become a much used means of solving international commercial disputes. Arbitrators are often in search of general principles of law.[6] Instead of applying the law of one system, they look for rules that express general principles of law and are commonly accepted for international contracts.[7] Several

6. *See* Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois interessées au litige* [*The Arbitrator's Cumulative Application of the Conflict of Law Systems of Those Countries Which Are Connected with a Dispute*], 1972 REVUE DE L'ARBITRAGE 99.

7. *See* Bertold Goldman, *Les conflits de lois en matière d'arbitrage international de droit privé* [*Conflict of Laws of International Arbitration in Private Law Matters*], 109 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE

writers, some of them arbitrators themselves, have encouraged arbitrators to develop such a *lex mercatoria*,[8] and arbitrators often feel the need for it. By choosing the *lex mercatoria*, the parties oust the technicalities and "awesome relics" of national law that often come as a surprise to a foreign party. They are further able to avoid rules unfit for international contracts. Those involved in the proceedings—parties, counsels and arbitrators—plead and argue on an equal footing: nobody has the advantage of having the case pleaded and decided by his or her own law, and nobody is exposed to the handicap of seeing it governed by a foreign law. If one can also show that the problem is solved in similar ways in the involved legal systems, this common core will, of course, be a valuable contribution to the *lex mercatoria*.

Until the middle of the 1990s, the *lex mercatoria* was a fairly thin body of law. It consisted of the rules of international conventions and uniform laws, of international usages and customs and of the common core of legal systems. However, the common core of European legal systems was often difficult to ascertain because the information available was either scant or cumbersome to obtain. The PECL and the UNIDROIT Principles of International Commercial Contracts[9] have been a much needed contribution to the European *lex mercatoria*, as have been recent publications by authors such as Hein Kötz[10] and Klaus Berger.[11] The PECL and these publications provide information on the contract law of European countries and the common core of the European systems, as will, indeed, the future publications of the Trento project.

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347 (1963); PHILLIPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL [INTERNATIONAL COMMERCIAL ARBITRATION] 401 (1965); Ole Lando, *Conflict-of-Law Rules for Arbitrators*, *in* FESTSCHRIFT FÜR KONRAD ZWEIGERT 157, 166-67 (1981).

8. *See* Goldman, *supra* note 7; FOUCHARD, *supra* note 7; Ole Lando, *The Lex Mercatoria 1985-1996*, *in* FESTSKRIFT TILL STIG STRÖMHOLM 567 (1997); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985).

9. *See* UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994).

10. *See* HEIN KÖTZ, EUROPEAN CONTRACT LAW (1997) (the second volume will be by Axel Flessner).

11. *See* KLAUS PETER BERGER, FORMALISIERTE UND "SCHLEICHENDE" KODIFIZIERUNG DES TRANSNATIONNALEN WIRTSCHAFTSRECHT [FORMALIZED OR "CREEPING" CODIFICATION OF EUROPEAN COMMERCIAL LAW] (1996).

II. Similarities and Differences in the Approach of the Trento Project and the CECL

A. *Similarities*

1. *On the "Functional Approach": Cases and Anecdotes*

The functional approach has not only become respectable, but in many cases, necessary for comparative research. It is often used by the CECL in its debates. However, because the object of the CECL is not only to find out whether there is a common core among European legal systems but to establish common rules for Europe, the CECL is eager to note the differences as well as the similarities of results. The CECL not only considers the results of the cases, but it also pays attention to the concepts and methods used to reach the results. This is, in fact, what the members of the Trento project are doing as well.

2. *Agreement with the Trento Project's Unorthodox Approach to Legal Concepts*

The functional approach of comparative research requires an unorthodox approach to legal concepts. It must be borne in mind that legal concepts, such as property, are only tû-tûs.[12] When a person can sell or mortgage a land estate or when he can claim it back if another person takes it and then claim damages from that other person, we say that the estate is his property. Tû-tû is a shorthand expression for these and other rights and remedies which an owner has. However, these rights do not necessarily mean that one can do with his property as he pleases. It is the rules of the legal system that determine the tenor of the concept of property and not vice versa. Each system sets various limits on what a person can do with his or her estate and moveable property. These limits differ from system to system.

Likewise, functional more than conceptual considerations determine whether *culpa in contrahendo* sounds in contract or tort. It also determines whether the abuse of confidential information given in contract negotiations should be treated, as does the general reporter Sjef van Erp in his questionnaire on information as property,

12. *See* Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

as an illegitimate appropriation of property, or, as do the PECL and the UNIDROIT Principles, as a breach of a contractual duty of confidentiality.

3. *The CECL General Reporters' Use of the Comparative Method*

The CECL realizes that a general reporter should go beyond the rules and concepts taught in law school, and that it is the problems, not the rules, which should be the basis of comparison.

The organizers of the Trento project invited American scholars to join the group, and some of them act as general reporters. This appears to have been a good idea. A foreigner is often well equipped to describe the rules of a legal system because, like his readers, he will view it from the outside and report those traits relevant for comparison. To avoid mistakes, the native reporters will check the general report to avoid other "natives lying in wait with their poisonous arrows" who will fall over the general reporter.

B. Differences

1. Cognition and Dogma

As is pointed out by Professors Mauro Bussani and Ugo Mattei,[13] the aim of the Trento project is to achieve knowledge of and to spread information on existing solutions to a selected number of issues in contract, tort and property available in various legal systems. In this respect, their approach resembles that of zoologists who describe the behavior of bees and ants. The Trento project will describe how judges (and other decision makers) decide cases and, so it seems, not whether they do right or wrong. I do not know whether it is also the purpose of the exercise to criticize and evaluate or to propose and propagate certain rules.

Many lawyers consider the legal values they support as extremely important and would hold their mission as lawyers to be futile if they could not express their opinions. However, a lawyer who is caught in a political or moral mission tends to forget, overlook or even suppress the facts that are unpleasant for his mission.

For the scholar whose endeavor it is to describe and analyze, the truth, and the whole truth, is the ultimate goal. He will not hide in-

13. *See* Bussani & Mattei, *supra* note 3.

formation which is unpleasant to his sense of morality, utility or political views. He will strive to obtain and convey all the relevant information that is available. This is the great scientific value of an unbiased comparative researcher. The CECL and others who are working toward the unification of European private law will need information that is based on unbiased research.

However, the aim of the CECL and of the UNIDROIT group, which drafted the Principles of International Commercial Contracts, is to provide rules on contracts that can be used in a future, uniform system. On the other hand, the task is dogmatic; there is a mission to fulfill: to propose rules. In spite of this, the CECL tries to provide objective notes on national laws and not to suppress negative information about the rules it proposes.

In this context, it should be mentioned that by and large, the members of the CECL support the same legal values. It has been remarkable to note how these values converge among scholars belonging to the legal systems of European origin. I submit that there is more consensus about which solutions are fair and appropriate than there is convergence among the legal rules of existing legal systems that often pursue their policies through very different techniques. It will be interesting to see whether the Trento project will confirm the assertion that there is this consensus on legal values and more uniformity in case outcome than in legal rules.

2. *Formant*

In his article on legal formants, Professor Rodolfo Sacco conveys the idea that a legal rule may be expressed in a variety of sources (statute, court decision or doctrine), that a source may also express the rule in various ways (massima, dicta or holdings in a judgment) and that the expression in these various sources and ways may lend different shades to the tenor of a rule.[14] Like the spectrum of a speech sound, which may be held within a certain number of cycles per second, the rule may vary and assume different meanings depending on the environment in which it is found.

There is no doubt that the formant is valuable for the perception of legal rules. In the notes accompanying the PECL, the sources of the national rules are described as well as a determination as to whether that source identification comes from the rule stated or

14. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 21 (1991).

whether its scope is doubtful. On some points, inconsistencies in the courts' interpretations of a statutory provision or establishment of new legal rules by the court are pointed out. In addition, the disagreeing opinions of prominent writers are mentioned. However, stating each rule of the sixteen legal systems in all its various formants would make the publications very voluminous. Therefore, the CECL often prefers the simpler but more inaccurate method of stating a rule as only one rule. In the future, the CECL may be able to refer the reader who wishes more accuracy to the *Travaux de Trento.*

3. Subjects Covered

The Trento project does not wish to cover the entire landscape of tort, property and contract law. It will not even cover the whole of what may be called the general part (Allgemeiner Teil) of these topics. This is an understandable and necessary restriction given the fact that the project is ambitious and will probably take a long time to complete. The CECL, on the other hand, is most interested in the subtopics of contract. The questionnaires include topics such as good faith, enforceability of promises and *vices de consentement.* It will be very helpful if reports on subtopics covering some of those fields that the CECL is going to deal with[15] are made available to the CECL before it has finished its work in 1999.

3. Liberal Versus Strict Approach to Comparative Reasearch

When conducting a comparative research program there is often a general reporter. This reporter is responsible for: (1) preparing and sending questionnaires to special or national reporters; (2) collecting and editing the answers received; and (3) making a general report that summarizes the answers and compares the laws. To fulfill these responsibilities, the general reporter may adopt various approaches.

One is what I would call the liberal approach. It leaves it to each general reporter to ask the questions he thinks fit. The general reporter may, and often will, use the concepts and rules of his own law as the background for the questions. He will not instruct the national reporter to adopt a specific method. For instance, each national reporter will decide whether to describe the formant of each rule that is

15. These fields include: set-off, assignment of claims, subrogation, *cessio legis,* assumption of debt (including novation and related topics), plurality of debtors and creditors, illegality and immorality, conditions and time terms, effect of termination of contracts, discharge of obligations other than by performance (release, waiver, substitute performance, delays in the exercise of rights) and prescription.

mentioned. Each national reporter will write what he pleases about the subject, answer those questions which he finds relevant, leave the rest unanswered and add information which, although not asked for, he believes is relevant to the subject.

This method is often followed in the exercises of the International Academy of Comparative Law and the Fédération Internationale Pour le Droit Européen. It is used in a spirit of friendship and tolerance; it may also be explained by the nature and structure of these organizations. However, questionnaires based on the concepts and rules of one law are sometimes difficult for national reporters from other legal systems to answer, and the general reports suffers from the heterogeneous answers submitted by the national reporters.

The other approach is the strict approach. Under this approach, the questionnaires are coordinated, at least as far as the methodological questions are concerned. Each questionnaire is made after a comparative analysis of the concepts and rules of the legal systems involved. The national or special reporters have to answer all the questions according to the sequence in which they are arranged on the questionnaire. Information that is not requested will be incorporated into the general report only if it is necessary to understand the answers to questions asked.

Such a strict method is time consuming work. Many organizations, such as the International Academy of Comparative Law and the Fédération Internationale Pour le Droit Européen, have neither the organization nor the resources necessary for adopting this method. One must know the structure and terms of all the legal systems involved in order to ask all the relevant questions and not to ask questions that may be misleading to some of the national reporters. Therefore, this method can only be adopted when the person who formulates the questions has this knowledge. He must almost know the answers before he creates his questions.

Rudolf Schlesinger used the strict approach. He had a profound knowledge of several of the legal systems concerned, and he and his collaborators from other legal systems prepared working papers that they distributed among the participants before the questionnaires were sent out in order to check whether the questions were meaningful to each national reporter. The CECL has also tried to adopt a strict approach.

The Trento project is still discussing its methods. I have only seen some of the questionnaires, and they generally follow the liberal approach, but this may not be the final attitude of the project. It is

my impression that, at each meeting of the Trento project, an attempt is being made to tighten the ropes and move more towards the strict approach.

a. Some of the Questionnaires Appear to Be Formulated on the Basis of Comparative Reasearch

In a note on "Property on the Environment," one of the general reporters of the Trento project[16] wisely asked members for assistance in drawing up his questionnaire to include all relevant questions and avoid misleading ones.

The questions on *vices de consentement* by Horatia Muir-Watt, Stéphane Reifegerste and Ruth Sefton-Green deal with fraud, misrepresentation and mistake. The questions are posed by a French, a German and an English academic who, before they made the questionnaire, compared the three legal systems.

In their "Memorandum on the Good Faith Principle," the English Professor Simon Whittaker and the German Professor Reinhard Zimmermann initially divided their cases into various categories, which in most respects seem to illustrate how German courts "apply" the good faith provision in section 242 of the German Civil Code. This may be explained by the fact that German law developed the good faith principle more than other systems in the world. Under the broad umbrella of the German categories, it was possible for all national reporters to answer the questions.

Some of the cases relating to the "Enforceability of a Promise" are important in legal systems that apply the doctrines of consideration and cause, but they have less relevance in countries that, like Germany and the Nordic States, enforce promises made without consideration or cause. It will be interesting for lawyers from countries which operate with consideration and cause to learn that in the other countries, some of the questions are hardly considered worthy of note. It may, perhaps, also be interesting for academic lawyers from Germany and the Nordic States to see that these problems occupy the minds of some of their colleagues abroad. In several cases, a Danish lawyer would tell Professor James Gordley that the promise was enforceable, and that it was not until he saw the case that he became aware of a problem.

16. The name of the author has not been disclosed to me.

b. It is Not Clear to What Extent the General Reporters Agreed on a Common Approach to Treat the Formant of the Rules

In this respect the questionnaires appear to have adopted various approaches. One of the difficult issues is identifying those factors that determine the outcome of a case. There are general instructions about how to answer the questionnaire.[17] They provide some general guidelines, for example, asking for reference to sources including literature. The rest of the instructions are divided into three levels.

Level 1 is called "Operative Rules," and here the reporter indicates how the case would be solved by the courts of his legal system, whether this is in accordance with other legal formants, and whether there is harmony or controversy among the formants. Level 2 is called "Descriptive Formants" and asks about "the reasons for which the lawyers feel obliged to give the solutions mentioned in Level 1." In this level, the reporter should, among other things, indicate whether the solution is dependent on legal rules and institutions outside the private law (e.g., procedural, administrative and constitutional provisions), and how the solution is dogmatically explained. In Level 3, "Metalegal Formants," the reporter indicates other elements, like those mentioned in Level 1, which may influence the outcome of a particular case. These may be social, political or legal values as well as the structure of the legal process.

In their "Memorandum on the Good Faith Principle," Professors Whittaker and Zimmermann also asked the national reporters to answer the questions at various levels of analysis. The first is how the legal system treats facts. This implies that the answer should include a conceptual analysis and the legal basis for the outcome. This may include information on the formant of the rule, but as in the other questionnaires, I have not seen much attention given to this issue.

Levels 2 and 3 deal with "extraneous" elements within and outside the system that influence the system's choice of analysis. Elements within the system relate, for instance, to factors which are the result of legal categorization within the civil law. In some legal systems, such as the German one, there is a tendency to qualify liability as contractual and not tortious in order to impose vicarious liability, which is not imposed in tort.

Level 3 specifically deals with elements outside of the system. Those elements relate to institutions and practices outside the realm

17. *See* Bussani & Mattei, *supra* note 3, at app. 1.

of the code which influence the outcome of decisions. Thus, the liability insurance industry has, in some countries, influenced the legal liability imposed on insurers.

It appeared from Professor Whittaker's oral presentation given at the Common Core Project's July 1997 general meeting that Levels 1 and 2 will merge in the published report—this is to be applauded. Regardless of any merger between Levels 1 and 2, it is difficult to uphold the distinction between Levels 2 and 3. What is inside and what is outside the system depends on the system. For instance, the Nordic Tort Liability Acts provide that, to the extent the victim is covered by insurance against loss or damage, a non-professional tortfeasor or an employee acting for his employer will not be held liable for damage done if he has acted with *culpa levis*. The same rule applies to the employee's liability when the employer is covered by liability insurance. The question is whether these rules are found at Level 2 or 3. It is respectfully submitted that the division between Levels 2 and 3 may be different in various systems, and this makes it difficult to distinguish the two levels.

In other questionnaires, the national reporters are not asked to analyze their systems at different levels. Instead, the national reporters are expected to follow the general instructions. However, the *vices de consentement* questionnaire poses questions about the procedural aspects of the remedies available and asks whether the court has discretion in their administration. In his questionnaire about the enforceability of a promise, Professor Gordley asks whether the answer in a particular legal system is clear or doubtful. This question is also posed in a more sophisticated manner in the general instructions where it is asked whether or not the formants are concordant. Professor Gordley also asks which doctrines would be used to explain the outcome. This question, it seems, is also asked in Professors Whittaker and Zimmermann's Level 2 general instructions.

To some extent, these differences are explained by the nature of the various topics. However, there should, perhaps, be more consistency between the general reporters. They should choose between Professor Gordley's simple questions asking whether the answer is clear or doubtful and which doctrine explains the rule and Professors Whittaker and Zimmermann's division into the three levels. Perhaps the choice is that the questions should be asked at the various levels, but they should not be divided into levels.

c. *Another Important Issue is Whether and How to Systematize the Questions in Memoranda and Questionnaires*

In their initial memorandum, Professors Whittaker and Zimmermann divided their cases into various categories. This method is not used in other questionnaires that I have seen, and the two general reporters later decided against the approach. A systematization of the questions in the questionnaire is always useful, but it may not be necessary to divide them into categories. Regardless, any division into categories should appear in the index of the published volume.

It is not clear to me whether the general reporters coordinated their questionnaires. Question 2 of the good faith questionnaire and Question 1 of the *vices de consentement* questionnaire deal with mistakes as to the value of an art object sold. The facts described in the two cases are not completely identical, but they both tell a story about an ignorant seller of a painting who accepts a modest bid by a buyer who knows or suspects that the painting is a Degas and later resells the picture at a windfall price.

The CECL chose to deal with this issue in the chapter on "validity" which covers *vices de consentement.* The good faith principle in the PECL article 1.106 (new 1.201) is mainly meant to cover situations not dealt with in other provisions.

d. *During the Session on Contracts in Trento, Attempts Were Made to Illustrate How the Answers to Questionnaires Should be Prepared*

Samples of model answers to the first question in the *vices de consentement* questionnaire dealing with the painting by Degas were distributed at the session on contracts. Answers considering the problem under English and French law were provided. The three-and-a-half page French model answer expressed doubts about whether, under the facts stated, the seller of the painting would have a remedy. It seemed to depend upon the court's evaluation of additional facts not revealed in the question. The nine page English answer, however, clearly said that the seller would not have any remedy, and then went on to describe the facts under which the seller might have a remedy. A remedy may have been available under English law if the buyer told the seller the painting was not by a famous artist. In addition, the answer gave an overview of the English doctrines of mistake and misrepresentation. Both answers resembled an attempt by a learned professor to illustrate how a top student

should write an exam answer.

III. Conclusion: The Question of Size

If the matrix of the model answers is followed, and if the unabridged answers to the questionnaires are published in addition to summaries and conclusions, very voluminous publications should be expected. In the notes accompanying the PECL, the CECL preferred brevity, which it is already being criticized for emphasizing. However, the CECL believes that brevity is sufficient to realize its main task, which is to propose rules, not to state existing laws.

For the members of the Trento project, accuracy is important. It will be useful to have access to more detailed accounts of how legal systems solve particular cases. However, it should also be remembered that voluminous books place a heavy burden on their authors regarding overview, surveyability and readability. Brevity and accuracy are enemies; the choice between them is difficult. However, there is no doubt that detailed Trento publications will bring a much-needed insight to the subjects covered. They will be great help for those working toward the unification of the laws of Europe.