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COMMON LAW VERSUS CIVIL LAW CONSIDERATIONS IN THE DRAFTING OF INTERNATIONAL CONTRACTS

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COMMON LAW VERSUS CIVIL LAW CONSIDERATIONS IN THE DRAFTING OF INTERNATIONAL CONTRACTS: The negotiation, conclusion, interpretation and enforcement of a multi-jurisdictional contract requires detailed and informed attention to the differences in legal tradition and practice.

by Professor Richard J. Graving

1. The acceleration in transnational business and commerce that we call globalization is producing two contradictory but expectable phenomena: more exposure to differences in tradition and practice and a concomitant diminution in those very differences. The more contact with the Unfamiliar, the less Unfamiliar it becomes. In the meantime the American lawyer and his client need to understand the differences that there are and to act on that understanding in dealing with those who approach business dealings from a different perspective. This morning we focus on that part of globalization that concerns contracting between parties from the Common Law tradition and parties from the Civil Law tradition. The latter is sometimes called, quite accurately, the Romano-Germanic tradition. There are other traditions as well, such as those in many parts of Africa and Asia, but our focus for business purposes is on the two Western legal traditions in which most of the world's transnational business is done.

2. The classification of legal traditions is an imprecise and sometimes arbitrary affair. There are today no pure examples of one tradition or the other. There is a great deal of overlap and admixture. It is usually said that the four elements distinguishing one tradition from another are (a) historical origin, (b) nature and treatment of sources of law, (c) method of legal reasoning and (d) characteristic legal institutions. (We return for a practical application of these elements in a moment). On this basis national systems of law can be identified, sorted and geographically distributed as follows: the whole of continental Europe (with the possible exception of the Scandinavian countries) as well as the countries of continental South and Central America are looked upon as the core of the Civil Law tradition. The archetypes are France, Germany and Switzerland, from whose modern national systems most of the other Civil Law systems are derived. The Common Law orbit is roughly coextensive with the English-speaking world, with England of course the source. Scandinavia is considered *sui generis*. So-called Socialist Law, once considered by some a separate tradition and typified by the former Soviet Union, is reverting in varying degrees to its largely Civil Law heritage. Within some national systems in the Common Law tradition are enclaves belonging to the Civil Law tradition, albeit in somewhat attenuated form because of their isolation: Louisiana, Puerto Rico, Quebec and Scotland are examples. Finally, some systems, like that of Israel, are a veritable potpourri.

3. The age of the two main traditions is vastly disparate. Historians date the Civil Law from c. 453 B.C. (Ancient Rome's Law of the Twelve Tables) and the Common Law from A.D. 1066 (the Norman Conquest of Britain). This means that when the Common Law was "born", the Civil Law was *already* older, by 1,519 years, than the Common Law is *today*.

7. The easiest way to differentiate the two traditions as to nature and treatment of sources of law is to compare the role of "codes" in each. A Civil Law code is theoretically the embodiment of all written law. It is meant to be comprehensive. Gaps in coverage are filled by reference to general clauses of an equitable nature or by analogy to code provisions covering other but putatively similar cases. There is no repository of case law on which to rely. That at least is the theory. Law reports in the United States and in England are filled with judicial musings about the existence or absence of precedents in a Civil Law country. Even expert witnesses testify to the same effect. They miss the mark. An American "code", in contrast, is merely the latest and invariably partial supplement to an underlying common law that fills in the gaps. Even our Uniform Commercial Code, drawn from the example of Germany (but not promoted or publicized as such) provides for suppletory application of the principles of law and equity (§ 1-103). What then replaces the invocation of case law other than argument from the code itself? The answer is revealed by the historic role of the Roman jurisconsult (see paragraph 4), whose modern descendent is the academic commentator. Annotated copies of the Civil Law codes are the staple research tool of the Civil Law lawyer. Never mind past decisions. They have no binding force except between the parties to the particular case. Both the French Civil Code and the Statute of the International Court of Justice, for example, state this explicitly. (International Law resembles the Civil Law much more than it does the Common Law, something to bear in mind to the extent international law may be relevant to the contemplated transaction.) Thus my **Recommendation No. 1: Assess your legal position principally in reliance on the commentators, not judicial decisions.**

8. The method of legal reasoning in the Civil Law tradition is often described as deductive rather than inductive. It is said that we Commoners proceed up from the particular to the general but that the Civilians reverse the order, proceeding down from the general to the particular. I am not sure that this particular and popular dichotomy helps us much in drafting an international contract. More apposite, I think, is a kind of horizontal dichotomy between the Common Law maxim *expressio unius est exclusio alterius* – expression of one thing is exclusion of another – versus the Civil Law notion of *in consimili casu* – reasoning by analogy. Lord Denning, when he descended from the House of Lords to preside over the Court of Appeal as Master of the Rolls, put it as well as anyone when he observed that the Civil Law style "lacks precision" and "uses words and phrases without defining what they mean." (An excerpt from one of his "speeches" is attached to this outline.) Civil Law drafting reads more like a constitution than, say, a municipal ordinance. And interpretation leans more to the teleological than the syntactical. Purpose trumps grammar. Thus my **Recommendation No. 2: Be tediously specific and detailed, leaving nothing to implication or inference (unless it is you who needs the ambiguity!)** Nit-pick and fly-speck as much as you reasonably (and nicely) can without endangering the deal.

9. The characteristic legal institutions of the Civil Law are going to be different and maybe even surprising. French administrative law, for instance, is markedly tipped in favor of the government, with even a separate hierarchy of courts and a separate court of

the Enforcement of Judgments and the Rome Convention on the Law Applicable to Contractual Obligations. There is also the European Convention for the Protection of Human Rights and Fundamental Freedoms, a treaty of rapidly increasing importance even for business operations. Thus my **Recommendation No. 6: Be familiar with unification and harmonization instruments even when they offer the promise of standardization.** Diminution in difference is not necessarily diminution in challenge.

13. Contrast between the printed word and actual practice is a peril in any context and especially so in transnational contracting. The variety of discrepancies can range from a kind of disguised but legitimate reliance on earlier judicial decision through corruption by political influence to outright graft. On the latter it is useful to consult the annual "Corruption Perceptions Index" published by Transparency International (TI) in Berlin (**www.transparency.de/documents).** Of the 139 countries on their current list, Denmark, Finland and New Zealand rank at the top for "purity", with Nigeria and Cameroon at the very bottom. The United States ranks 22nd. Thus my **Recommendation No. 7: Find out how the law *really* works in the other party's country.** What matters is the "living law".

14. Finally my **Recommendation No. 8: Engage and interact knowledgeably with cosmopolitan local counsel.** This is self-explanatory. My outline is hardly a start!

R.J.G.
Houston
25-II-00

The following is an excerpt from the opinion in the English Court of Appeal of the Master of the Rolls, Lord Denning, in *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] 2 All E.R. 1226, dealing with the "problem" of applying in England the civil-law structure of the 1957 Treaty of Rome (establishing the Common Market).

10. The Principles of Interpretation

In view of these considerations, it is apparent that in very many cases the English courts will interpret the Treaty themselves. They will not refer the question to the European Court at Luxembourg. What then are the principles of interpretation to be applied? Beyond doubt the English courts must follow the same principles as the European Court. Otherwise there would be differences between the countries of the Nine. That would never do. All the courts of all nine countries should interpret the Treaty in the same way. They should all apply the same principles. It is enjoined on the English courts by Section 3 of the European Community Act, 1972, which I have read.

What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation—which was not foreseen—the judges hold that they have no power to fill the gap. To do so would be a "naked usurpation of the legislative power," see Magor and St. Mellons R.D.C. v. Newport Borough Council (1952) A.C. 189. The gap must remain open until Parliament finds time to fill it.

How different is this Treaty. It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by regulations or directives. It is the European way. That appears from the decision of the Hamburg Court in Re Tax on Imported Lemons (1968) 7 C.M.L.R. 1.

Likewise the regulations and directives. They are enacted by the Council sitting in Brussels for everyone to obey. They are quite unlike our statutory instruments. They have to give the reasons on which they are based (Article 190). So they start off with pages of preambles, "whereas" and "whereas" and "whereas." These show the purpose and intent of the regulations and directives. Then follow the provisions which are to be obeyed. Here again words and phrases are used without

COMPARATIVE LAW

CASES — TEXT — MATERIALS

FIFTH EDITION

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Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

L. HAND, Circuit Judge. These two appeals involve only the question of the statute of limitations. The libels were filed for damage to certain consignments of goods, shipped on the respondent's vessels under bills of lading, issued in France, and containing the following clause (Rule 18): "All litigations arising out of interpretation or execution of this contract or bill of lading shall be judged according to the French law at the Tribunal of the place indicated in the bill of lading, and the owners of the ship and claimants formally declare to accept its competency." The bills further provided: "Disputes resulting from the interpretation or execution of this bill of lading shall be submitted to the court provided for in Rule 18 of the Commerce Court of the Seine."

The respondent proved the French law by its relevant sections, and by a competent French lawyer, and maintained that under it the limitation of one year was made a condition of the obligation, in the sense that the lapse of that period extinguished the right. Hence it argued that the local statute did not apply as part of the lex fori, and that as the libels had not been filed within a year, though within the time allowed by the local law, the suits must fail. The following sections of the French Codes are pertinent. Section 433 of the Commercial Code, which is under the title, "Prescription," provides: "The following are barred by prescription. All claims for delivery of goods, or for damages for average losses, or delay in the carriage of them, one year after the ship's arrival." This is all that there is in the Commercial Code, but the Civil Code under chapter five, which concerns the "discharge" (extinguishment), "of obligations," provides, section 1234: "Obligations are discharged" (s'éteignent), "by payment (or performance)—by novation—by voluntary release—by set-off—by merger—by loss of the subject matter—by being void or by rescission—by the effect of a condition in avoidance, which has been explained in the preceding chapter; by prescription which will form the subject of a special title." The only evidence in the record of that special title is the following two sections: Section 2220, "The right of prescription may not be waived" (renoncé), "beforehand; prescription which has been already acquired may be waived"; section 2223, "Judges may not of their own motion base their decisions upon grounds which depend upon prescription."

The testimony of the expert was exceedingly confusing, not due to any fault of his, but inevitable because of the attempt to import into the French law the refined notion which pervades our own, of a right barred of remedy, but still existing in nubibus. He based his opinion upon the reasoning that since section 1234 of the Civil Code provides that "prescription" shall extinguish or discharge obligations, and since section 433 of the Commercial Code establishes a prescriptive period of one year for suits like those at bar, it follows that the French law extinguished these obligations. When faced with the sections from the Civil Code dealing with prescription, he became however less clear. It

observed elsewhere.[e] This has ordinarily come up in the case of statutory rights in which the limitation was imposed by the same statute which created the right itself [Citations.] But it is not necessary that the limitation should be in the same statute, so the purpose be plain to make it a condition. [Citation.] Since in France all obligations are presumably created by force of statute, we have therefore to decide how far the French law imposes such a condition upon the obligations created by bills of lading.

The embarrassment is, as we have said, that we have to interpret another system of law according to notions wholly foreign to it. It is indeed easy to say that as the French law recognizes nothing but the extinguishment of an obligation by lapse of time, we have nothing more to do than take all obligations there created as subject to such a condition. But the question does not seem to us quite so simple as that, for it is apparent that the right is not always extinguished, as, for example, if the obligor renounces the prescription, or fails to claim it. Our own statutes of limitation do in fact extinguish the right so far as they extinguish all remedies, for a right without any remedy is a meaningless scholasticism, and the distinction we make is more than formal only in that the applicable period varies with the law of the forum where the suit chances to be laid. At any rate it is permissible for us to say that if the assumed extinguishment which the French law imposes, is itself subject to conditions which assimilate it to our ordinary statutes of limitation, it makes no difference that it speaks of "extinguishment." We are to decide whether the defense falls within one class or the other recognized by us, and in that inquiry we are not necessarily concluded by the terms used; we may assimilate it rather to matter of remedy, just because it has those conditions which would so determine it in our law.[f]

It appears to us that this is the case here. For example, as mere matter of procedure the defendant under our law need not plead the limitation, when it is a condition upon the right.[g] [Citations.] The rule is otherwise when it merely bars the remedy, and section 2223 of the French Civil Code pro tanto makes the defense like that of our ordinary

e. ". . . The usual conflicts rule [that the statute of limitations is procedural and hence controlled by the law of the forum], is subject to an exception in the case of limitations affecting statutory rights of action which did not exist at common law. In such cases, the period of limitation is ordinarily said to be a condition to the right itself and not merely a bar to the remedy; hence, it is treated as a matter of substantive law. Accordingly, when such period of limitation has expired the law of the forum is inapplicable because, the right of action itself having ceased to exist, there is nothing left to sue upon. Thus, even under a statutory conflicts rule, as in New York, where a resident plaintiff's foreign cause of action is subject only to the New York statute of limitations, such action will nevertheless be barred if the period of limitation which is a condition to the foreign right has expired, even if the local statute of limitations has not yet run." Note, 40 Cornell L.Q. 589, 590 (1955). This approach, however, has been questioned by some of the more recent authorities. See infra p. 212.

f. More recently, the Second Circuit has given up this criterion. See Bournias v. Atlantic Maritime Co., Ltd., 220 F.2d 152 (2 Cir., 1955), discussed infra p. 211.

g. See Atkinson, Pleading the Statute of Limitations, 36 Yale L.J. 914, 926 ff. (1927).

The Expert's Testimony in the Wood & Selick Case

The following is taken from the Record which was before the Circuit Court of Appeals in the above case (the bracketed numbers are folio numbers of the Record):

UNITED STATES DISTRICT COURT,

Southern District of New York

A. SALOMON, INC.,
Libellant,
AGAINST
COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent. [185]

WOOD & SELICK, INC.,
Libellant, [186]
AGAINST
COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

JEAN C. MANCINI, called as a witness on behalf of the respondent, having been duly sworn, testified as follows: [187]

Mr. Longley [attorney for the plaintiff or "libellant"]: Let the record appear that we except to the witness testifying, on the ground that it is immaterial. I will admit the witness is well qualified as an expert in French law.

Mr. Garity [attorney for the defendant or "respondent"]: Just for the purpose of the record I will ask a few questions.

Direct Examination by Mr. Garity:

Q. Are you a lawyer admitted to practice under the laws of the Republic of France? A. Yes, sir. [188]

Q. Are you a French citizen? A. Yes, sir.

Q. Have you a law degree delivered to you by the Republic of France? A. Yes, sir.

Q. Where and when did you obtain this degree? A. In Paris, in 1918.

Q. Are you qualified to practice law in France and to appear before the Courts of France? A. I am.

Q. Have you a law office in Paris? A. I have.

Q. Read section 433. A. It is in French, but there is a translation.

Q. I notice that it says "Prescription"? A. Yes.

Q. What does the word "prescription" mean? A. Limitation.

Q. Limitation? A. Yes, sir.

Q. What does the word mean, prescription? A. It means limitation.

Q. All right then, this is article 433? A. Article 433.[i] [194]

Q. Continue. A. Are extinguished—

Q. Where do you get the word extinguished? A. That is it here.

Q. I asked you what the word prescription meant, and you did not say extinguished, you said limitation, what does the word prescribe mean? A. Extinguish.

Q. What is the French word for extinguish? A. Eteindre.

Q. Prescription does not mean that? A. Yes, your Honor, prescription is a way of distinguishment, extinguishment of the obligation. [195]

Q. Do you know Latin? A. Yes.

Q. Does the word prescribe mean the thing that the word prescribe would etymologically? A. Yes, sir.

Q. Prescribe does not mean extinguish, does it? A. But it is in the Code.

Q. What? A. In our Code prescription means—

Q. I am not asking for the effect, I am asking you to read that. Show me the French for "the obligations, are extinguished on payment," show us that, that is the important part of this case? A. Section of the Code, article 1234.

Q. We will get at 1234, do you speak French? [196]

Mr. Garity: Not fluently enough to discuss that, your Honor. If your Honor please, I think that this certificate of the translation we have been given of it will show that that does mean a distinction is made between that and limitation. [197]

The Court: Chapter 5, for the extinguishment of obligations.[j] That is a different section and is entirely different from this other section that you referred to. Here, this is what prescription means, is it not?

Mr. Garity: I cannot testify to it.

The Court: What do you want to show me?

The Witness: That prescription here is shown.

i. For (mis)translation of the pertinent parts of that article, see infra p. 197.

j. Book III, Title III, Chapter V of the French Civil Code (articles 1234–1314), entitled "Extinction of Obligations." For an outline of this code, see infra pp. 531–532.

Q. Now, are there any further provisions that bear on this thing? The Commercial Code, did you read that into the record? [202]

Mr. Garity: I think the record should be made clear by having article 433 of the Code in there.

The Court: What Code is that?

The Witness: The last one was the Civil Code.

The Court: And now what are you reading? [203]

The Witness: Now I am going to read from the Code of Commerce.

The Court: Read from the Commercial Code, section 433. Do you see the point now?

Mr. Longley: I see the point, but I say it does not apply.

The Witness: Article 433: *Are extinguished*[m] all actions in payment of the freight, and every claim in delivery of the goods and for damaged goods or delay in the transportation one year after the arrival of the ship. [204]

By Mr. Garity:

Q. Is it necessary to refer to this article 433 in the bill of lading? A. No.

Q. Did I understand you to say that in your opinion under the laws of France by article 433 an action for damage to cargo is extinguished unless the action is started within one year, is that correct? A. Yes.

Q. Now, you were talking to his Honor about prescription, what do you mean by that? Do you mean that the right under the contract or the remedy under the contract is extinguished if suit is not instituted within a year? A. It is the right which is extinguished. [205]

Q. The right is extinguished? A. Yes.

Q. Rights under the contract are extinguished unless action is started within a year, is that your interpretation of the French law? A. Yes, sir.

Q. Is that based on the statutes you have just read to us? A. Yes, sir. [206]

[Folio numbers 206–12 of the record have been omitted. They are reproduced at pp. 200–202 of the Fourth Edition (1980) of the present work.]

. . .

m. French: Sont prescrites (emphasis in text supplied). For derivation, see supra note k. The corresponding provision of article 433 of the Commercial Code has now been replaced by article 26 of Law No. 66–420 of June 18, 1966, which provides that claims for damage to cargo "sont prescrites par un an."

Evidence ¶615[02], p. 615–11 (1985) (footnote omitted). One of the co-authors of the present edition has testified as an expert witness on foreign law in federal courts for two decades, and has always sat at counsel table during the cross-examination of opposing experts. Counsel will usually agree in advance (in obvious mutual self-interest) to "waive the Rule" as to expert witnesses on foreign law, but this might not always be the case. It is hoped that the above annotated account of Me. Mancini's testimony in Wood & Selick, supra, will aid trial courts, if called upon, to exercise their discretion in this matter so as to afford the parties (represented by counsel aided by experts) their full day in court.

What follows is the continuation of the trial record in the Wood & Selick case.

Q. Does that in any way affect the extinguishment of a right as has been previously testified to under Section 433? A. No. It does not.

Q. Will you explain the effect of Section 2223? Is this an Article or Section? A. Article.

The Court: That is as to the effect of it?

Mr. Garity: Yes.

The Court: You know what it means?

Mr. Garity: Yes, under the French law.

A. It means that if the prescription is not raised by the parties, the judge has no right to raise it. But it does not mean that the prescription is not the extinguishment of a right. [222]

Q. Mr. Mancini, when you say that it is not the extinguishment of a right, how do you explain that?

The Court: Just let me ask you a question. A prescription is nothing like anything in the American law?

The Witness: I do not think so. [223]

The Court: Do you know what limitation means?

The Witness: Yes, sir.

The Court: Do you know what is called expiration of limitation?

The Witness: Yes.

The Court: Is the French prescription the same as limitation?

The Witness: Yes.

The Court: This means in American law that a party who does not plead limitation waives it? [224]

The Witness: Yes.

The Court: Is that what this clause means, that it is waived?

The Witness: Yes.

The Court: The Court cannot raise the question of prescription if the party himself does not?

The Witness: Yes.

The Court: Is that what that means?

The Witness: Yes.

The Court: Is that right?

Mr. Garity: No. [225]

The Court: If it is not, set me right. Is that what you understand it to mean?

Mr. Longley: I think there was an inconsistency between his answers made to you and his answers made to my brother.

The Court: Did you read all those provisions, 2219?

Mr. Garity: I was just going to try to lead up to the main point.

The Court: Did you testify?

The Witness: I testified that that affects the right.

Q. Does this Section 2223 of the French Civil Code in any way make you change your statement that you have previously made as regards the effect of Section 433? A. No. Not at all. [232]

Q. How can you explain the fact that if the judge cannot of his own motion raise the question of prescription that Section 433 of the Commerce Code affects a right rather than a remedy? A. The Code says that a prescription is a way of extinguishment of an obligation. From the authorities in France we find that the meaning of the prescription is an extinguishment of right. I remember. I can quote from his work, which is stated in the very precise manner, that the prescription is an extinguishment of a right. Therefore Article 2223 cannot go against what we have seen in the Code and what the authority has been. Furthermore, I understand that such article means that the judge cannot raise the prescription by himself if it is a right, because if a party does not want to take advantage of a right the Court cannot force such party to take it. [233]

The Court: Well, under 2223, if a party does not take advantage of it, then the right exists to be enforced.

The Witness: Yes. The right exists. [234]

The Court: That is under 2223. What is the other section?

Mr. Garity: 433.

The Court: Now, if a prescription under 433 takes effect, and nobody alludes to it, could the party recover?

The Witness: The rights still exist.

The Court: The rights still exist under 433 too?

The Witness: Yes.

The Court: The rights still exist?

The Witness: Yes. [235]

The Court: So in both instances it is only the remedy that is affected.

The Witness: It is only the remedy that is affected under 2223.

The Court: The right—

The Witness: No. Under 433 there is no remedy. Under Section 433 it is a right.

The Court: Suppose you get a right which you otherwise would have if it were not for 433, if you understand me, if it were not for 433 you would have a right. You can enforce that right, can't you? [236]

The Witness: The right is extinguished.

The Court: You cannot sue?

The Court: Have you any understanding of it?

Mr. Garity: No. I understand this, Judge, he has so testified. I had better ask questions rather than make statements though, hadn't I?

The Court: You may ask the witness questions if you want to. [242]

Q. Does Section 2223 have any application when the defendant sets up the provisions of 433? A. No.

Q. When the defendant does set up the provisions of Section 433, what will the Court do? A. If the defendant claims that there is prescription, the Court will give,—the Court will dismiss the case.[243]

The Court: That is a different case. The case you are putting forward, the plaintiff himself is urging prescription.

Mr. Garity: Yes, as in this instance, we have set up prescription. We plead for the defense.

The Court: I understand that.

Mr. Garity: That is to say we plead that. The other case has no relevancy in this particular case.

The Court: You raise the plea?

Mr. Garity: We are pleading it. [244]

The Court: Section 2223 applies to a case where it is not pleaded.

Mr. Garity: Where it is not pleaded.

The Court: And there the Judge cannot raise it. What that means is immaterial, because in this case before me, I understand it is pleaded. Do I get the fact right?

Mr. Garity: I did not ask the witness. It was just for that reason that I objected to any admission of the evidence. [245]

The Court: I understand.

Mr. Longley: I desire to ask Mr. Mancini one question.

By Mr. Longley:

Q. Section 433, I take it in your testimony, is a statute providing a defendant a statutory defense to a claim which may be filed or a suit which may be filed after the statutory period has elapsed, under the French Law. That is the situation, is it not? A. Yes, sir. [246]

Mr. Longley: That is our case, if your Honor please.

By Mr. Garity:

Q. Mr. Mancini, is that statutory defense directed to a remedy which is open to a defendant or to a right under a contract? A. It is directed to a right.

Q. Why do you say it is directed to a right rather than to a remedy? A. For two reasons: The first is because in the Code itself

The Witness: In principle thirty years. When there is no provision of the law within thirty years but in this case there is a provision of the law.

The Court: That is a provision of thirty years. Is that a translation by you? [256]

The Witness: That is a translation.

The Court: You are speaking of the rights of patrimony?

The Witness: Yes.

The Court: That is you said prescription is a way of extinguishment of a patrimony? [257]

The Witness: I have given an explanation.

The Court: Patrimony under the French law?

The Witness: Is where the man's property and rights are involved. That is what this is. I could not find any translation of the French words. The translation is patrimony.[p]

Q. Did you say that patrimony under the French Law means extinguishment of all the rights? A. Means the whole of the rights of a man. [258]

Q. Of the man's what? A. With respect to his property.

Q. And the prescription of patrimony means the prescription of the entire rights?

The Court: The next paragraph helps you out. What is that?

The Witness: The rights of actions susceptible of prescription. That is the way of extinguishment applies [sic] to all the rights of patrimony, the rights of claims, and the rights on property of third parties. Not only the rights of patrimony are extinguished by the non-use, but also all the real or personal actions attached to these rights. [259]

The Court: Have you any other reasons upon which you base it?

The Witness: Well, I base it on the books and on the authority and the Code.

. . .

The Court: . . . you are willing to state what he says is the law?

Mr. Longley: I am willing to rest our case on Mr. Mancini's testimony.

p. The difficulty of the witness in this respect is understandable. Patrimoine (Fr.) = patrimonio (Sp.) = Vermögen (Ger.) describes "property" rights as contradistinguished from "moral" or "personal" rights, but includes liabilities as well as assets. "Net worth" or "estate" are kindred but not exactly parallel concepts. See generally A. N. Yiannopoulos, Property 315 et seq. (vol. 2 of Louisiana Civil Law Treatise, 1980).

the French Civil Code and articles 433 and 435 of the French Commercial Code related to each other.

(2) If an American lawyer who has had some training in comparative law were to look into the questions of French law raised by the principal case, he could—by cursory research—find the following data:

(a) The defense of prescription must ordinarily be pleaded (Code Civil, art. 2223) and is waivable, though not in advance (arts. 2220, 2221, 2224).

(b) After the period of prescription has run out, there remains what is known in the civil law as an *obligatio naturalis*, i.e., an obligation which cannot be enforced. A voluntary performance of such "obligation" does not constitute a gift. An obligor who made payment in ignorance of the prescription, is not entitled to restitution (*condictio indebiti*); the payee is not unjustly enriched, because the payor, though he could not be sued, was still "obligated" to pay.[1]

(c) There is controversy among French scholars as to whether prescription bars the right or the remedy. The theory which claims that the right is barred, is based mainly on the literal meaning of "extinguish" in Art. 1234 of the Code Civil. It is, however, the other theory, according to which only the remedy is barred, which has the weight of authority behind it. Among modern, sophisticated authors the view seems to be gaining ground that it is impossible to devise a unitary label accurately stating the nature and effect of prescription, and that prescription may have to be treated as procedural or remedial for some purposes, but as substantive for others.[2]

(3) In his opinion, Judge L. Hand referred to the "refined notion" of our law, according to which some statutory time limitations (especially those in wrongful death statutes) extinguish the right, while others merely affect the remedy. On the basis of the expert testimony in the record, he thought that this refined notion was "wholly foreign" to the French system. In reality—but this was not brought out in the examination of the expert—the pertinent French notions are no less refined than ours; in fact, they are more refined.[3] While we distinguish between two kinds of statutory time limitations, the French recognize at least three different types:

(i) Regular prescription (see supra).

(ii) In some instances of short statutory limitation periods the rule prevails that the expiration of the time limit creates merely a presumption of payment, and that the presumption can be rebutted in certain ways.[4]

1. See French Civil Code Art. 1235, and the interesting discussion by Constantinoff, Two Creations of Praetorian Jurisprudence Under French Law, 24 Tulane L.Rev. 302, 307–10 (1950). See also 1 M. Ferid, Das französische Zivilrecht, Secs. 1F2 and 1F97–102 (1971). Art. 63 of the Swiss Code of Obligations, infra p. 711, announces a similar rule. In our law, the rule (although not the terminology) is essentially the same. See Restatement of the Law of Restitution, Sec. 61 and Illustr. 4 (1937).

2. See, e.g., G. Marty and P. Raynaud, Droit Civil, Vol. II 1, § 876 (1962).

3. Because of these (perhaps excessive) subtleties, the subject of statutory time limitations is known to be complex in French law; a number of pertinent points, including some of those briefly mentioned here, are embroiled in controversy.

4. Marty and Raynaud, supra n. 2, at § 877; Ferid, supra n. 1, at Secs. 1F103–105.

The latter must be developed through the testimony of an expert; but counsel cannot ask the right questions unless he knows precisely what the criterion is.[6]

Defendant's counsel apparently thought that the criterion is predicated on whether the French, in unspecified contexts, *label* their prescription as substantive or procedural.[7] Libellant's counsel, on the other hand, correctly anticipated the criterion which the appellate court ultimately used. Thus, the few questions he asked turned out to be the decisive ones.

(7) The sophisticated and perhaps overly refined criterion announced by the Second Circuit in the principal case was followed by some other courts,[8] but the Second Circuit itself abandoned it some time ago for maritime cases.[9] In Bournias v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir., 1955), the Court of Appeals for the Second Circuit modified the views expressed in the principal case and announced a new criterion, predicated on whether the foreign time limitation is *specifically* directed to the right in question.[10] Under this rule, it would be necessary to present expert testimony concerning the "specificity" of the foreign prescription statute. Along what lines would you question the expert in order to prove or disprove that art. 433 of the French Commercial Code is "specifically" directed to causes of action for damage to cargo shipped under an ocean bill of lading? [11]

6. In cases where the forum's choice-of-law rule is clear, counsel and experts are more likely to understand, and to focus on, the precise question of foreign law to be explored. In such cases, the experts' testimony is apt to be more helpful. For an example, see Diaz v. Southeastern Drilling Co. of Argentina, S.A., 324 F.Supp. 1 (N.D. Tex. 1969), aff'd 449 F.2d 258 (5th Cir. 1971).

7. There is some support for this position. See Goodwin v. Townsend, 197 F.2d 970, 972–3 (3d Cir., 1952); Matter of Tonkonogoff's Estate, 177 Misc. 1015, 32 N.Y.S.2d 661 (Surr.N.Y.Co. 1941; Foley, S.).

8. See, e.g., Ramsay v. The Boeing Co., 432 F.2d 592 (5th Cir. 1970). In this wrongful death case, the defendant invoked a Belgian statute imposing a five-year time limitation upon any claim arising from a tort which at the same time constitutes a crime. Faced with the question whether this Belgian time limitation is substantive or procedural, the court surveyed the controversial views expressed in the cases concerning the proper criterion to be applied, and then (purporting to determine the question under the choice-of-law rules of Mississippi) chose the Wood & Selick criterion as the soundest one. As the expert testimony showed that under Belgian law this particular statutory time limitation cannot be waived, and that it must be applied by the court *ex officio*, it was treated as substantive under the Wood & Selick test, with the result that it had to be applied in the case at bar.

Cf. Gillies v. Aeronaves de Mexico, 468 F.2d 281 (5th Cir. 1972) (Action for severance pay under Mexican law, including wages for the period from the day of discharge to the date of the judgment. *Held*, under Florida law, that where defendant is subject to continuously accumulating claims but plaintiff is required to bring his action within two months, the time limit is substantive because of its obvious connection with plaintiff's substantive claims, the further accumulation of which the time limit is designed to stop).

9. In diversity cases the question is governed by state law. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020 (1941). See also the cases cited in n. 8, supra.

10. "Was the limitation directed to the newly created liability so *specifically* as to warrant saying that it qualified the right?" Bournias v. Atlantic Maritime Co., Ltd., supra, at 156, quoting from Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 694 (1904).

To the same effect see Kalmich v. Bruno, 553 F.2d 549 (7th Cir. 1977), a case in which the court had to determine whether certain time limitations imposed by the law of Yugoslavia were substantive or procedural.

(11) The Bournias opinion (at 157), intimates that Wood & Selick would have been decided the same way under the new test,

Cuando un hecho u omisión ilícitos produzcan un daño moral, el responsable del mismo tendrá la obligación de repararlo mediante una indemnización en dinero, con independencia de que se haya causado daño material, tanto en responsabilidad contractual como extracontractual. Igual obligación de reparar el daño moral tendrá quien incurra en responsabilidad objetiva conforme al artículo 1913, así como el Estado y sus servidores públicos, conforme a los artículos 1927 y 1928, todos ellos del presente código.

La acción de reparación no es transmisible a terceros por pacto entre vivos y sólo pasa a los herederos de la víctima cuando ésta haya intentado la acción en vida. El monto de la indemnización lo determinará el juez tomando en cuenta los derechos lesionados, el grado de responsabilidad, la situación económica del responsable y la de la víctima, así como las demás circunstancias del caso. Cuando el daño moral haya afectado a la víctima en su decoro, honor, reputación o consideración, el juez ordenará, a petición de ésta y con cargo al responsable, la publicación de un extracto de la sentencia que refleje adecuadamente la naturaleza y alcance de la misma, a través de los medios informativos que considere convenientes. En los casos en que el daño derive de un acto que haya tenido difusión en los medios informativos, el juez ordenará que los mismos den publicidad al extracto de la sentencia, con la misma relevancia que hubiere tenido la difusión original.

Artículo 1916 Bis No estará obligado a la reparación del daño moral quien ejerza sus derechos de opinión, crítica, expresión e información, en los términos y con las limitaciones de los artículos 6 y 7 de la Constitución General de la República.

En todo caso, quien demande la reparación del daño moral por responsabilidad contractual o extracontractual deberá acreditar plenamente la ilicitud de la conducta del demandado y el daño que directamente le hubiere causado tal conducta.

Artículo 1917 Las personas que han causado en común un daño, son responsables solidariamente hacia la víctima por la reparación a que están obligadas de acuerdo con las disposiciones de este capítulo.

Artículo 1918 Las personas morales son responsables de los daños y perjuicios que causen sus representantes legales en el ejercicio de sus funciones.

Artículo 1919 Los que ejerzan la patria potestad tienen obligación de responder de los daños y perjuicios causados por los actos de los menores que estén bajo su poder y que habiten con ellos.

Artículo 1920 Cesa la responsabilidad a que se refiere el artículo anterior, cuando los menores ejecuten los actos que dan origen a ella, encontrándose bajo la vigilancia y autoridad de otras personas, como directores de colegios, de talleres, etc., pues entonces esas personas asumirán la responsabilidad de que se trata.

Artículo 1921 Lo dispuesto en los dos artículos anteriores es aplicable a los tutores, respecto de los incapacitados que tienen bajo su cuidado.

Artículo 1922 Ni los padres ni los tutores tienen obligación de responder de los daños y perjuicios que causen los incapacitados sujetos a su cuidado y vigilancia, si probaren que les ha sido imposible evitarlos. Esta imposibilidad no resulta de la mera circunstancia de haber sucedido el hecho fuera de su presencia, si aparece que ellos no han ejercido suficiente vigilancia sobre los incapacitados.

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