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John Cartwright, Contract Law: An Introduction to the English Contract Law for the Civil Lawyer

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1 – Purpose and contents.

In the Preface to this book, M. John Cartwright tells us that it was "designed to provide an introduction to the English law of contract for the lawyer who is trained in a civil law jurisdiction – whether as a student who is discovering English law in order to compare it with his or her own law, or as a practitioner who needs to understand how English lawyers view a contract and why they draft their contract as they do".

While admitting that "there is no shortage of excellent books on the English law of contract", Cartwright deems that they present "something of a challenge" for the civil lawyer who comes to English law for the first time, because they are founded "on the unwritten assumption that the reader already has a background in the English legal system, the sources of law and the method of legal reasoning in the common law". Of course, M. Cartwright points out, civil lawyers lack this background and their "view about the nature of law, legal sources and the detail of the law of contract" is different from that characteristic of common lawyers; therefore, in order to better achieve its aim and "enable the reader to find a way into the English law of contract", the first part of the book introduces the continental reader into the purported intricacies and oddities of the Common Law. The first chapter deals with the meaning of the Common Law and its relations with Equity and Civil Law, before exposing a short survey of the Common Law systems around the world. The second chapter, "Finding the Law", details the sources of law, of the judge as an interpreter and a law-maker, of English statutory drafting.

The exposition of the proper matter begins in the third chapter that opens the second part: in this chapter M. Cartwright explains the relations of the law of contract with the law of obligations, the

law of tort and the law of property. The author then illustrates how the approach of English law to contract is different from that of many other legal systems on the basis that these organise their law of contract not only as a general law but also within categories of "special" contracts. English law of contract has not developed such categories, but supports the idea that all contracts are governed by the same principles, except to the extent that legislation has intervened to override the common law (p. 53). This introductory chapter ends by dealing with some general features of the English law of contract, such as the absence of a general principle of good faith, the objective approach to the idea of contract with the related recourse to reasonableness and reliance, the limited role of the intention of the parties, and the relevance of contractual freedom.

The fourth chapter concerns the negotiations for a contract, stressing the lack of general duties between negotiating parties while taking care to illustrate the particular liabilities that can otherwise arise during the pre-contractual phase. The fifth chapter, on the formation of contracts, deals with the meaning of "agreement", the rules of offer and acceptance and the need for completeness and certainty of the contract's content.

The sixth chapter rests on three main pillars: the role of formalities in the law of contracts, the doctrine of consideration and the limited importance of promissory estoppel in English law, where it is not a source of obligations (while in other common law jurisdictions, mainly in the US, it can operate as a source in the absence of consideration: p. 137). The last section deals with the limited relevance of the contractual intention.

In the seventh chapter the reader finds a broad exposition of the law about the vitiating factors (mistake, misrepresentation and non-disclosure, duress, undue influence, unconscionability, capacity and illegality: themes dealt with in depth. in Cartwright's previous text on *Unequal Bargaining* (1991). The eighth chapter deals with the interpretation of contracts and the implication of terms, while the ninth exposes the indirect and the direct control over the fairness of the contract. The tenth chapter first illustrates the doctrine of privity of contract in order to introduce the exposition of the attempts of judges and practitioners to circumvent it and, afterwards, the reform by the Contracts (Rights of Third Parties) Act 1999. The last section of Chapter Ten deals with assignment and novation of contractual rights and duties. The eleventh chapter deals briefly with the doctrine of frustration while the twelfth – and last – chapter exposes broadly the remedies for breach of contract which – according to Cartwright – confirm the idea that "the common law generally views a contract as a commercial vehicle, to be entered into by parties bargaining at arm's length and protecting their own economic interests accordingly": actually, "the rules emphasize not literal performance but the economic equivalence of performance" (p. 271). This idea finds further expression in the last sentence at page 272: "the paradigm contract for the purpose of English law in the formulation of its remedies is the negotiated commercial contract".

2 – A short discussion of some specific points.

Some statements found in the book, in this reviewer's opinion, deserve critical appraisal. First of all, the comparison between the methods of legal reasoning in civil law countries as radically different from that of common law countries suggests that English law has preserved a pragmatic attitude to cases, avoiding the formalism of continental lawyers. This opinion, whatever its merits in past times, seems today a little outdated, if we must believe in what was observed by Hugh Collins (Collins 1999) about the influences of continental doctrines on the English law of contracts[1]:

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[1] At p. 194 Collins states that the "much admired" text by G. H. Treitel (Treitel 1999) presents the law with the same "formal logical rationality" as any German textbook.

According to Collins, the common law of contract received a succession of transplants from civil law systems through which "the formal rational mode of reasoning … spread like a fever throughout the process of contract adjudication". On the other hand, the portrait of continental legal methods as inherently formalist is a little outdated as well: many concurring factors, not least the Europeanisation of contract law[2], have induced continental lawyers to adopt more flexible methods in interpreting and applying the law.

The second question relates to the stern statement that "there is no general principle of good faith in the English law of contract" (p. 58): that is, there is no general duty to negotiate a contract in good faith nor any general duty to perform the contract in good faith. Cartwright substantiates his statement with the exposition of various reasons that can explain why English law rejects the very notion of duties of good faith in the formation and performance of contracts, stressing that in many circumstances English law will use more particular doctrines in order to respond to problems which continental systems usually solve according to the general principle of good faith (p. 59 ff.). I shall refrain from a discussion of the merits of his position, but must remark that, once again, "the picture has changed quite dramatically" as was said by Roger Brownsword (Brownsword 2007, p. 113). The transposition in English law of the EC Directives on Commercial Agents and on Unfair Terms in Consumer Contracts and a considerable body of writing on the topic (see the articles and the essays quoted by Brownsword 2007, p. 114 n. 12) have made the concept of good faith familiar to English lawyers. Surely, the adoption of a general doctrine of good faith is still controversial (see the discussion of the arguments for and against adopting a general principle of good faith in Brownsword 2007, p. 114 ff.) but the tendency towards that result looks already to be clearly established (Brownsword 2007 p. 135). The real question is, indeed, the function that good faith could serves, whether to facilitate the performance of the contract according to reasonable commercial standards in the trade or to adapt the content of the contract to the opinions of the legal system on what is reasonable[3].

The third question relates to the role of formalities in English law, as opposed to their role in civil law. Having defined the deed as a formal transaction sufficient to render enforceable a promise, even if not supported by consideration, that is, even if gratuitous, the author analyses the possibility that a civil lawyer may find no substantive difference between the common law system and the civil law systems, the latter of which "do not exclude gratuitous promises from contracts but subject gifts to special formalities" (p. 115). His answer is that English law restricts the concept of contract to transactions supported by consideration and that the law of the deed must be conceived as a stranger to the law of contract. Actually, the idea that the English deed and the formal donation of civil law systems serve the same purpose is not new: around the middle of the twentieth century it was proposed by an Italian lawyer, Gino Gorla, in a comparative course on civil and common law of contract (Gorla 1954)[4]. According to Gorla's research, both systems use a formal scheme in order to enforce gratuitous promises. Gorla continues to state that the English system uses the deed or a bargain supported by a nominal consideration, while continental systems use the notarized act[5]. This thesis is not unfamiliar to common lawyers: in a classical treatise one can read that "if a mere token payment is named, a transaction virtually gratuitous may well be invested with the insignia of contract" (Cheshire, Fyfoot and Furmston, 1986, p. 84 ff.; see also Treitel, 1999, p. 70). In a more recent and theoretical study, it is stated that "donative promises are enforceable if they (are) made under seal or for nominal consideration" (Smith 2004, p. 224; see Chen-Wishart 2005, p. 136 ff., as

[2] This point will be returned to in the last section of this review.
[3] Both these tendencies are manifest in Brownsword 2007, p. 142 and p. 258.
[4] Prof. Gorla, at that time, taught private law in the University of Pavia (Italy) and comparative law in the University of Alexandria (Egypt).
[5] Prof. Gorla commented on the greater simplicity of the common law system, which avoids the heavy and expensive formalities of civil law.

well). A comparative study of a well-known common lawyer finds strict similarities between the role of formalities in both systems, which is to induce the donor to reflect on the merits of the gift (Gordley 2006, p. 232 ff.) On this matter, Cartwright does not share the opinion of most of his academic colleagues.

The fourth question relates to the controls over the fairness of a contract. Cartwright, having illustrated the distinction between substantive and procedural unfairness, insists that English law, as a matter of principle, refrains from striking down a contract on the basis of substantive unfairness: that is, it may be relevant only as evidence of procedural unfairness (p. 196 ff.). The control on an unfair term implies an inquiry on whether the party, against whom it is to operate, can be taken to have given assent to it (p. 197), and its interpretation *contra proferentem* (p. 198 ff.) These are rules that do not appear to be very different to those contained in the Italian civil code and Unidroit's *Principles of International Commercial Contracts,* which both require that standard terms be known by the other party or that this party may have knowledge of them and deny the enforcement of unusual terms unless expressly accepted (Pontiroli 1997, 568 ff.). Based on these rules, the Common Law admits some limited direct controls over particular substantive content, such as terms that exclude liability of a party for his own personal fraud and penalty clauses (p. 201), but the real departure from the maxim that only procedural unfairness is relevant is found in statute law, in particular in the Unfair Contract Terms Act 1977 and in the Unfair Terms in Consumer Contract Regulations 1999[6]. Cartwright offers a short illustration of the basic provisions of both legal texts (p. 202 ff.), followed by a cursory comparison and brief explanation of the reform proposed by the English and Scottish Law Commissions. In summary, the author gives very little information on the application and interpretation of the rules governing standard contracts in England after the enactment of those legal texts. The – admittedly, largely political - problem of how to deal with different strength of the parties to a contract, which is central to the recent development of contract law in European countries, is almost completely ignored. The citizen, eager to investigate whether English law shares the discussions of continental systems and their legal solutions, cannot find an answer[7] .

3 – Some final considerations.

Cartwright's book has its merits and deserves some praise It is well written, in plain and easily understandable English and can give to the lay reader a simple but comprehensive outlook of English law of contract. The points that I have raised in this review, indeed, do not concern mistakes in the exposition of the law, but rather turn on wider questions of interpretation of the law or on conceptual construction.

Consequently, a continental student can employ the book as a simple but engaging source of knowledge of the English system, but what about the "practitioner who needs to understand how English lawyers view a contract and why they draft their contract as they do"? Before answering this question, one must try to guess why a civil lawyer might look for an exposition of the English law of contract and what kind of information he or she needs

The answer to this question is simple: a civil lawyer may be interested in learning the basic English law of contract if he or she needs to advise his or her clients on how to structure a cross-border business or on which law to choose to govern an international contract, or even – if he or she is a

[6] These instruments implement the EC Directive on Unfair Terms in Consumer Contracts, n. 93/13.
[7] A summary of these questions can be found in Brownsword (2007) p. 75 ff.; a more comprehensive treatment is offered by Willet 2007.

law scholar – in order to compare different systems. In at least the first and the second hypothesis[8], that need has arisen because of the globalisation of business, which involves the phenomenon of legal transplants (Watson, 1974), and - according to a recent discussion of the themes of globalisation and law - "no contemporary doctrinal legal textbook is untouched by globalisation" (Goldman 2007, p. 34).

The word 'globalisation' does not appear in Cartwright's book, where one can find only some brief notations on the influence of European law on English law (mainly, p. 27 ff.), but where the topics of the so-called Europeanization of contract law (on this matter, see Twigg-Flesner, 2008) are not dealt with. This leaves the impression that the English law of contract is only marginally affected by these phenomena and that it will preserve those specific characteristics that affect businessmen from other countries in order to have their contracts governed by a law more business-friendly[9]: Even if the "strong opposition" of the British Government (Baroness Ashton of Upholland, 2006) and the lack of resolution in the European Commission contribute to postpone the enactment of an European contract code, no one, however, can be certain that the tendency towards some form of legislative and doctrinal convergence of the systems of the member States of the EU will relent[10]. One must admit that Cartwright's book could not deal in depth with these phenomena, which are too specialized to take a large part of a basic text of English law of contract. Nevertheless, a warning that the picture given may be altered by transplants from other legal systems, not to mention a stricter harmonisation of contract law in Europe, would have been appropriate. Cartwright did not take this into account, and this is – in this reviewer's opinion - a serious limit to the achievement of his goals.

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[8] The comparitavist, of course, does notneed a simple introduction to the English law of contract.

[9] According to Prof. McKendrick (McKendrick 2006, p. 20), "certain features of English law are seen as 'extremely attractive' to the international business community, in particular, its commitment to the principles of freedom of contract, certainty and consistency in dispute resolution": this statement is based on the response issued by the Bar Council to the 2001 Commission Communication and on a business survey conducted in 2005, on whose results see Vogenauer and Weatherill (2006b), 121 ff.

[10] On the other hand, the diffusion and the adoption by the practitioners of the *Principles of European Contract Law* may open the way towards a creeping codification of contract law (Bronsword 2007, p. 181) and the subsequent introduction into the English law of principles and methods from civil law systems.

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