Book Reviews

Christian von Bar, *The Common European Law of Torts – Volume Two – Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences*, Oxford: Clarendon Press (2000) pp. 1–607 and i–cxx.

This book is the companion volume to von Bar's treatment of foundations, continental Europe's codifications, Scandinavia's liability laws, EU unification efforts, and the law of tort in the context of private, constitutional and criminal law, which appeared with OUP as Volume One in 1998. Both volumes are translated from German. They can be contrasted with Walter van Gerven's 'Cases, Materials and Text on National, Supranational and International Tort Law' by Hart Publishing (1998 and 2001), and the The Common Law of Europe Casebook Project, in which Christian von Bar is also participating. While the casebooks are designed for student and classroom use, von Bar's volumes are for the serious academic use, representing a monumental and exhaustive research effort concerning the characteristics and commonalities of European tort law. This book will be an invaluable resource for further research and analysis and is more than impressive in both scope and depth.

The author deals first with the somewhat confusing distinctions which appear in the various European systems regarding loss, damage, and damages. Clearly the most confused treatment of these elements can be found in English law. The analysis of this issue is especially interesting and enlightening. Other topics covered, in order, are the theory and characteristics of liability for personal misconduct, liability without misconduct, causation, and general defences. Among these, the treatment of liability without personal misconduct (known as strict liability in some systems) stands out in the way it deals with the theoretical underpinnings of each major system and the differences in approach and corresponding results.

One of the implied purposes of the book is to argue that there are enough similarities within each of the major tort systems to establish a unified system of tort law of some form throughout Europe (or at least within the European Union). However, it sometimes appears as though the basic differences in approach in the countries analysed by von Bar are so diametrically opposed to each other that to think that they may be harmonised within the European Union is not always plausible. One could consider, for example, the same basic factual situation that arise in two distinct jurisdictions, one in England and the other in France, and come to completely different results. This illustrates the almost insurmountable differences which exist. To

the present reviewer it seemed, after having read von Bar, that to achieve any serious harmonization in the EU would require nothing less than throwing out the entire common law approach of pigeon-hole type tort structure and rewriting either the German or French tort code. While, from a theoretical standpoint, such a change may be desirable in the EU, it seems unlikely that England will be willing to give up its various forms of tort, or Germany to opt for a less restrictive and less theoretical approach such as found in the French Code Civil. Hence, to promote the idea of a common law of tort in Europe by emphasising the 'similarities' in the national systems seemed somewhat akin to trying to pound a square peg into a round hole. Naturally, these problems do not in any way diminish the achievement of von Bar.

Stylistically, the book is very well written/translated, both instructive and lucid. Sometimes it is somewhat heavy reading, with many pages consisting of equal parts text and footnotes. Occasionally, the author uses more or less lengthy phrases in French and other languages, which may be unintelligible to some readers and should have been supplemented by English translations in footnotes. Nevertheless, the rich bibliography and comprehensive tables of translated national legislation are very powerful arguments in and of themselves for acquiring this book.

Overall, it is an achievement that can only be commended and highly recommended to its potential readers.

William Burns

Thomas M.J. Möllers, *Die Rolle des Rechts im Rahmen der europäischen Integration*, Tübingen: Mohr Siebeck (1999), pp. 1–119 and i–viii.

Ulrich Beck once said that unless the national politics of European States become part of the transnational system of European integration, they would continue to react to the threats of globalisation, instead of pro-actively shaping globalisation for the opportunities it holds. This is the point of departure of Thomas Möllers' essay. He sees common tasks of the European States, such as overcoming the lipothymia of the nation state at the doorstep to the 21st century, as well as common goals, such as the desire to play a more constructive role in the world alongside the USA. Regional integration in the form of the European Union potentially provides the means. However, Möllers also diagnoses a fundamental weakness in this integration process: while it is built on law, the quality of its laws is often left wanting. One reason for this weakness, according to the author, is the lack of a common European methodology of law, which was as yet simply not developed, in spite of many common legal traditions of the EU Member States.

On the basis of this analysis, the second half of the book is dedicated to providing some stepping stones for a future common European methodology of law. Möllers focuses on methodology at the EU level, on methodology at the national level, when

EU law is implemented, and finally on language as a crucial element in the common methodology.

Even more than the first part, the second makes for interesting reading. It contains a multitude of proposals and ideas, some developed in greater detail than others, others just hinted at. While many will remain theoretical or utopian, given the murky procedures in Brussels, Luxembourg and Strasbourg – remember the old proverb that those who like sausages and laws should not look too closely at how they are made – there are more than enough useful and realistic ideas in the text to make follow-up studies towards a more developed methodology and guidelines for European best practices worthwhile.

To give but a few examples: Möllers notes that some of the Member States are still not seriously interested in European directives prior to their actual adoption by Council and Parliament. He cites the French example, where impact studies have to be made for each piece of legislation discussed at the European level in order to achieve a good understanding of what it will mean for France, which legislative instruments and administrative practices may need to be changed and whether there could be any specific problem in the practical implementation. Obviously, this would be a very advisable approach for all Member States. Möllers also promotes the idea of a European Law Institute – which could be located at the European University Institute in Florence – with the task of preparing legislative proposals based on scientific analysis towards optimal solutions of given problems. These proposals should then influence and ideally replace the horse-trading and formula compromises that so far all too often riddle the legislative process in Brussels. The European Court of Justice is encouraged to provide more extensive reasoning and explanations for those of its decisions that could meet with acceptance problems in certain Member States.

On the national level, Möllers would like to see less formalistic application of EU law and more concern for the *telos*, the goals to be achieved. Thus, the transposition of directives by way of an ever-increasing number of special laws, without serious analysis of the need to make changes in other parts of the existing legal order must come to an end. For the national courts, more emphasis on the *telos* of European law can mean in specific cases applying progressive interpretations of national law. However, Möllers points out rightly that this kind of legal activism is by no means *contra legem*. Under the presumption that the national legislature intended to transpose a directive properly, the judge is actually fulfilling this intention by going beyond the wording of national law in order to achieve conformity with the prescriptions of the directive. Naturally, the courts have to disclose how and why they arrived at a certain result and how it fits into the existing body of case-law, even if continental European law does not recognize a binding rule of *stare decisis*.

Finally, with respect to language, Möllers accepts the position of Grimm, Kirchhoff, and others, according to whom there will not be a European *demos*, as long as there are a multitude of languages spoken in the EU. However, instead of postponing further integration and leaning back to wait for the *demos* to grow, Möllers makes practical suggestions for overcoming the language barriers in law.

While discourse in natural sciences has largely shifted to English, the national languages are more than just a means of communication in law. Consequently, the solution cannot be a replacement of the national languages with a new *lingua franca*. Rather, the solution must be a complementary second language. This second language should be English and it should be promoted beyond the level of high school small talk that is commonly found in Germany, France, Italy and other Member States. Law schools should follow the models found in Sweden or the Netherlands and introduce mandatory courses taught in English in subjects such as comparative law, public international law, or European Union law. But the onus is not only on the educational institutions. In order to have an impact abroad, to be noted and considered, the decisions of the highest courts of each Member State could be systematically translated and published in English as well. Finally, equally important is that those national laws that are adopted in order to transpose European law should be published both in the national language and in English.

Möllers has written a short book that reads well and quickly. It contains many proposals and ideas that deserve broader attention and discussion. Anyone who can read it in the original should do so. For all other readers, Möllers has written a somewhat more comprehensive article "The Role of Law in European Integration" in *AJCL* Vol. XLVIII (fall 2000), No. 4, pp. 679–712; the three-page English language summary at the end of the book can only serve as an *amuse bouche*.

Frank Emmert

Helen Staples, *The Legal Status of Third Country Nationals Resident in the European Union*, The Hague et al.: Kluwer Law International (1999), pp. 1–418 and i–xviii

This book was written as the author's doctoral dissertation at the University of Utrecht. It discusses the lack of a common immigration policy in the EU with respect to third-country nationals. While there is Community law on the immigration of nationals of other Member States, the current immigration law for third-country nationals is still largely contained in the national law of individual Member States, with a patchwork of provisions in association agreements to which the EC is also a signatory. The European Court of Justice has recognised the direct applicability of provisions of the association agreements under certain conditions and these provisions may prevail over conflicting national law. However, many issues remain unresolved, even for those groups of persons covered by an association agreement. Aside from nationals of another Member State, nationals of a state with whom there is an association agreement that includes provisions for the free movement of persons, and nationals of states that do not have any such benefits under EC law, there is a fourth group of persons, namely family members of a Member State national who is employed in another Member State. The latter group enjoys a range

of 'derived rights' and are rather well protected under EC law, regardless of their nationality. The book concentrates on the legal status of third-country nationals who are already lawfully residing in a Member State. This is compared to the status of nationals of a Member State residing in another Member State.

In part I, Staples explains the importance of migration as part of the objective of the EC to establish a free internal market. However, the free movement of persons was initially reserved for the nationals of Member States only and the extension to family members with third-country nationalities in the form of 'derived rights' was not originally intended. The European Court developed these rights on the basis of basic principles, in particular non-discrimination of migrant workers with respect to all kinds of 'social advantages' (see Article 7 of Regulation 1612/68) and essential considerations of human rights and protection of the family.

Staples points out how a number of Member States has persistently resisted attempts by the EC to adopt comprehensive rules for the immigration of third-country nationals. Only after the entry into force of the Maastricht Treaty was some progress possible and it was not until the Treaty of Amsterdam that the EC properly acquired the necessary competencies. Finally, in 1999, those parts of the former third pillar of the EU that related to immigration, visas, asylum, and other elements of the free movement of persons, have been integrated, together with the Schengen acquis, into the first pillar and have become subject to the supranational procedures applicable in EC law.

In the second part of her work, Staples focuses on the right to free movement of nationals of the Member States to pursue economic activities in other Member States. With respect to third-country nationals, the author discusses their 'derived rights', as well as the provisions under the association agreements, and the common visa policies. Finally, there is a discussion of the institutional and decision-making procedures in the EC in the area of immigration policy. The final direction of this policy is still unclear, as the Council has five years from the entry into force of the Treaty of Amsterdam to adopt the necessary implementing legislation.

With respect to 'derived rights', the author points out how the Court justified its expansive practice by arguing that Member State nationals would not make use of their free movement rights if their family members were discriminated on the basis of their third-country nationality and that this would jeopardise the purpose and objective of the common market.

Another system that provides ancillary benefits for third-country nationals who are lawfully residing or travelling in a Member State is the Schengen agreement which has as its goal dismantling border controls between the participating Member States. While this has made it easier to travel within the EU, not all rules and restrictions for third-country nationals have been removed. Thus, it is now mandatory throughout the Schengen area to have adequate health insurance and – where requested – third-country nationals may have to present proof of sufficient funds for their stay in the EU.

In the third part, Staples discusses the non-discrimination rules applicable to nationals of the Member States, as well as the rules contained in the various association agreements and those created under intergovernmental co-operation. This also extends

to the limitations on the principle of free movement that can be imposed by the Member States on grounds of public policy, public security, and public health. In addition, there is a discussion of the elements of European citizenship, such as political participation rights, and the extension of diplomatic protection. A short section deals with the problems related to the mutual recognition of diplomas, one of the stumbling blocks in the effective exercise of the free movement rights.

The provisions in the association agreements with Turkey, the candidate countries in Central and Eastern Europe (Europe Agreements), and the Maghreb countries are analysed in some detail. Subsequently, the various conventions adopted in the context of the Schengen co-operation are examined. Finally, there is an equally worthwhile section on relevant provisions in the European Convention on Human Rights, such as the right to family life, protection of privacy, data protection, and non-discrimination in the scope of application of other rights, all of which should be guaranteed to nationals of third countries when residing or travelling in the EU.

The fourth part provides a projection for the future. The author argues that the integration of the Schengen acquis and the decision-making procedures on immigration, asylum and visa policies into the first pillar cannot solve the more fundamental problems related to the lack of a common immigration policy in the EU. For example, there should be common rules on the acquisition of citizenship of the Member States.

Overall, the book is largely descriptive. The thesis statement, the purpose of the dissertation as such, and the innovative contribution to science are not evident. Even if there are interesting ideas, in particular in the final part describing the future of immigration policy, the book loses value to academic readers. Furthermore, while the book addresses all relevant topics related to the legal status of third country nationals in the EU, the organisation of the chapters and the structure of the book are not very clear. In a way, the author discusses the same issues throughout the book, that is, the discussion is repetitious. This, of course, reduces the value of the book to practitioners who are looking for a quick reference guide or a handbook on the practical problems in this important area of law. This begs the question, therefore, from the perspective of the publisher: what is the target group, who should buy and read this book? The answer is not very clear.

Dita Sole

Sylvester C. W. Eijffinger and Jakob de Haan, *European Monetary and Fiscal Policy*, Oxford et al.: Oxford University Press (2000), pp. 1-199 and i-xiv

This book concentrates on European economic integration. The work of more than forty years is finally coming to an end – the European Union has got its own single currency – the Euro. However, the fear is that the Monetary Union will bring not just benefits but also new conflicts.

The first chapter of the book focuses on the early stages of developing the Monetary Union, its advantages and disadvantages, and on the practical implications for moving towards a single currency. While a single currency was never a goal when the Organisation for European Economic Co-operation was first formed in 1948, 12 of the 15 EU Member States have entered into the third, and final, stage of the development of Monetary Union.

In Chapters 2 and 3 the authors consider the European System of Central Banks (ESCB), the European Central Bank (ECB) and its monetary policy options. The main hope is that by following the monetary policy of the German *Bundesbank,* the ECB will be able to maintain its independence and the effectiveness of its activities in the financial infrastructure of the Community. The EU has placed great emphasis on the ECB's independence, as it is considered to be the driving force of maintaining price stability. The authors also discuss the necessity for the ECB to be accountable to the governments and parliaments. The question now arises, whether the two concepts – independence and accountability – can be employed together. The authors believe that transparency of the ECB's activities as a feature of accountability could definitely benefit the common market.

Chapter 3 provides an analysis of the two monetary policies that are available to the ECB – monetary and inflation targeting. However, according to the authors, since inflation cannot be controlled to a great extent, monetary targeting should be given priority. The reality is that the ECB has chosen to balance between the two options. The authors argue that the main reason behind this position is the lack of information about the demand for the Euro. The authors also discuss the monetary policy instruments available to the ECB. The Chapter concludes with a discussion on the banking supervision that is still left in the hands of national authorities, instead of being taken over by the ECB.

In Chapters 4 and 5, the authors look at national and European fiscal policies. Germany has strongly suggested developing a fiscal policy that would be specific to the European Monetary Union. The result is a Stability and Growth Pact, which sets 3 per cent annual deficit as a reference value. It is, nevertheless, questionable whether the Members of the EMU will always strictly follow this guideline, as there are no real enforcement mechanisms at present. The authors end Chapter 4 with a discussion of the need for tax harmonisation, because different taxes will decrease the effectiveness of tax collection in Member States with high taxes, the investments may flow to States with lower tax rates, undertakings could be established in low-tax States, and so on. The first part of Chapter 5 explains revenues and expenditures of the EU, followed by a short description of Agenda 2000. The main focus here is that the multitude of applicant countries seeking to join the EU have made it necessary to change the budgetary structure of the EU. In the last part of this Chapter, the authors analyse in detail whether a European Stabilisation Policy to offset possible problems brought by the Euro is necessary.

Chapter 6 focuses on financial integration, by first discussing covered and uncovered nominal interest parities as possible alternatives for integrating financial markets, and, second, the monetary transmission mechanisms. In addition, Eijffinger

and de Haan consider different views of other authors regarding the future of the financial infrastructure of the EU market. The argument presented by other authors is that legal systems largely determine how the financial intermediaries would act. The effect will be that the ECB's policies would have an impact on each Member State of the EMU in different ways. In addition, the authors discuss other financial issues, such as pension funds that require restructuring due to the large increase in the number of people aged 65 and over. The authors also take the equity market into account, particularly the stock market trends in Europe, and portfolio management after introducing the Euro into circulation in 2002. The authors conclude Chapter 6 by analysing mergers and acquisitions in the banking sector.

The last chapter of the book focuses on the external effects of the EMU. The authors' argument is that the Euro area plays an important role in the world market due to its large size. The question, whether the Euro will be able to gain the same credibility as enjoyed by the USD, is discussed from two perspectives – one enthusiastic and the other sceptical. Nevertheless, it will not be possible to observe this until after the Euro is put into circulation.

On the one hand, this book provides its readers with a comprehensive financial and economic analysis of European monetary and fiscal policies. It gives clear and understandable insights into the possible problems and benefits of the EMU and the process to introduce the Euro. The book is suitable for researchers in both economic and legal fields, as it analyses advanced issues of economic consequences after the single currency comes into circulation. On the other hand, the major disadvantage to this book is that it is extremely theoretical and based on analysis and predictions prior to the introduction of the Euro. Whether it will be worth reading or buying after the year 2002 remains questionable.

Dita Sole

Richard Plender (ed.), *European Courts Procedure*, London: Sweet & Maxwell (2001), loose-leaf

It took quite some time for the new edition of the 'European Courts Procedure' to reach the store shelves. However, it has been worth the wait, because this new edition of the book contains important substantive amendments to certain chapters and incorporates the changes in the law, as well as the latest developments in case-law. Moreover, the format has been changed to loose-leaf from the bound format of the past.

The new loose-leaf format obviously allows the reader to keep the book up to date with new developments and new legislation in the area of law concerned. This will hopefully also encourage the editor and the publisher to extend the scope of the book in an important direction. The new edition focuses again only on the EC courts, namely, the European Court of Justice (ECJ), and the Court of First Instance (CFI), with some remarks on the Court of the European Free Trade Association (EFTA). Only the introduction, which contains an overview of the procedural rules of the

three courts, also contains a comparative reference to the Statutes of the International Court of Justice, one of the sources of inspiration for the Statutes of the ECJ. However, it is not evident why the European Court of Human Rights is omitted completely, as it would have completed the list of European courts, and is much more important for most practitioners than the EFTA Court.

The book is divided into eight parts, or 39 chapters. The first part introduces the origins of the statutes and rules of procedure. Part II focuses on the organisation of the courts, including the rights and obligations of the parties and their attorneys. Part III takes the reader step-by-step through the procedure for the ECJ, including issues of time limits and service, as well as of costs and legal aid. Part IV deals specifically with certain special forms of procedure in the ECJ, such as interim relief procedures, third-party intervention, and the preliminary reference procedure. Part V is dedicated to the Court of First Instance and also addresses questions related to appeals against judgements of the CFI. The one part where the book is unique, and which is probably of the greatest interest to practitioners, is a section with sample pleadings at the end of the substantive parts.

In general, the reader will find good analysis of possible actions to be taken under the procedures of the three courts. However, the price of 245 GBP is rather high given the fact that the procedural issues covered in Parts IV and V of the new edition have already been introduced in the 'Procedural Law of the European Union' (Sweet & Maxwell, London, 1999) by K. Lenaerts and D. Arts. Moreover, the reader will have some difficulty with Part IV of Plender's new edition due to a number of publishing mistakes. For example, the introduction to chapter 24 is missing and chapter 31 is especially misleading as Article 239 instead of Article 234 EC is cited as the one providing for the preliminary reference procedure. The reader will also find numerous references to appendices in the table of contents and in the text, which should have been included at the end of the book. However, out of four appendices mentioned, only Appendix 2 on the rules of procedures of the ECJ is included, and even that has many articles missing. Appendix 3 has a few pages printed in the section of Appendix 2, and thus makes no sense at all. Therefore, the publisher will have to provide the readers with an option of receiving a completely revised appendices section that is essentially missing in this first loose-leaf edition.

In conclusion, the new edition of the 'European Courts Procedures' by Richard Plender goes well beyond what was covered in the first edition. The general quality of the book is very good and should meet the expectations of the majority of its readers. However, there is certainly room for improvement to this latest edition as it still does not include the European Court of Human Rights and makes only a few references to cases from the ICJ and the national courts. The law is referenced up to and including 2000. Readers will be offered regular updates on changes in the law, interesting new judgements, and organisational points such as the composition of the chambers in the ECJ and CFI. Of greater and more immediate importance, however, is correcting a fairly large number of mistakes, lest readers wonder whether they are overpaying for their new edition.

Arturas Mickus