University of Groningen

Twenty-eight Jurisdictions and Twelve Types of Morally Dubious Contracts

Colombi Ciacchi, Aurelia

Published in:
Immoral Contracts in Europe

DOI:
10.1017/9781839701153.018

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Colombi Ciacchi, A. (2020). Twenty-eight Jurisdictions and Twelve Types of Morally Dubious Contracts: To What Extent is There a Common Core? In A. Colombi Ciacchi, C. Mak, & Z. Mansoor (Eds.), *Immoral Contracts in Europe* (pp. 717-731). (The Common Core of European Private Law; Vol. 2). Intersentia. https://doi.org/10.1017/9781839701153.018

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license. More information can be found on the University of Groningen website: https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment.

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 03-10-2023

28 JURISDICTIONS AND 12 TYPES OF MORALLY DUBIOUS CONTRACTS

To What Extent is there a Common Core?

Aurelia Colombi Ciacchi

1. INTRODUCTION: TWO LAYERS OF CONVERGENCE

This chapter draws a number of conclusions from the case studies and comparative remarks contained in Part II. Here, the subject matter of the comparative analysis changes. While the comparative remarks in Part II analysed and compared the 28 national answers to each case of the questionnaire, the present chapter analyses the 12 comparative remarks and compares them with each other. It aims at answering the central question of to what extent there is a common core intended as substantial convergences between the 28 jurisdictions as regards the operative rules found in each of the 12 case studies.

The degree of convergence between the national answers to the questionnaire's questions varies a lot from case to case. In some cases, the national answers only converge for what concerns the (in)validity or (un)enforceability of the contractual agreement, but not for what concerns the remedies ultimately available to the parties. Vice versa, in other cases, the national answers only converge to a certain extent for what concerns the remedies ultimately available, while no consensus can be found for what concerns the validity of the contractual agreement: half of the countries would consider the agreement valid and enforceable; the other half would deem it invalid and/or unenforceable. Furthermore, in some other cases, a convergence only concerns the main scenario, while the variation is characterised by great divergence.

This apparent inconsistency stems from the very nature of the operative rules that characterise the Common Core methodology.[1] In this volume, the

[1] On the distinction between operative rules, descriptive formants, and meta-legal formants in the methodology of the Common Core project, see M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' (1997/1998) 3 *Columbia Journal of European Law* 339, 356.

operative rules are determined by two factors: the validity or enforceability of the contractual agreement on the one hand, and the availability of the specific remedies asked for in the questionnaire's questions, on the other. The really decisive factor is the availability of the remedies, which could be not only contractual but also restitutionary, under the specific circumstances of the case. The restitutionary or unjust enrichment dimension often determines a practical convergence of the operative rules in two countries whose legal and meta-legal formants deeply diverge for what concerns the compatibility of a certain agreement with legislative provisions, public policy or good morals.

Therefore, two layers of convergence (or divergence) should be assessed in the present chapter: the first layer deals with the validity and/or enforceability of the contractual agreement, while the second layer addresses the actual availability of the remedy mentioned in the questionnaire's question.

For what concerns the invalidity or unenforceability of the contractual agreement, the existence of a convergence for the purposes of this chapter will only be assessed from the viewpoint of the result, that is whether or not the agreement will be enforceable. The convergence will not be assessed from the viewpoint of the specific legal formants justifying this result. Very often, a contractual agreement considered immoral in a certain country would be unenforceable in other countries as well, but on other formal legal grounds, such as contrariety to law or public policy. And very often, a contractual agreement considered invalid in a certain country would be unenforceable in other countries as well, albeit from a formal viewpoint it would still be regarded as a valid agreement.

There is thus a clear difference in perspective between the comparative analyses in Part I, Part II and Part III of this volume. Part I searched for a common core of convergence from the viewpoint of the historically grown legal formants, with particular regard to both the good morals clauses contained in the civil codes, and immorality as a ground of unenforceability of contracts in the common law of England and Scotland. The comparative remarks in Part II assessed the convergences and divergences of the national answers to each case from the viewpoint of the descriptive and meta-legal formants, and the operative rules. The comparative remarks classified the groups of countries on the basis of two criteria: the (in)validity of the contract, and the ultimate operative rules. Thereby a distinction was often made between the countries in which an agreement would be invalid, and the countries in which the same agreement would be valid but unenforceable.

On the contrary, Part III abandons every distinction based on formal legal categories, including the distinction between validity and enforceability. The

present chapter only searches for a common core of convergence for what concerns the two above-mentioned layers: the enforceability of the agreement, and the availability of the remedies mentioned in the questionnaire's question.

Among the 12 case studies analysed in Part II, the greatest convergence can be found in Case 10. Vice versa, the arguably greatest divergence concerns Case 4. The remaining 10 cases may be placed more or less close to one of these two extremes. The following sections will start from the cases of greatest convergence and end with the cases of greatest divergence.

2. VERY STRONG CONVERGENCE AT BOTH LAYERS: PROTECTING MR BROKE (CASE 10)

From the national answers to Case 10, a common core clearly emerges: a term of a loan contract which limits the debtor's freedom to leave or change his job, borrow money, dispose of his property or change his address, until the loan is fully repaid, would most probably be unacceptable in 27 jurisdictions. Whether or not fundamental rights play a role in this case, and whether the ground of invalidity is illegality, immorality or contrariety to public policy, it does not matter: the result remains the same. Whether or not the invalidity of such a condition makes the whole contract invalid does not matter either: the ultimate operative rules converge anyway in the sense that the debtor would be able to challenge the creditor's claim, at least partially.

Only one country remains outside of this common core: Lithuania. Here, such a condition of a loan contract would in principle be enforceable. Only in very exceptional cases could the debtor challenge an excessively disproportionate contractual restriction of the above-mentioned freedoms.

In Lithuania, the proportionality seems to be defined in purely economic terms: the less creditworthy the debtor is, the higher the likelihood that such restrictions will be considered proportionate and thus fully enforceable.

In Sweden, the contract would probably not be invalid but could be adjusted by the court under Section 36 of the Contracts Act. A court could adjust an excessively disproportionate, i.e. unfair, contract. Excessive disproportionality could arise either from a change in the economic and social conditions after the conclusion of the contract, so that the contractual imbalances in the agreement becomes very burdensome for one party, or from situations of extremely unequal bargaining power between the parties. Agreements whereby a party restricts itself not to engage in certain business or take certain work would probably be adjusted by a Swedish court.

3. STRONG CONVERGENCE AT THE FIRST LAYER, VERY STRONG CONVERGENCE AT THE SECOND: SUCCESSION CONTRACTS RESTRICTING FREEDOM OF MARRIAGE (CASE 9)

A typical common core – intended as convergence of the operative rules, despite considerable divergences in the legal formants – can be observed in the case of a succession contract indirectly restricting the freedom of marriage. In the past, within noble families, wills or succession contracts according to which the family property shall always pass to the eldest male successor who is not "unequally married or born of an unequal marriage" were normal. Such succession contracts still exist in the 21st century, as evidenced by the main source of inspiration for Case 9: the *Hohenzollern* case adjudicated by the German Federal Constitutional Court in 2004.[2]

In 27 out of 28 jurisdictions, (at least one of) the brothers would be able to challenge their exclusion from the succession. However, this very strong convergence only concerns the operative rules strictly intended, i.e. the ultimate answers to the questionnaire's question. For what concerns the enforceability and the remedial layer, the picture is much more varied.

A first distinction must be made between the legal systems that allow for succession contracts, and the ones that do not. In the majority of the 28 jurisdictions considered, succession contracts are invalid per se. Then, in the majority of the jurisdictions where succession contracts are not invalid per se, this specific contract would not be binding on the brothers, either because of the principle of privity of contract, or because such an agreement does not fulfil the requirements for a valid will. Ultimately, only three legal systems seem to deem this succession contract as enforceable, at least partially: Estonia, Germany and Scotland.

In Germany and Scotland, only the contract as such would be valid, not the discriminatory condition. The condition would be unenforceable (at least partially) on ground of contrariety with fundamental rights, public policy and/or morality. Both in Germany and in Scotland, only the eldest brother would be able to challenge the exclusion from the succession. The courts would interpret the contract as a valid will, as if the discriminatory condition were not existent, and would designate the eldest brother as heir. In Germany, the other brothers would only be entitled to claim their compulsory statutory portion of the inheritance from the heir. In Scotland, whilst the other brothers have title to sue, they might find it difficult to sue because they were not due to benefit financially from proper performance of the contract. They could only benefit if the contract

[2] BVerfG 22.03.2004, 1 BvR 2248/01 <http://www.bverfg.de/e/rk20040322_1bvr224801.html>. The second source of inspiration for Case 9 was an English case from the 19th century: *Egerton v. Brownlow* [1853] 4 HLC 1.

as a whole would be found void, allowing them to benefit through operation of the general law of succession (rather than through this succession contract).

Only in Estonia does such a discriminatory condition seem to be fully enforceable. However, like in the vast majority of European countries, also in Estonia the statutory right to a compulsory portion of the inheritance cannot be restricted by private autonomy. Thus in Estonia, although the brothers cannot challenge their exclusion from the succession of the family property, all of them have the right to claim their compulsory portion from the successor. Therefore, for what concerns the actual remedies, intended as the share of inheritance that the excluded brothers would be able to get in the end, one might argue that in Estonia most of the brothers would be better off than in Scotland.

Overall, for what concerns both layers of convergence (enforceability and remedies), a clear common core emerges: a clause (either of a succession contract, or of a testament) that conditions the inheritance to a marriage with a person of equal rank would be unenforceable in the vast majority of legal systems. In almost all jurisdictions, the excluded brothers would be entitled at least to their compulsory statutory portion of inheritance.

4. STRONG CONVERGENCE AT BOTH LAYERS: LAWFULNESS OF TELEPHONE SEX-RELATED CONTRACTS (CASE 3)

Another evident common core consists in the finding that in 24 jurisdictions, telephone sex-related contracts are considered fully acceptable and enforceable. The majority of countries seem to strongly differentiate, for what concerns immorality and/or illegality, between the provision of sex services with and without physical contact: because of the absence of physical contact, contracts related to telephone sex are mostly deemed valid.

Four legal systems remain outside of this common core: Malta, Romania, Scotland and – surprisingly – Belgium. In Belgium and Romania, the provision of telephone sex services contravenes statutory rules. The marketing of telephone sex cards would probably also be illegal in Malta, as far as it can be considered a display of pornographic material in a public place. In Scotland, there is no legislation or case law on this specific matter, but the courts would probably deem such contracts immoral and thus unenforceable.

The convergence concerning the operative rules in Case 3 is less great than the one related to the legality of the provision of telephone sex services as such. Italy adds to the divergence in the operative rules, although in this country the provision of telephone sex services as such would be lawful. Two reasons determine the divergent operative rules in Italy: firstly, the requirements for the remedy in question – set-off – would not be met in the specific case, and secondly,

the contract would be illegal on a completely different ground: contrariety to public policy of sales for the purpose of guarantee.

5. STRONG CONVERGENCE AT BOTH LAYERS: LOANS WITH EXCEPTIONALLY HIGH INTEREST RATES (CASE 11)

A common core clearly emerges also in the case of a loan contract according to which an individual who borrows €5,000 would have to repay to the lender €12,500 in total. In 24 jurisdictions, such a high interest rate would be unenforceable, and the borrower would be able to challenge the lender's claim. Like in the cases discussed in the previous sections of this chapter, also in this case a strong convergence of the ultimate operative rules contrasts with a wide variety of legal solutions. In 10 countries (Bulgaria, Croatia, Denmark, Finland, France, Lithuania, Malta, Poland, Sweden and The Netherlands), the agreement as such would remain valid and the borrower could only apply to the court for a reduction of the interest rate. In 12 other countries (Austria, Belgium, the Czech Republic, Estonia, Germany, Greece, Italy, Latvia, Spain, Portugal, Slovenia and Slovakia), the agreement would be probably totally or partially invalid on ground of usury, and the borrower would only have to pay back the €5,000. In Portugal, the borrower may choose between voiding the contract or requiring a modification. Should the borrower choose the first option, the lender would be entitled to request that the transaction be modified instead. In Romania, the borrower would be entitled to a reduction of the interest rate, a rescheduling of the rates, or could even be completely exonerated from liability. In Scotland, if the lender sued the borrower, the latter could counterclaim and the court would have a wide range of remedies at its disposal, including requiring the bank to repay sums of money to the borrower, reducing the sum payable by her, or altering the terms of the agreement.

Only in four jurisdictions – Cyprus, England, Hungary and Ireland – does the borrower not seem to be able to successfully challenge the claim. In these jurisdictions, the interest rate would most probably not be considered unreasonably high or unfair.

6. STRONG CONVERGENCE AT THE FIRST LAYER, MORE LIMITED CONVERGENCE AT THE SECOND: SEX WORK CONTRACTS (CASE 1)

A trend towards the progressive social and legal recognition of the rights of sex workers is clearly visible in most European countries. However, from a private law viewpoint, the traditional common core consisting in the invalidity of the

contract between a sex worker and her client still remains. Such a contract would be unenforceable in 23 jurisdictions: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England, Estonia, France, Finland, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Romania, Scotland, Slovakia, Slovenia, Spain and Sweden. In these legal systems, sex work activities are still deemed contrary to good morals, public policy and/or statutory provisions. However, not in all these countries is a sex worker's claim in court for payment against her client likely to fail. The distinction between the first and second layer of convergence becomes evident: in France, Slovenia and Spain, the sex worker could possibly obtain payment for the services she provided under the rules on unjustified enrichment. In Spain, the scope of application of this restitutionary remedy is much more limited than in France and Slovenia, since it is only available in cases of dependency, abuse or special vulnerability.

Five jurisdictions seem to have courageously distanced themselves from the above-mentioned traditional common core: Austria, Germany, Hungary, Latvia and The Netherlands. In these countries, the contractual obligation of the client to pay the agreed price for the sexual services would most probably be valid and enforceable.

Overall, the second layer of convergence is more limited than the first one: in 20 legal systems, the sex worker would probably not have any claim for payment against her client.

7. CONSIDERABLE CONVERGENCE AT BOTH LAYERS: LEASE OF A CAR TO A SEX WORKER (CASE 2)

A common core also exists in relation to the enforceability of (and remedies under) a contract of lease of a limousine to a sex worker, both in the main scenario and in the variation. If the lessor knows or should have known that the car is used for sex work purposes, the contract would probably be unenforceable in 20 jurisdictions: Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, England, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Romania, Scotland and Sweden. In France and the Czech Republic, the contract would be probably unenforceable anyway, independent of the lessor's knowledge. On the contrary, in the remaining 18 countries, if the lessor lacks such knowledge, the contract would be enforceable.

Eight legal systems remain outside of this common core: Austria, Germany, Portugal, Slovakia, Slovenia, Spain, Sweden and The Netherlands. In these jurisdictions, the threshold of unenforceability of the contract is much higher: the contract would only be unenforceable if the lessor intended to profit from the lessee's sex work activity (which in most jurisdictions constitutes a crime).

The intent to profit from the lessee's sex work activity characterises the variation, where a much greater common core emerges. If after confirming that the vehicle was being used for this purpose, the lessor raises the monthly rent from €2,000 to €3,000, the latter agreement would most probably be unenforceable – at least partially – in 26 jurisdictions. Such a modified agreement seems to be enforceable only in Germany and The Netherlands. In Austria and Slovakia, some increase of the monthly rent under the given circumstances seems to be acceptable, but an increase from €2,000 to €3,000 would be probably deemed excessive. Such a modification of the agreement would be unenforceable, but the contract would remain enforceable under the original conditions. In the remaining 24 legal systems, the contract would be unenforceable anyway, either because of the lessor's knowledge of the sex work purpose, or because his intent to profit therefrom, or on other grounds.

8. VERY STRONG CONVERGENCE AT THE FIRST LAYER, WEAK CONVERGENCE AT THE SECOND: SURROGATE MOTHERHOOD AGREEMENTS (CASE 5)

For what concerns the first layer of convergence, surrogate motherhood contracts are deemed unenforceable in the vast majority of the considered jurisdictions (25 out of 28). In this regard, a common core evidently exists.

Only three legal systems run against the mainstream: Cyprus, Greece and Romania. In Cyprus and Greece, surrogacy is regulated by statute. In both countries, only gratuitous surrogacies are allowed and must be authorised by the judiciary in advance, i.e. before the transfer of the fertilised egg cells. If all statutory requirements are met, the intended parents have the right to require the surrogate mother to hand over the child to them.

In Greece, if the surrogacy is gratuitous but the statutory requirements are not met, the intended parents can claim the reimbursement of the amount of money they paid to the surrogate mother for expenses related to the pregnancy and birth (including health care and clothing) on the basis of unjust enrichment. On the contrary, in Cyprus, such a reimbursement claim would probably fail on public policy grounds.

Romanian case law seems to allow even non-gratuitous surrogacies. In this country, the intended parents would probably be successful when claiming from the surrogate mother to hand the child over to them.

For what concerns the second layer, and more precisely the availability of a reimbursement claim, in the main scenario only a weak convergence can be observed. Only in 16 legal systems out of 28 do the intended parents not seem entitled to claim the reimbursement of any expenses from the surrogate mother. In the remaining 12 jurisdictions, the surrogate mother would have to reimburse such expenses, regardless of the validity of the contract.

In the first variation, a clearer common core emerges: commercial surrogacies are unenforceable in almost all jurisdictions (with the probable exception of Romania). In 18 countries, the couple would probably not be able to claim back the €25,000 paid to the surrogate mother. Such a restitution claim seems to be available, at least partially, only in eight jurisdictions: Croatia, Cyprus, Estonia, Lithuania, Poland, Portugal, Slovakia and The Netherlands. In the latter two countries, the couple would only be able to claim repayment of the difference between the €25,000 and the reasonable expenses incurred by the surrogate mother.

A common core also emerges in the second variation. If the baby was conceived by using genetic material of both the intended parents, this would make a difference only in Cyprus and Romania. In these two countries, the intended parents would be legally considered the child's parents and could require the surrogate mother to hand over the child. In all the other countries, the woman who gave birth is presumed to be the child's mother, and the intended parents would not have any claim against the surrogate mother to hand over the child to them.

9. VERY STRONG CONVERGENCE AT BOTH LAYERS IN THE MAIN SCENARIO, DIVERGENCE IN THE VARIATION: SURETYSHIPS OF FAMILY MEMBERS (CASE 12)

A clear common core is also visible for what concerns the protection of Miss Penny, a 19-year-old daughter, with no experience in business and no other financial means than her low wage as a fish factory employee, who signed a contract of suretyship for her father's business debt, after the bank representative told her that her signature was needed "for the files". In 26 jurisdictions, such contracts are inacceptable and the daughter would most probably be able to challenge the bank's claim under the suretyship. In most countries, such a contract would probably be totally unenforceable. In Finland, Lithuania, Scotland and Sweden, the courts would grant the daughter a partial or complete adjustment of her liability.

Two countries seem to remain outside of this common core: the Czech Republic and Italy. Here, the daughter could probably not challenge the bank's claim. In these countries, only the most general limitations seem applicable: the bank would first have to exhaust its claim against the father before claiming from the daughter, and the part of the daughter's monthly income corresponding to the minimum subsistence level could not be used to repay the debt. This protection, however, applies in all countries to any debtors, even the most experienced businesspersons.

If the guarantor has some experience in business and/or greater financial capacity, this would make a difference in only half of the jurisdictions (14 countries out of 28). A common core thus only exists in the main scenario (Miss Penny), not in the variation (Ms Hazard). In Belgium, Cyprus, England, Estonia, Germany, Ireland, Latvia, Lithuania, Malta, The Netherlands, Poland, Portugal, Romania and Slovenia, the wife of the main debtor, employed in the same business and earning a decent salary – would likely not be able to challenge the bank's claim. On the contrary, in the other half of the jurisdictions, the protection against unfair suretyships (especially of family members) would probably extend to Ms Hazard as well.

As is often the case, the perception of morality of fairness changes over time. For example, until 1993, Miss Penny's contract was considered fully enforceable in Germany and Austria: the civil courts' standard argument was "*Vertrag is Vertrag*" (a contract is a contract), and every adult (19-year-old blue collar workers or 50-year-old white collar workers, no difference) should be aware of the risks of signing banking agreements. Only with the intervention of the German Federal Constitutional Court (BVerfG) with the famous "Suretyship" judgment of 1993 were the German civil courts forced to change their case law,[3] and the Austrian courts followed suit.[4] Also in other countries, the consensus about the (un)enforceability of suretyships of non-professional guarantors securing a family member's business debt progressively has changed during the last 20–25 years.[5]

10. STRONG CONVERGENCE AT THE FIRST LAYER, WEAK CONVERGENCE AT THE SECOND: DONATIONS RESTRICTING FREEDOM OF MARRIAGE (CASE 8)

A strong convergence at the enforceability layer can be observed with regard to Clementine's case: a contractual agreement by which a father obliges himself

---

[3] Miss Penny's case is indeed a simplified version of the real case that occasioned the "Suretyship" judgment of the BVerfG (BVerfG 19.10.1993, BVerfGE 89, 214). For a discussion of this judgment from a comparative perspective see among others A. Colombi Ciacchi, 'Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships' (2005) 13 *European Review of Private Law* 285, 308; C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England,* Kluwer Law International, Alphen aan den Rijn 2008, pp. 75–82; A. Colombi Ciacchi, 'Party Autonomy as a Fundamental Right in the European Union' (2010) 6 *European Review of Contract Law* 305, 307.

[4] See W. Faber, 'Austria' in A. Colombi Ciacchi and S. Weatherill (eds.), *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships*, OUP, Oxford 2010, pp. 60–64.

[5] For a comparative study on the protection of non-professional guarantors from unfair suretyships in 22 European jurisdictions see Colombi Ciacchi and Weatherill, above n. 4.

to pay for his daughter's round-the-world trip in return for her promise to only marry a man belonging to the father's faith. Such a contractual condition would be unenforceable in 24 jurisdictions: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Scotland, Slovakia, Slovenia, Spain, Sweden and The Netherlands. In most of these countries, the condition would be unenforceable because it restricts Clementine's freedom of marriage. The legal ground of invalidity could be illegality, immorality, contrariety to public policy, or the lack of the form required for the validity of donation agreements. Whatever legal ground applies, and whether the invalidity only affects the condition or extends to the whole contract, it does not matter: for the purposes of the first layer of convergence (enforceability of the condition), the result remains the same.

Four countries seem to run against the mainstream: Hungary, England, Ireland and Malta. In these four legal systems, such a condition would probably be valid and enforceable. In England – as well as in Ireland and Malta, two jurisdictions strongly influenced by English common law – this has an evident historical reason: the judgment in the case *Lowe v. Peers*,[6] which is still a valid common law precedent. In *Lowe v. Peers*, a case very similar to Clementine's situation,[7] such a contractual agreement was deemed valid and enforceable. Since this decision dates back to the 18th century, it is questionable whether the social values it embodies are compatible with the contemporary values. Interestingly, the Irish rapporteur notes that an Irish court, having weighed the constitutional rights applicable in this case, could possibly depart from the traditional view and deem the agreement contrary to public policy.[8]

Along the same line, one might argue that the operative rules in these four jurisdictions could evolve in the near future so as to close the gap with the above-mentioned 24 countries. This seems to confirms the thesis that the contemporary trend of constitutionalisation of private law, intended as (re-)interpretation of contract law in the light of fundamental rights, fosters a non-legislative harmonisation of the contracts law of Europe,[9] or in other words: the growth of a new common core.

The second layer of convergence (the available remedies) presents a remarkably different picture. In seven jurisdictions (France, Italy, Lithuania, Poland, Portugal, Slovakia and The Netherlands), where the contract, or at least the condition restricting Clementine's freedom of marriage, would be invalid or otherwise unenforceable, the father would nevertheless be successful in claiming

6 *Lowe v. Peers* [1768] 4 Burr 2225.
7 As indicated in Part II, the source of inspiration for Case 8 was indeed *Lowe v. Peers*.
8 See A. McCann's responses for Ireland (answer to Case 8) in this volume.
9 Cf. Colombi Ciacchi (2005), above n. 3, pp. 285, 308.

his money back. In five of these seven countries (France, Italy, Portugal, Slovakia and The Netherlands), according to the rules on restitution applicable in cases of invalidity of contractual agreements, Clementine will have to repay all the money she received from her father. Thus paradoxically, in these five legal systems that clearly deem such a contractual condition unlawful, the ultimate operative rule is identical to that in the four legal systems that deem the agreement fully lawful (England, Ireland, Malta and Hungary). One might question the logic or fairness of this result: it arguably does not make any sense to formally declare such an agreement null and void, for example on the ground of incompatibility with the constitutionally protected freedom of marriage, and then condemn the daughter to repay the full sum to her father, as if the contractual condition had been fully valid.

The legal systems of Lithuania and Poland allow for a more nuanced, arguably much better solution: the court will ultimately determine the amount that Clementine must pay.

In the variation, Clementine fell in love with a woman who belongs to the same faith as her father, and entered into a civil partnership with her. This does not seem to make any difference in any of the 28 legal systems considered, for what concerns either layer of convergence.

Overall, in Case 8, the common core of the remedial layer is much smaller than the common core of the enforceability layer: only 17 legal systems out of 28 converge towards not allowing the father to claim (all of) his money back.

11. MAJOR CONVERGENCE IN THE MAIN SCENARIO, DIVERGENCE IN THE VARIATION: PRE-NUPTIAL AGREEMENTS (CASE 7)

In the case of pre-nuptial agreements, a common core can be observed in several regards. Only in four legal systems – France, Italy, Slovakia and Slovenia – are pre-nuptial contracts traditionally deemed invalid per se (although in Italy recent trends consider them partially valid). In the remaining 24 jurisdictions, pre-nuptial agreements are in principle allowed. In these countries, the specific agreement in the main scenario – the one between Miss Money and Mr Doe – would be considered enforceable, at least partially. As a consequence, Miss Money would be able to protect her assets, at least partially. However, in the vast majority of these countries, a minimum common core of protection of the disadvantaged spouse applies: the pre-nuptial contract cannot be used by Miss Money to refuse to provide alimony (at least for what concerns the minimum of subsistence) to Mr Doe.

The main scenario of Case 7 only presents a considerable difference in wealth between the spouses, without further elements that might imply the taking of

advantage by the wealthier spouse of the particular vulnerability of the other. On the contrary, in the variation, such further elements can be found: Mr Money arguably takes advantage of Miss Cinderella's vulnerability as a pregnant woman who desperately wishes to marry the father of her future child. Accordingly, some national reporters consider the agreement in the variation to be unenforceable, even though they deemed the agreement in the main scenario to be enforceable. This results in a clear divergence: in 14 jurisdictions, the agreement in the variation would most probably be unenforceable and could not be used to protect Mr Money's assets, while the opposite would be true in the remaining 14 jurisdictions. In the latter group of countries, both in the main scenario and in the variation, only the minimum common core of protection seems to apply: the pre-nuptial contract cannot be used to refuse to provide alimony to the other spouse.

12. CONSIDERABLE CONVERGENCE IN THE MAIN SCENARIO, DIVERGENCE IN THE VARIATION: MARRIAGE BROKERAGE CONTRACTS (CASE 6)

A moderate common core also emerges in the case of marriage brokerage contracts. A contract whereby the marriage broker promises to use its best efforts to find a suitable spouse for an individual, for a remuneration of €9,000 (of which €7,000 is to be paid in advance, and €2,000 upon conclusion of the marriage) would be most probably valid and enforceable – at least partially – in 22 jurisdictions. Six legal systems run against the mainstream: Belgium, Germany, England, Scotland, Ireland and Cyprus. In the common law of England and Scotland, relevant also in Ireland and Cyprus, marriage brokerage agreements are traditionally considered to be contrary to public policy. However, the relevant judgments were passed more than a century ago, at a time when the protection of the religious institution of marriage was deemed necessary. Therefore, it may be argued that in contemporary society, marriage brokerage contracts should be accepted. The same could apply to Germany, where the unenforceability of marriage brokerage agreements is enshrined in a civil code provision dating back to 1900.

In Belgium, dating agency contracts have been relatively recently regulated by statute in order to protect the clients. A marriage brokerage agreement such as in Case 6 would be unenforceable as it would not meet the statutory requirements, both in the main scenario and in the variation.

For what concerns the remedial layer, advance payments made under a marriage brokerage contract could not be claimed back in 23 jurisdictions: the 22 legal systems in which the agreement would be enforceable, plus Germany, where the agreement is unenforceable but gives rise to an *obligatio naturalis*.

In the remaining five jurisdictions, the advance payments could be claimed back under the rules on unjust enrichment.

The variation differs from the main scenario in two aspects. Firstly, the advance payment is €2,000, while the remaining €7,000 has to be paid upon conclusion of the marriage. Secondly, the brokerage was successful, but the couple did not inform the agency about the marriage. The question is whether the agency can successfully claim the remaining €7,000 from the client.

From this variation, a much weaker convergence at the first layer, and a clear divergence at the second layer, emerge. The contract clause that obliges the client to pay €7,000 to the agency in the event of marriage would be unenforceable in 11 legal systems. Moreover, in some of the 17 jurisdictions where such a clause is considered enforceable, the client would probably be successful in challenging the agency's claim. As a result, in 13 countries the client would have to pay the €7,000 to the agency, while in the remaining 15 the client could successfully challenge the agency's claim. Thus, in the variation the divergences prevail.

13. DIVERGENCE AT THE FIRST LAYER, MAJOR CONVERGENCE AT THE SECOND: CONTRACTS ON DWARF THROWING (CASE 4)

One of the most interesting outcomes of this volume's comparative analysis concerns the dwarf-throwing case. A contract concluded between a dwarf and a pub owner, according to which the dwarf would be paid for being hurled across the pub onto an airbed by strong men who were competing to see who could throw him the furthest, would be probably valid and enforceable in 15 jurisdictions, whilst in the remaining 13 it would be probably deemed unenforceable. Such a weak convergence arguably does not any common core in the enforceability layer to be identified: the divergence prevails.

This is indeed one of the most controversial cases, not only in this volume, but also in the academic literature on European contract law. Dignity-based arguments have been brought forward both in order to justify a legal prohibition of dwarf-throwing shows (and related contracts), and vice versa, in order to plead for the legal validity and recognition of such work of the persons affected by dwarfism.[10]

---

[10] See Marella's and Colombi Ciacchi's contributions to the edited volume arising from a conference of the Society of European Contract Law: M.R. Marella, 'Human Dignity in a Different Light: European Contract Law, Social Dignity and the Retreat of the Welfare State' in S. Grundmann (ed.), *Constitutional Values and European Contract Law*, Kluwer Law International, Alphen aan den Rijn 2008, pp. 123–147; A. Colombi Ciacchi, 'Social Rights, Human Dignity and European Contract Law' in Grundmann ibid., pp. 149–160.

This divergence of the enforceability layer contrasts with a major convergence – a veritable common core – in the remedial layer. In 22 countries out of 28, the dwarf would be able to obtain monetary compensation for his performances. Whether the claim would be based on contract law (in the jurisdictions where the contract would be enforceable) or unjust enrichment (in the ones where the contract would be unenforceable), the ultimate result remains the same.

In the variation, the pub owner has paid the dwarf in advance, but the latter refuses to perform. Concerning the remedies available to the pub, a common core clearly emerges: in almost all jurisdictions – with the exception of Romania – the pub cannot require specific performance. 20 legal systems would probably allow a claim for restitution of the advance payments, completely independent of the validity and enforceability of the contract. Only in seven countries (Belgium, Finland, Germany, Greece, Italy, Latvia and Scotland) would the dwarf probably not be obliged to pay back anything.

14. CONCLUSION: THE COMMON AND THE "UNCOMMON" CORE

The wide variety of scenarios and legal solutions discussed in the previous chapters of this volume, and the relativity of the relevant convergences, could prima facie induce a reader to see more of an "uncommon core"[11] than a proper common core. However, this prima facie impression is arguably confuted by the comparative analysis contained in the present chapter, which has enabled the assessment of a proper common core in all 12 cases, on either the first or the second level of convergence, or both. Even in the cases where the greatest divergences could be observed, a common core clearly emerged at least in relation to the remedies ultimately available to the parties.

The analysis of the present chapter has also evidenced the importance of drafting variations of the main scenarios in the questionnaires of the Common Core project. In several cases, a proper common core only emerged in relation to the main scenario, while in the variation the divergences prevailed.

[11] The notion of an "uncommon core" in comparative contract law was coined by Mel Kenny in describing the convergences and especially the divergences between European countries in the legal treatment of non-professional suretyships. See M. Kenny, 'The Uncommon Core of European Suretyship Law' in A. Colombi Ciacchi (ed.), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, Nomos, Baden-Baden 2007, pp. 361–382.