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## Geoffrey Samuel, Law of Obligations

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in the development of agency rules at European level” (8), whether those rules be imposed internationally or furthered by national borrowings.

This desire to see similarity – without re-reading the text, I cannot recall seeing the word “different” – produces some curious results. I shall take just one example, the rather important question as to whether the law should not only allow a third party to sue an unauthorised agent’s principal but also allow the principal a reciprocal right of action against the third party. Some systems, such as the English and the Scots, tend to think of apparent authority in terms of estoppel. They do not sanction a principal’s right to sue but only accord the third party a right to sue the principal. The latter cannot deny his agent’s appearance of authority, and the third party is entitled to damages on an expectation footing. This cluster of systems can be contrasted with the *US Restatement* (3<sup>rd</sup>) and *PECL*, arts 3.201(3) and 3.202, in which both third party and principal are at liberty to invoke apparent authority, where the consequences of the agent acting without authority are treated as an extension of the objective approach to contract, and where, in the case of *PECL*, both parties are in likelihood entitled to specific performance. Finally, in other systems (Belgium and Holland) we are told that only if the third party actually elects to invoke apparent authority, will both principal and agent then be prevented from denying the existence of a valid contract and will the principal acquire the right to sue on the transaction. Commenting on these disparate solutions, the editors begin by telling us “[i]n practical terms, it is probably not particularly significant which of the above three approaches is applied” (394). In terms of “outcomes”, it may be just possible to maintain this position. But looking at the question as a comparatist, and reflecting both on what lies at the root of these three different outlooks and the manner in which each individual approach then enmeshes with further deep assumptions within the legal systems, it would be hard to imagine more dramatic differences of approach. The Trento school’s pursuit of legal “harmonisation”, I would suggest, carries an intellectual price-tag.

But to conclude on a deservedly positive note, this substantial volume is well-produced, ably edited, and replete with food for thought. Repeatedly, it provokes one to reflect on unexpected points that emerge in the accounts of legal systems with which one can claim little or no familiarity. Those systems of which the reviewer could claim some knowledge, it should be said, were accurately presented, and although overall editorial control seems to have been anything but domineering, the finished product is pleasingly accordant, reading really well. One could disagree with some of observations: I am not sure that I would claim that *Bolton Partners v Lambert* (1889) 41 ChD 295 exactly “remains good law” (441) since Robert Walker LJ’s major reinterpretation of it in *Smith v Henniker-Major* [2003] Ch 182. However, the general quality of analysis is sharp, thoughtful and detailed. Despite my reservations, Danny Busch and Laura Macgregor have undoubtedly done commercial and contract law a considerable service in assembling, editing and commenting upon this collection of materials.

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**Geoffrey Samuel, LAW OF OBLIGATIONS**

Cheltenham: Edward Elgar Publishing Ltd ([www.elgar.co.uk](http://www.elgar.co.uk)), 2010. xxxix + 358 pp. ISBN 9781848447646. £89.95.

This book is a challenging addition to a field in which English law is somewhat lacking in works treating of the modern “law of obligations” in the round. The historical reasons for the

very late (in comparative terms) development of a taxonomic category of obligations in the Common Law has been well documented by David Ibbetson in his renowned work *A Historical Introduction to the Law of Obligations* (Oxford, 1999). Samuel's book does not focus primarily on the history (though there is reference to Roman and medieval English law throughout it), but rather presents a specific theory of the modern English law and legal culture, setting it in (or rather apart from) its European comparative context.

Those seeking to find in the work a plan for aligning the Common Law of obligations with the new European *ius commune* will be disappointed: Samuel is firmly within the camp of those promoting the distinctiveness of English law. He frequently voices his opposition to the idea that English law was ever really part of a European legal scientific community (as many would argue) or that it should be in the future. For Samuel, the Common Law "was formed within a feudal and not a Roman model" (68), and this history has created a culture which sets it apart from the civilian tradition, including the Civil Law category of a "law of obligations".

Samuel's choice of that category for the title of his book appears essentially to have been made in order to demonstrate that there is, in reality, no such coherent legal category within English law. As he robustly puts it, "the common law has never subscribed to, or even had any notion of, a general theory of obligations ... There has never been anything above or beyond the specific categories of contract, tort and restitution. There is, in short, no point in the common law adopting the category" (332). Some might feel that this is a conclusion which underestimates the growing appreciation in the Common Law of the unremarkable nature of many instances of concurrent liability (a subject barely addressed by Samuel), and hence of the connections and overlaps of the various obligations recognised by the law. Moreover, it arguably overlooks both the legacy of Lord Mansfield (who does not feature in the index to the book) as well as the influence on English law of Pothier (who is mentioned several times in the index), whose *Treaty of Obligations* was widely cited in the English courts after the publication of an English translation of his work in 1806 and whose views were doubtlessly a major influence in the development of the idea of a unified law of contract out of the older disparate actions. Such doubters are firmly put in their place throughout the work, however, as Samuel repeatedly provides substantive and remedial examples to justify his thesis: thus, for instance, restitution via means of an *actio in personam* based upon a relationship *in rem* is cited as a clear example of how English law remedies cannot be made to fit within the civilian classificatory structure which comes with the law of obligations.

Samuel supports the idea of a much less rigid law than that of civilian jurisdictions, one which cannot be mapped comprehensively, and one in which therefore there will always be "a certain conceptual anarchy" (331). Those fond of the idea of legal science will be horrified at the active promotion such a suggestion, but Samuel is not afraid to take such people head on, as his express refutation of the ideas of Reinhard Zimmermann demonstrates. It is in this light that Samuel's keenness for a greater appreciation of the civilian tradition by English lawyers must be understood: "know thy enemy" might almost be his motto. He laments previous neglect by English lawyers of the Civil Law, remarking in the Preface that a "quite recent publication of the Law Society has, sadly, revealed a depth of ignorance both among today's practitioners and some Lord Chancellors about the civil law tradition" (x).

Interestingly, for one keen to demonstrate English law's distinctive nature, it is noteworthy that in his very brief chapter on unjustified enrichment (ch 16) Samuel adopts the Draft Rules on Unjustified Enrichment published by the Scottish Law Commission (see SLC Discussion Paper No 99) as the basis for analysing English law. The reference to these draft rules on unjustified enrichment, which evidently find their origin in Pomponius' maxim *nemo debet locupletari aliena ex jactura*, is somewhat surprising, as one might have expected Samuel to

have defended an older English view of the superfluosity of an independent principle of unjustified enrichment.

If one may be allowed to highlight a slip, if trifling, on Samuel's part, it would be in relation to the tables included in the book. In the list of "Common Law Cases" there are included such decisions as *Donoghue v Stevenson*: an authority in Common Law jurisdictions it may be, but a Common Law case it is not, nor indeed are *Bourhill v Young*, *Hughes v Lord Advocate*, or *White & Carter Councils (Ltd) v McGregor*, though they also appear in the same list. In a similar vein, statutes such as the Unfair Contract Terms Act 1977 are not simply "Common Law Statutes and Regulations", though listed as such, given their applicability not only in the Common Law systems of the UK but also the "mixed" legal system of Scotland. Scotland, in fact, appears to have been classed as a European or international jurisdiction, given that the Scottish Law Commission's Draft Rules on Unjustified Enrichment appear in the list of "European and International Statutes and other texts", lodged between the CFR and an EU Directive. These may be overly fussy criticisms of minor tabulation points, but such errors tend to jar in the mind of Scots lawyers, especially in a work which is so particular about advancing the distinctive national legal culture of England.

Overall, Samuel's work, while it will undoubtedly be seen as controversial by those keen to align English with continental law, fulfils admirably two evident aims of the author: a rejection of civilian legal science, and, as a result, a rejection of the idea that English law can participate in any scheme for the European harmonisation of private law, particularly in the field of obligations. English legal nationalists will find in Samuel a champion of the type which Scottish legal nationalists had in Lord Cooper. While the present writer cannot commend such an approach, and predicts that it is unlikely to provide the bulwark against harmonisation which it is clearly hoped it will, there is no doubt that Samuel's work will rightfully find a place in the canon of new works which any defender of the distinctiveness of the English legal tradition will wish to have on his bookshelf.

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**EXPLORING CONTRACT LAW. Ed by Jason W Neyers, Richard Bronaugh and Stephen G A Pitel.**

Oxford: Hart Publishing ([www.hartpub.co.uk](http://www.hartpub.co.uk)), 2009. xix + 442 pp. ISBN 9781841139067. £75.

The essays in this collection are based on papers delivered at a symposium entitled "Exploring Contract Law" held at the University of Western Ontario in January 2008. The editors describe the conference as involving "... good intellectual punch-ups" (v). The pugilists in question were "those who see law as an adjectival study focused on the work of the courts and commerce, and others who dedicate their careers to more philosophical musings about legal concepts" (v).

The brief given to the participants was a wide one: the presenters were asked to explore contract law in one of three ways: "[f]irst, they could (re)explore doctrines that are considered tangential or antiquated... Second, they could explore what appeared to be settled principles in light of recent case law developments... Third, they could explore black letter contract law from a theoretical or comparative perspective" (xi). Given this wide brief, not surprisingly the collection varies in subject matter and approach. The book does not disappoint, providing much food for thought on the Common Law approach to both substantive contract law and theories of contract law.