

The *formants* and IMOLA II: the way forward

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The theory of the *legal formants*

R. SACCO, *Définitions savantes et droit appliqué dans les systèmes romanistes*, in *Revue Internationale de Droit Comparé*, vol. 17, 4, 1965, p. 827 ss.

R. SACCO, *Contratto e negozio a formazione bilaterale*, Studi in onore di Paolo Greco, II, Padua, 1965, p. 953.

R. SACCO, *Les buts et les méthodes de la comparaison du droit*, in *Rapports nat. italiens au IX congrès intern. de droit comp.*, 1974.

R. SACCO, *Introduzione al diritto comparato*, first ed., Turin, 1980.

The theory of the legal *formants*: core

The *unity* of the legal system v. the *dissociation* of the
legal formants

Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, Vol. 39, No. 1 (Winter, 1991).

The legal *formants*

“Within a given, single legal system there is no guarantee that the *legal formants* are in harmony, rather than in conflict”.

R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law, cit.*,

Cour de Cassation (French Supreme Court) Judgement «Maison de Poésie»

Cass., 3e civ., 31 octobre 2012, in Rec. Dalloz, 2012 and in Sem. Jur., éd. gén., 2012.

France: the legislative formant

Article 544

La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.

“Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations” (unofficial translation).

France: the legislative formant

Article 543

On peut avoir sur les biens, ou un droit de propriété, ou un simple droit de jouissance, ou seulement des services fonciers à prétendre.

“One may have a right of ownership, or a mere right of enjoyment, or only land services to be claimed on property” (unofficial translation).

France: the case law formant

Cour de Cassation (judgement «Maison de Poésie»).

The owner can freely establish a **right of perpetual enjoyment**.

France: the legislative formant

Art. 619

“A usufruct which is not granted to private individuals may last only thirty years”

Art. 625

“Rights of use and habitation are established and lost in the same manner as usufruct”

France: the case law formant

- Unexpectedly, the Court of Cassation reversed the decision of the Court of Appeal, stating that the owner can freely establish a **right of perpetual enjoyment** and that the right granted to the **Maison de Poesie** by the deed of sale was a **right of perpetual exclusive enjoyment**, and not a right of use and habitation
- The Court of Cassation ruled that the principle of legal certainty recognized by the law of the European Union and by Article 6 § 1 of the European Convention on Human Rights requires that the legitimate expectations of the parties be respected. This principle therefore precludes, where the parties conventionally provide for the existence of a perpetual right, that the court may assign to that right a term prior to the date on which it rules.

France: the case law formant

The operative rule: the *Maison de Poesie* has the right of enjoy and/or occupy, on exclusive basis and with no time limit, the second floor of the building, where the Foundation was located.

The theory of the formants

- Does a perpetual right of enjoyment exist under French law?"
- legislative formant: no: real rights are typical and limited
- case law formant: yes, both operative rule and declaration
- foreign doctrine (Akkerman): yes: a new type of property right

Formants and IMOLA II: a clear view of how a legal system works in reality

In the development of the IMOLA II project, the methodology of comparative law has become relevant and proved to be a useful scientific tool.

- Firstly, the description of the formants and the understanding that the unity principle is an illusion has developed a clearer view by the professionals involved in IMOLA II of how a legal system works in reality, beyond the theoretical and abstract definitions, on which scholars or legislators rely to communicate the norms and, in general, the law.
- This has favored the elaboration of a method of research founded on a more solid ground, which results could clearly reflect how a legal matter is solved in each specific legal system involved in the scientific investigation of IMOLA II.

Formants and IMOLA II: analysis of one single legal system

Secondly, until today the formants were used in IMOLA project:

- to uncover the rules of any single national system, which could be found in enacted legislation, case law or praxis.
- to make clear that in a single legal system the operative rules (applied rules, praxis) might not coincide with the definitions (legislation, formal sources).

Formants and IMOLA II: analysis of one single legal system

Secondly, in IMOLA II comparative law methodology proved to be the best method to collect the rules in the legal systems involved.

Here the theory of the formants was crucial for legal professionals to understand the origin of a national solution and its real impact on the system (operative rules).

Formants and IMOLA II: analysis among several legal systems

Reminder n. 1:

Legal formants are very useful not only within a single legal system - as noted above - but also to identify differences and similarities among several legal systems.

Formants and IMOLA II: analysis among several legal systems

Similar operative rules can be found in the **formants** of different legal systems, beyond the lack of definitions.



«Trasferimento dell'erede apparente al terzo»

A person who believes himself to be heir disposes of property (he has inherited) to a third person, who is in good faith.

The transfer is valid in Italy, under the definition «trasferimento dell'erede apparente al terzo»

R. SACCO, *Legal Formants: A Dynamic Approach To Comparative Law*, in *The American Journal of Comparative Law*, Volume 39, January 1991.

«Trasferimento dell'erede apparente al terzo»

Civil Code art. 534 par. 2 : yes	Italy Case law: yes	Doctrine: yes
Civil Code: X	France Case law: yes	Doctrine: no
Code: X	Belgium Case law: no	Doctrine: no

*This is a theoretical case. Note that the legislative formant might have changed after the French reform of the law of contract of 2016.

Beyond the definition

The definition «trasferimento dell'erede apparente al terzo» is present only in the Italian legal language, but the same operational rule exists in France (case law formant).

Regardless the definition

Different operative rules can be found in the **formants** of different legal systems, regardless formal definitions are similar or identical



Regardless the definition

Usufruct under Dutch law

Article 3:215 Dutch Civil Code (BW) the usufructuary has the right to dispose and to **consume** the property subject to usufruct

Formants and IMOLA II: the *ELRD pivot (pivot terms)* are meta - concepts

The comparative method is founded upon the actual observation of the elements “at work” in a given legal system, it concerns with what is real and effective.

Dynamic approach to a legal system!

Formants and IMOLA II:
the *ELRD pivot (pivot terms)* are meta - concepts (meta -
definitions)

Reminder 2:

ELRD Pivot terms are meta- definitions (meta - concepts)

Semantic aspect: immediately final

Legal effects: not final until all national formants are included in
the pivot definitions.

Formants and IMOLA II: the *ELRD pivot (pivot terms)* are meta - concepts

France

«real property rights» : right of enjoyment, land services, the right of emphyteusis, usufruct, use and habitation.

After 2012 the definition “real property rights” even if semantically untouched comprehends further legal effects because of the right to create a **perpetual right** of enjoyment (operative rule).

Formants and IMOLA II: keeping the template updated.

- Finally, it is also important to underline that the legal formants could be useful within the context of the IMOLA projects not only to reach a more complete, detailed and comprehensive template, but also as a tool to keep the template updated.
- It will be important, in the future, to maintain the correspondence between the template platform and the real base of law that is currently being applied within the states. In this perspective, the study of the different formants can be a very useful mean to maintain the digital template linked to the legal reality that is supposed to represent.

Formants and IMOLA II: the supranational level

Eu private law (substantive law harmonization)

Private international EU law (regulations)

Formants and IMOLA II: the supranational level

EU private law (substantive law)

Reminder:

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste

<<possession>>

Art. 3 (definitions) “waste holder” means the waste producer or the natural or legal person who is in *possession* of the waste

Formants and IMOLA II: the supranational level

Private international EU law

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

Regulation (EU) No 650/2012

The rule introduced by the regulation is that of habitual residence and not that of the citizenship of the deceased.

Thus, problems may arise when the *lex successionis* is invoked in a Member State different from that in which the property is located (*lex rei sitae*).

As a consequence, it might happen that the right *in rem* in question is not regulated by the law of the Member State in which the right is invoked and it is then unknown.

The adaptation principle

Article 31

Adaptation of rights *in rem*

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

The adaptation principle

The international private law scholars commenting the regulation suggest to rely on the methodology of comparative law in order to verify the applicability of the adaptation principle.

The instruments of comparative law

Comparative law methodology

- 1) homologation (legal translation)
- 2) operational rules

CJEU, 12 October 2017, judgment “Kubicka”

The referring Court asks, in essence, whether Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 must be interpreted as precluding refusal, by an authority of a Member State (Germany), to recognise the material effects of a legacy ‘by vindication’, which is recognised by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation (Poland), when that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State whose law does not provide for legacies with direct material effect when succession takes place.

CJEU, 12 October 2017, judgment “Kubicka”

- In the present case, both the legacy ‘by vindication’, provided for by Polish law and the legacy ‘by damnation’, provided for by German law, constitute methods of transfer of ownership of an asset, namely, as the Advocate General noted out in points 46 and 47 of his Opinion, a right *in rem* that is recognised in both of the legal systems concerned. Therefore, the direct transfer of a property right by means of a legacy ‘by vindication’ concerns only the arrangement by which that right *in rem* is transferred at the time of the testator’s death, which, according to recital 15, is precisely what Regulation No 650/2012 seeks to allow, in accordance with the law governing succession.

CJEU, 12 October 2017, judgment “Kubicka”

- Article 31 of Regulation No 650/2012 does not concern the method of the transfer of rights *in rem*.....

....herefore, in so far as the right *in rem* transferred by the legacy ‘by vindication’ is the right of ownership, which is recognised in German law, there is no need for the adaptation provided for in Article 31 of Regulation No 650/2012.

The consequences of the decision in Germany

The *Rechtspfleger* and the legacy

The operative rule in Germany

After «Kubicka»

In the German legal system the *operative rule acting* is the effective transfer of a legacy with direct material effects.

Comparative law

- After Kubicka
- A new «model» in Germany, that is a substantive law institute (rule)

The formants

In a legal system must be observed not only how courts have actually resolved cases. Knowledge of a legal system entails knowledge of factors present to day which determine how cases will be resolved in the near future.

R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, cit., p. 47.

The formants

- The CJEU is introducing de facto new substantive law rules in the Member States!

IMOLA II and the formants: the way forward

- IMOLA II and the formants are useful not only in the harmonization of the land registry system, but also to uncover the right solution applicable in the framework or the adaptation principle (in various regulations) and so to support civil justice in Europe.
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- The study of the different formants will be crucial for the updating of the digital template, so as to keep it linked to the legal reality that each template is supposed to represent.
- Informatic instruments are crucial (but experts should manage informatic data and not the opposite).