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Special issue the Great War and private law: Introduction

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Introduction: The Great War and Private Law

Michael Lobban

If the Great War which broke out in August 1914 had been a long time coming, the Great Powers nevertheless stumbled into the conflict without much prior co-ordinated preparation for a war which would be like none which had preceded it, in the sheer scale and size of military and manpower commitments. Faced with similar problems of mobilising military forces, securing defence at home, and maintaining a functioning economy, the major western powers adopted similar kinds of legislation, running from the grant of emergency powers to the state (allowing it to curtail civil liberties and seize private property), to restrictions on freedom of contract and free trade, and eventually to the growth of state control over the economy and enterprise unimaginable to most of the political classes in 1913.

Many of these developments were unplanned. It was far from evident in August 1914 that state intervention would grow to the degree it had by the Armistice. In the first autumn of the war, many in England anticipated that the fighting would be over by Christmas, and that - military hostilities aside - it should be 'business as usual'. One journal commented in November 1914 that 'legal matters affect lawyers and the civil population, and should be carried on with as little disturbance as is consistent with the effectiveness of military operations'.¹ But the notion that business could be carried on as usual was somewhat utopian. The outbreak of war itself severely disrupted much economic activity, as both credit and trade across borders was interrupted. In France, which (unlike Britain) already had conscription, the mass mobilisation of August 1914 brought general economic activity to a standstill, as

¹ (1914) 59 *Solicitor's Journal* 36. 'It is important to keep in mind two principles,' it noted in November 1914, 'first that war should not interrupt business relations further than is necessary to prevent assistance being given to the enemy; and secondly, that war and its effects should be confined as far as possible to the armed forces of the belligerents.' *Ibid* 83.

resources - and especially manpower - were diverted to supporting an all-out-offensive which it was hoped would bring the war to a swift conclusion.² By the time economic activity was resumed, German forces had occupied much of northern France, home to many industries crucial for the war effort, including coal, steel and engineering. In such conditions, civilian and military matters could hardly be separated. In a new era of total war, the very outcome of hostilities would be determined less by prowess on the field of battle than by the economic strength of the state, and its ability to maintain a moral climate domestically to support the massive mobilisation required.³ This new form of war clearly had an impact on the world of property, contract and obligations, as new forms of regulation and state control interfered in areas hitherto left largely to the private lawyers. At the same time, new problems created by war generated new doctrinal difficulties which needed to be resolved by the courts, and which fed their way into private law doctrine, to remain there even after state interference had subsided in the post war era.

The articles in this collection set out to explore the impact of the Great War on private law in France, Austria, Italy, Germany, Great Britain⁴ and the Netherlands. Each of the belligerent states faced similar problems of mobilizing the economy to produce the munitions needed at the front, while at the same time keeping the home population fed. Neutral countries like the Netherlands were as affected by the disruption of the pre-war transnational economy (through blockades and embargoes) as the belligerents. If the general challenges faced by the countries

² After August 1914, '[m]ost firms retained on average only one-third of their pre-1914 workforce': Leonard V Smith, Stéphane Audoin-Rouzeau and Annette Becker, *France and the Great War, 1914-1918* (Cambridge University Press, 2003) 61.

³ See the essays in Stephen Broadberry and Mark Harrison (eds), *The Economics of World War I* (Cambridge University Press, 2005).

⁴ The essay in this collection by Catharine MacMillan focuses on English law, but the introduction addresses the wider legislation which affected Scotland as well.

examined were similar, they varied according to context. Equally, the six countries studied here had varying legal traditions - common law versus civil law countries, with either older or more recent codifications - as well as varying experiences of war. As shall be seen, while in many respects, these countries responded in very similar ways to the problems generated by the war, the contrasts between their responses can be as interesting as the similarities.

The six studies which follow are detailed examinations of the experience of particular countries. This introduction aims to set the scene for these developments, and draw some comparisons between the experiences described here.

I

At the outbreak of war, each country saw the rapid implementation of legislation allowing for emergency powers. On 4 August, the German Reichstag passed seventeen war bills, which included an Enabling Law,⁵ allowing the executive to issue emergency decrees.⁶ Over the next four years, 825 decrees were issued under this law to regulate the economy, labour and welfare. Legislation passed on the same day also included laws to protect soldiers from civil suits, as well as a number of law concerning the wartime economy and social matters, including a law

⁵ Art 3 of this read: 'The Federal Council is hereby authorized to adopt during the war such economic measures as may be necessary in order to avert economic damage'. J W Scobell Armstrong, *War and Treaty Legislation affecting British Property in Germany and Austria and Enemy Property in the United Kingdom* (Hutchinson & Co [1921]) 20.

⁶ Art 63 of the 1850 Prussian constitution had made provision for special ordinances to be issued in an emergency. Art 68 of the 1871 Bismarckian constitution gave the emperor the power to declare a state of war, whose conditions followed those of the Prussian Law of Siege of 1851. On the declaration of national emergency, executive power passed into the hands of the corps commanders in each of 24 military districts (in practice, the Deputy Commanding Generals): R Chickering, *Imperial Germany and the Great War, 1914-1918*, 2nd ed (Cambridge University Press, 2004) 33.

on price ceilings. A state of siege was invoked, giving military commanders the power to issue decrees, to requisition and to fix prices.⁷ Extraordinary courts were also set up, staffed by three officers and two civilians.⁸ The state of siege permitted the authorities to restrict personal liberty - including detention and press censorship. Austria also passed special wartime legislation, in the form of decrees made by the government, using provisions of the 1867 constitution. By 1917, the government in Vienna had issued over 500 decrees regulating various aspects of the wartime economy. In France, the outbreak of war was accompanied by a declaration of martial law, as well as further conscription laws, and laws to facilitate the continued operation of civil courts (threatened by a loss of manpower young men went to the front) as well as allow the state to raise loans and to control exports. During the course of the war, 747 decrees and ordinances would be issued in France to deal with wartime problems.⁹ In Britain, parliament authorized the King in Council to issue regulations to secure the public safety and authorise trial in military courts of persons contravening regulations designed to prevent communications with the enemy or the safety of communications.¹⁰ Further legislation in the autumn and spring empowered the military authorities to requisition factories for the production of arms, or to require a factory owner to run it on behalf of the state. By May 1917, 206 Regulations had been issued under four Defence of the Realm Acts. In contrast to Britain, France, Germany and Austria, Italy did not join the war until 26 April 1915, when she joined Britain and France in the Triple Entente, to fight her former allies Germany and Austria. But it

⁷ The government was authorised to requisition certain specific articles and services for the war effort under the Law relating to War Contributions of 1873. However, a decree of 24 June 1915 (issued under the Enabling Law) authorized the requisition of any article likely to be of use for the war effort, and provided for settling a price by arbitration.

⁸ H W Koch, *A Constitutional History of Germany in the Nineteenth and Twentieth Centuries* (Longman, 1984), 188. In all, sixty such courts heard 150,000 cases in the war.

⁹ Eric Alary, *La Grande Guerre des Civils, 1914-1919* (Perrin, 2013) 227.

¹⁰ Defence of the Realm Act 1914.

did not take long for her government to be given extraordinary powers: within a month, Italy also passed legislation which authorised the government to issue regulations for the defence of the state and the protection of public order.

The need to maximise the war effort thus brought a significant expansion of state intervention throughout Europe. In war conditions, the international economy which had operated so extensively before the war was interrupted, so that the great powers had to rely much more on the home economy. The supply of food was a pressing concern throughout Europe, leading to price controls and restrictions on free markets, which extended from belligerent countries, such as Austria, to neutrals, such as the Netherlands. In the Netherlands, legislation was passed in 1914 to regulate the supply and prices of essential goods and further measures in the same year authorised government requisitioning of goods. In France, the government regulated the price of grain from 1915, and in the autumn began to requisition wheat and grain. In April 1916, statutory price controls and a policy of requisitioning were also imposed on other essential foodstuffs.¹¹ In 1917, a *Ministère de Ravitaillement* was set up, to co-ordinate the activities of various ministries and municipalities.¹² When imports of foodstuffs were blocked by the German submarine campaign of 1917, rationing was introduced for sugar and subsequently (in 1918) of bread. In Germany, where both imports and domestic production fell dramatically as a result of the British wartime blockade, the government imposed price ceilings, regulated production and introduced rationing.¹³ When the system of price ceilings was found not to work, the government took increasing control of food production and supply. In 1915, a War

¹¹ See David Deroussin's article in this collection, which also discusses the penalties imposed for illicit speculation.

¹² Alary (n 8), 227.

¹³ See Hans-Peter Haverkamp's article in this collection, describing rationing, price controls and their effects.

Grain Corporation (*Kriegsgetreidegesellschaft*) was set up to buy and distribute wheat, and similar bodies were set up for other foodstuffs. With increasingly severe shortages of food and declining production, a War Food Office (*Kriegsernährungsamt*) was set up in May 1916 to co-ordinate the distribution of food. However, local officials (Deputy Commanding General) determined local prices and distribution.¹⁴ There were also controls over retailers, with a law against profiteering (*Preistreiberei verordnung*) passed in July 1915, and price examination agencies (*Preisprüfungsstellen*) established after September to regulate retail prices. However, such was the complexity of the administrative network regulating the food supply, that the system proved ineffective, and generated much resentment, not least because farmers were happy to resort to the thriving black market which continued to exist.

In Britain, legislation at the start of the war authorised the army to requisition food and stores, and the Board of Trade to take possession of foodstuffs unreasonably withheld from the market.¹⁵ A Cabinet Committee on Food was set up at the beginning of the war, which took over all sugar imports,¹⁶ and in the following year a Departmental Committee proposed a system of guaranteed minimum prices (underwritten by the government) for a period of four years.¹⁷ By the end of 1916 (when the German submarine campaign had made the problem of food supplies even more pressing), a Ministry of Food was set up, and a Food Controller appointed, with extensive powers under the Defence of the Realm Regulations. Regulations

¹⁴ See Gerald D Feldman, *The Great Disorder: Politics, Economics and Society in the German Inflation, 1914-1924* (Oxford University Press, 1993) 57-63, David Stevenson, *With Our Backs to the Wall: Victory and Defeat in 1918* (Allen Lane, 2011).

¹⁵ Army (Supply of Food, Forage and Stores) Act, Unreasonable Withholding of Foodstuffs Act.

¹⁶ Samuel J Hurwitz, *State intervention in Great Britain: A study of economic control and Social Response, 1914-1919* (Columbia University Press, 1949) ch 13.

¹⁷ Departmental Committee on the Home Production of Food, PP 1914-16 [Cd. 8048, Cd. 8095] V 779, 787,

introduced in January 1917 empowered him to make orders regulating the production and distribution of food, as well as to set prices. Those whose stocks were requisitioned were to be paid cost price plus a reasonable profit.¹⁸ The Board of Agriculture and Fisheries also had the power to take possession of land and property to increase the food supply. Moreover, the 1917 Corn Production Act guaranteed a minimum price to farmers for wheat and oats, while fixing rents below the rate of inflation - so that it would be the large landowners rather than the farmers who would bear the cost. By the end of the war, 80% of all food consumed in Britain was bought and sold by the government, and 90% was subject to price regulation.¹⁹ Many producers and suppliers became in effect government agents, working either on commission or at prices fixed by the government. Numerous committees and commissions were set up, including a Royal Commission on Sugar Supplies (which had a monopoly of the purchase and distribution of sugar), and a Central Control Board (Liquor Traffic). The latter was set up in response to the government's concern to limit the consumption of alcohol, particularly among soldiers and munitions workers. It had the power to control the sale and consumption of liquor, and to take over breweries and public houses in designated areas. Indeed, the government seriously considered complete nationalisation of the drinks trade during the war,²⁰ but in the end only took over the industry in three key areas.

Ensuring that the military were adequately supplied with munitions was also a pressing concern for all states at war. State control over industry grew. In Germany, a Raw Materials

¹⁸ See E M H Lloyd, *Experiments in State Control at the War Office and Ministry of Food* (Clarendon Press, 1924), ch 25.

¹⁹ R H Tawney, 'The Abolition of Economic Controls, 1918-21' in J M Winter (ed), *History and Society: Essays by R H Tawney* (Routledge and Kegan Paul, 1978) 129-86.

²⁰ See John Turner, 'State Purchase of the Liquor Trade in the First World war' (1980) 23 *Historical Journal* 589-615.

Section (*Kriegsrohstoffabteilung*) was set up within the War Ministry, and co-ordinated a number of war corporations to control, purchase and distribute war-related raw materials. Some 200 *Kriegsrohstoffgesellschaften* were set up, run by businessmen who were paid a fixed return on their investments in these ventures.²¹ The German state also drew on the tradition of industrial syndicates and cartels, as in the Coal Industry, where industrialists maintained an organisation on the verge of fracture, when faced with the threat of government control as an alternative.²² A Reich Commissioner for coal was subsequently appointed to ensure continued supplies. In Austria, the military was empowered to take over the administration of private companies, with the owners of the firms being paid a remuneration reflecting previous average profits. This country also saw war associations and central agencies which sought to guarantee the optimal use of industrial resources by an increasingly centralised system of control. The British state also became increasingly involved in regulating industry, to ensure supplies for the war effort. At the beginning of the war, Britain's 3000 coal mines were owned by some 1500 companies: after the war broke out, numerous measures were taken to control the coal trade (by limiting exports and prices, and controlling the price of shipping coal), and after December 1916 collieries came under the control of the Board of Trade with a Coal Controller.²³ The Ministry of Munitions, created in 1915, was given the power to declare any factory a 'controlled establishment', to supply material at fixed rate of profit.²⁴ Although the vast majority of factories producing munitions continued to be privately owned and run (though there were also some state enterprises), munitions legislation controlled labour and

²¹ These corporations parcelled out much of the manufacturing work to participating firms: Chickering (n 6) 38.

²² Feldman (n 14) 57.

²³ The method of compensation was settled by agreement with the mineowners and confirmed by the Coal Mines Control Agreement (Confirmation) Act of 1918.

²⁴ Munitions of War Act 1915.

production in these factories, interfering considerably in the contract of employment.²⁵ In 1916, a Ministry of Shipping was set up, with a shipping Controller with power to requisition ocean going mercantile ships. After the submarine campaign reached its height in April 1917, almost all the British sea-going tonnage above 300 tons was requisitioned, to be run either directly or through the agency of the owners. The control of shipping was extended after the Paris conference in November 1917 led to the creation of the Maritime Transport Council and Executive, to allocate tonnage to different countries.

In France, the realisation that the war would be prolonged increased government involvement in industry. To begin with, it had to release conscripts to return back from the front, ensuring a labour supply. The *loi Dalbiez* of June 1915 released half a million military men to work in the factories, though significantly they remained under military discipline.²⁶ Furthermore, it was soon evident that state arsenals could not supply all the necessary armaments, and in September 1914 at the Bordeaux Conference, the government developed a strategy with industry for the war economy, with the state providing much capital for the expansion of plant, and buying the output at favourable prices. Given the loss of production in the north, the state began to work with industrial and commercial bodies to establish import monopolies for heavy industry and to manage the distribution of imported material among various firms. 18 groups of industries (made up of 375 companies) were organised, with leading companies in each industry receiving orders from the state and then distributing them to the other companies within the groups. Production was subsequently co-ordinated by a new Ministry of Armaments set up in December 1916, which controlled prices and production, but which left the actual work in the

²⁵ On this see G R Rubin, *War, Law and Labour: The Munitions Act, State Regulation and the Unions, 1915-1921* (Oxford University Press, 1987).

²⁶ See Smith, Audoin-Rouzeau and Becker (n 2) 62-3 for the material in this paragraph.

hands of private firms operating for a profit.

The states' war efforts thus had considerable impact on the existing private rights of their citizens: in this modern warfare, the needs of the state would be primary. Wartime legislation allowed governments considerable power to take private property for public defence. Using powers derived from requisitioning was the law of 13 June 1873 (*Gesetz über die Kriegisleistungen*), the German Raw Materials Section requisitioned not only industrial equipment, but all kinds of metallic objects which could be used for munitions. Similar steps were taken in Austria, where compensation for property taken for the war effort was determined, under legislation passed soon after the outbreak of war, by administrative bodies with no recourse to the courts.²⁷ French case law had also established a right to compensation for loss of the use of property requisitioned by the state. In Britain questions were soon raised over the level of compensation which was to be given for property taken for the public defence. In the view of government lawyers, the crown had the prerogative power to take property in times of emergency, without having to pay compensation as a matter of legal right. This view was confirmed in 1915 by the Court of Appeal in a decision which was very controversial - the government's lawyers settled with the claimants who had brought the case against them when they discovered that the House of Lords would overrule the decision when the case came before them.²⁸

²⁷ See Schennach's contribution to this collection.

²⁸ *In re a Petition of Right* [1915] 3 KB 649. For hostile comment, see (1916) 32 *Law Quarterly Review* 339. On the case, see G R Rubin, *Private Property, Government Requisition, and the Constitution, 1914-1927* (Hambleton Press, 1994) ch 4.

In Britain governments were constantly aware of the need to avoid a decision coming to the courts which would established the right of litigants to compensation for the seizure of their property, or harm done by the government to their economic interests. The greatest concern was the sheer size of the potential cost. This did not mean that property was taken without compensation, for in March 1915 the government set up a royal commission under Henry Duke MP to settle what sums should be paid in respect of losses to businesses or properties as a result of the crown's exercise of its rights to defend the realm. This commission however gave payments as a matter of grace rather than of right, and on a scale much lower than would be awarded in the court.²⁹ After the war ended, the House of Lords held that the crown in fact had no legal right to seize property without compensation;³⁰ but the decision was soon followed by an Indemnity Act preventing the reopening of claims. As GR Rubin has shown, the crown's lawyers were constantly aware in wartime that their actions exceeded the powers given to them by DORA and the Regulations and that they faced potentially numerous challenges to the *vires* of their acts. However, they managed for the most part to postpone the legal problem until the war had ended.³¹ At the same time, in many industries, such as shipping, levels of compensation could be determined by arbitration or negotiations. An Admiralty Transport Arbitration Board was set up in Britain in 1914, including representatives from the shipping industry, to set rates for hire, which resulted in the 'Blue Book' rates to be paid for ships requisitioned by the state. This Board laid down the conditions and rates of hire for different kinds of vessels, accepting a 'fair profit'. If shipowners grumbled about the impact of inflation

²⁹ It only awarded sums representing losses, rather than lost profits Defence of the Realm Losses Commission. First Report of the commissioners. PP 1916 [Cd 8359] VII. 1 See Rubin (n 25) ch 12.

³⁰ *Attorney General v De Keyser's Royal Hotel, Ltd.* [1920] AC 508.

³¹ *Newcastle Breweries v The King* [1960] 1 KB 854, *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, *Chester v Bateson* [1920] 1 KB 829. For unsuccessful wartime challenges, see *Lipton v Ford* [1917] 2 KB 647.

on these rates, they benefit from inflation when it came to the compensation to be paid if ships were sunk.

Alongside the issue of compensation for property requisitioned, the war raised questions of whether and how the public might be compensated for damage to property caused by the war itself. In Austria (as Martin Schennach shows), there was some debate over the delictual liability of the state for war damage, and about how far the state should compensate for losses caused by enemy action; but most regarded this as a matter for public law. In France (as David Deroussin shows), the war also generated a debate about the state's duty to compensate those whose property was damaged by acts of war, leading to legislation in 1919 which gave such a right to compensation, reflecting a notion that there had to be a spirit of national solidarity when faced with war. The British state enjoyed an immunity from tort which derived from the ancient notion that the crown could do no wrong, though in theory the individual wrongdoer could be sued.³² This principle survived the war. At the beginning of the war, the government set up a war risks insurance scheme, to cover shipping,³³ and in the following year a Government Aircraft Insurance Scheme was set up to offer insurance for damage caused by enemy bombing.³⁴ The scheme was perceived by many to be unsatisfactory, and there were continued calls, particularly from local authorities, for the state to pay compensation for war damage from national funds. A modified scheme was introduced in November 1917, to help

³² For the application of this rule in Scotland, see *Macgregor v Lord Advocate* 1921 SC 847.

³³ This was in effect a reinsurance scheme, to underwrite other insurers. Insured ships had to obey Admiralty instructions as to their voyages: see (1914) 58 *Solicitor's Journal* 765 (15 August 1914). France also introduced such a scheme (1914) 59 *Solicitors Journal* 230.

³⁴ It was managed by the General Accident Insurance Company: *Hansard* vol. 74 (5th ser), col. 724 (28 Sept. 1915).

those with smaller properties, but without going early as far as had been called for.³⁵

Particular questions were raised for workplace injuries. Different states reacted differently to the question of workmen's compensation, when questions arose whether the injury resulted from an accident in the workplace, or from war risks. In Britain, whose pre-war Workmen's Compensation legislation only applied to British territories, an Injuries in War (Compensation) Act was passed to allow the crown to frame schemes to provide pensions for soldiers injured in the war.³⁶ Otherwise, no new scheme was introduced for wartime conditions,³⁷ but claimants were left to the existing 1906 Act, which required them to show that the injury arose out of and in the course of employment.³⁸ French courts (as Deroussin shows) also debated which injuries arose from the course of employment, generating mixed results. A system which decided compensation on a case by case basis was bound to lead to inconsistent decisions. Other countries, such as Germany, had more bureaucratic systems of compensation which compensated those harmed by enemy bombs.

³⁵ See *Hansard* vol. 98 (5th ser) col. 1766 (5 Nov 1917). In the Second World War, a War Damage Commission was set up under the War Damage Act 1941 to pay compensation for bomb damage. See 'War Damage to Property: Government Compensation Scheme': PP 1939-40 [Cmd. 6136] V 543. Given the likely scale of bomb damage, property was considered to be largely uninsurable on the private market. See *The Times* 16 March 1938, p 11.

³⁶ See *Tomalin v Pearson* [1909] 2 KB 61; *Schwartz v The India Rubber, Gutta Percha and Telegraph Works Company, Ltd* [1912] 2 KB 299.

³⁷ There were however some amendments to the legislation: see P W J Bartrip, *Workmen's Compensation in Twentieth Century Britain* (Aldershot, 1987) 74-82.

³⁸ Thus, a potman who was cleaning the brass plate outside the public house where he worked failed to recover compensation when injured by a bomb which fell (*Allcock v Rogers* (1917) 62 *Solicitor's Journal* 173, 601; WN 1 Dec 1917, p 353, 6 Apr 1918 p. 96; *Law Times* 5 Dec 1917, p. 111, 6 April 1918, p 401). The family of another workman, killed by a bomb while out on his employer's business, failed to obtain compensation: *Knyvett v Wilkinson Brothers (Ltd)* (1918) 62 *Solicitor's Journal* 60, *Law Times* 4 May 1918, p. 6, where the Lords applied its own (non-war-related) decision in *Dennis v A J White and Company* [1917] AC 479). By contrast, the widow of the chief engineer of a ship which struck a mine and was lost was compensated: *Newstead v Owners of the Steam Trawler Labrador* [1916] 1 KB 166.

The war also had a significant impact on family law. Old rigid rules, relating to marriage and the legitimisation of children, which had already come under some pressure after the turn of the century in some countries, were removed in wartime conditions. In France, several measures were passed to facilitate marriages, allowing for marriages between parties who were separated by war (as when a soldier was on the front), and even regularising marriages celebrated when (unbeknown to the wife and the person officiating) the ‘husband’ had already been killed. With husbands away from the marital home and unable to exercise paternal powers, women were able to acquire greater powers in the household. Wartime experience led to the liberalisation of the law relating to adoption. As Carlotta Latini shows, Italy also saw similar reforms in family law, with the war leading to the abolition of marital authorisation (opening the way for far greater participation of women in the workplace). The war also made issues of child protection more urgent, particularly of war orphans and illegitimate children, which resulted in reforms which would survive the war.

The expansion of the ‘public law’ activities of the state clearly had a disruptive impact on private law during the war, as the state interfered with free markets and co-ordinated commercial activity. The impact of the war on private law and private law rights and duties was therefore considerable. However, private law relations remained a crucial underpinning: ‘war socialism’ did not erase property rights, and in many instances private economic relations were not replaced with a state-owned system. Instead, a wartime public law structure was laid over the top of a private law base, through which most economic activity continued to take place. As one historian has put it, ‘[b]usinessmen oversaw the business of war everywhere’: the allocation of resources, in war, as in peace, was driven by considerations of profit.³⁹ State

³⁹ Chickering (n 6) 39.

agencies were the main consumers of industrial output, but they also guaranteed set rates of profit. Economic activity continued, contracts continued to be made and broken, and courts had to deal with the consequences of legal disputes. In doing so, they often sought to defend and develop traditional private law doctrines, and to adapt old law to new purposes.

II

For private commercial parties, the most pressing questions concerned what impact the war had on their existing contractual relationships. The most immediate problem raised by the war was that the many parties were unable under the new economic conditions to pay their debts or fulfil their contracts. The outbreak of war was bound to impede the payment of debts across borders, which threatened to create a contraction of credit and a collapse in the price of securities. Consequently, stock markets all over Europe were closed, to avoid their collapse.⁴⁰ At the same time, a number of states introduced temporary moratoria on the payment of debts. The effectiveness of moratoria in sustaining the system of credit in emergencies had been established in the Franco-Prussian war of 1870-1, when the French legislature had periodically postponed the date of payment of bills of exchange, to ensure that they did not become payable till the end of the war.⁴¹ In 1914, such moratoria were again introduced in France, where numerous laws extended the period for payment of negotiable instruments.⁴² and in the Netherlands, where debtors were permitted to petition the court for a renewable six month moratorium. In England, the Postponement of Payments Act - which postponed payments on

⁴⁰ See Ranald C Michie, *The London Stock Exchange: A History* (Oxford University Press, 1999) 145-6.

⁴¹ See (1914) 137 *Law Times* 376. The validity of these moratoria had been accepted by the English courts: *Rouquette v Overmann and Schou* (1875) LR 10 QB 525.

⁴² See David Deroussin's article in this collection.

negotiable instruments for a month and allowed for further postponements - was passed in a single day (3 August).⁴³ Three days later, the reach of the moratorium was extended to cover a wider range of contracts.⁴⁴ Germany did not pass a general moratory law - something which was a matter of pride for Reichsbank President Havenstein - though the Reichsbank did (like other central banks) suspend gold and silver payments.⁴⁵ However, a number of measures were passed in Germany to suspend the payment of debts.⁴⁶

It was not only short term commercial debts which were postponed. Wartime conditions allowed for the postponement of the payment of various forms of debt throughout Europe. Particular attention was paid to the financial position of soldiers. In France, legislation was passed at the start of the war to protect those who had been mobilised. As Deroussin shows, particular attention was paid here to protecting rural leases held by farmers who had been mobilised, to avoid the disruption of farming. In Germany, legislation also passed on 4 August conferred special rights on persons in military service (echoing one of 1870) protecting them from proceedings in civil, commercial and industrial courts.⁴⁷ In Britain (where conscription began only in 1916), legislation was also passed to protect soldiers from actions for debts, even if their inability to pay could not be attributed to war conditions.⁴⁸ Nor was it only the military

⁴³ *Hansard* vol 65 (5th ser.) col. 1805.

⁴⁴ *The Times*, 12 August 1914, p. 10. It excluded (among other things) contracts for wages or salary, or for sums under £5. The Postponement of Payments Act was in force for six months.

⁴⁵ Feldman (n 14) 33.

⁴⁶ Ordinances passed on 7 August provided that no suits could be commenced by those domiciled outside Germany, and that stays of execution could be granted to debtors by the ordinary courts, where it was not prejudicial to creditors. (1914) 59 *Solicitor's Journal* 40.

⁴⁷ (1914) 59 *Solicitor's Journal* 55.

⁴⁸ Courts (Emergency Powers) (Amendment) Act 1916. For critical comment, see *Solicitor's Journal*, vol. 60, p. 412. Britain also passed legislation facilitating the termination of leases held by those in the military. In 1918, an act was passed to amend the law relating to

who were protected, for legislation was passed to postpone the liabilities of those on the home front. Following the example of legislation passed in 1870, France introduced a complex series of moratoria on rents, to protect those unable to pay because of wartime conditions, while attempting at the same time to balance the rights of landlords. In Italy, special courts were set up to deal with disputes over rural leases in an equitable manner, in effect taking the matter out of the ordinary courts and giving power to arbitrators chosen by the parties. In Britain, the Courts (Emergency Powers) Act of August 1914 enacted that no one could seek execution on a judgment, or distrain for rent, or foreclose on a mortgage without the leave of a court. The act applied to debts arising from before the war, and was to be used where the debtor was unable to pay for reasons attributable to the war.⁴⁹

The number of litigants resorting to these legislative special regimes was considerable. For instance, in England, in 1918, there were 97,303 orders under the Courts (Emergency Powers) Act 1914 in the County Courts, as against 101,957 cases determined on a hearing.⁵⁰ The legislation had to be prolonged after the end of the war, for fear that creditors might now swoop on their debtors to recover their debts. In fact, in January 1918 a committee appointed by the Board of Trade reported that they had been ‘much impressed’ by the ‘readiness of businessmen not to insist on the strict letter of a contract, the performance of which has been affected by the

testamentary dispositions by soldiers and sailors, to allow them to pass real property, as well as personal property, without observing the formalities of the Wills Act. This was passed in response to the decision of the Probate Division in *In the Estate of Anderson* [1916] P 49.

⁴⁹ As Eve J put it, ‘The Act is not for the relief of insolvent debtors, still less for the conscription for the benefit of debtors of the property of their creditors.’ *Re Courts (Emergency Powers) Act 1914 and Re Jobson’s application* (1918) *Solicitors Journal*, vol. 62, p. 248.

⁵⁰ Judicial Statistics, PP 1920 [Cmd 831] I 515, p. 29.

war', since they had seen it in its 'true patriotic light'.⁵¹ This was perhaps over-optimistic, since the statute continued to have some life after the war.⁵²

Besides introducing legislation to suspend the payment of debts, legislation was passed in a number of countries to contracts to be terminated or amended because of war conditions. In France, legislation was proposed in 1915 (following an earlier Italian decree) to allow for the rescission or revision of commercial contracts because of wartime conditions, though the act which finally passed in 1918 did not allow courts to rewrite the contract. In Britain, legislation in 1917 allowed the court to vary, suspend or annul not only any building contract entered into before the war which could not be 'enforced according to its terms without serious hardship' owing to restrictions in the supply of labour or materials, but also 'any contract' which could not be performed because of any restriction imposed in pursuance of any act or regulation passed for the defence of the realm.⁵³ Italian legislation also aimed at protecting the weaker party to a contract, by setting up fast and fair tribunals in place of the formalism of civil trials applying the fixed code.

Many contractual relationships were thus regulated by statutes passed in the war.⁵⁴ These developments, which sat alongside traditional private law doctrine, raised the question of how

⁵¹ Pre-war contracts. Report of the committee appointed by the Board of Trade to consider the position of British manufacturers and merchants in respect of pre-war contracts, 1918 [Cd. 8975] VII. 817, p. 7.

⁵² In 1922, there were 31,876 orders under the act in the county courts, compared with 738,379 plaintiffs entered. The respective figures for 1921 were 67,781 and 553,656. Judicial Statistics 1922, PP 1923 [Cmd 2001] XXIV.1, p. 32.

⁵³ Courts (Emergency Powers) (Amendment) Act 1917. Note also the Increase of Rent and Mortgage Restriction Act 1915, passed to control wartime rents.

⁵⁴ According to (1917) 143 *Law Times* 230, 'the emergency code is fast becoming exceedingly complex, with the additional inconvenience that statute follows on the heels of statute almost as fast as the leaves fall on an autumn day'.

far doctrinal developments would be influenced by new equitable ideas introduced in wartime. The area of private law perhaps most affected by the war was the contractual doctrine of *force majeure* or frustration. This concept was well established in the codified civilian systems. Arts. 1147-8 of the French *code civil* provided that no damages were payable if a party to the contract had been prevented from performing because of an ‘external cause which could not be imputed to him’⁵⁵ or because of ‘*force majeure* or *cas fortuit*’ [‘superior force or chance occurrence’].⁵⁶ This provision was echoed in other codes based on the French one, such as the Dutch civil code and the Italian civil code. The Austrian civil code (s 1447) also made provision for the impossibility of fulfilling a contract if there were unforeseen impediments lying beyond the will of the parties. The notion of *force majeure* was derived from the notion of *vis maior* in Roman law,⁵⁷ which also contained rules establishing who was to bear the risk of unforeseen events in certain contracts, such as leases.⁵⁸ Where civilian systems of law could draw on centuries of discussions on the allocation of risk, the common law notion of ‘frustration’ was of much more recent growth and much less developed by 1914.⁵⁹ Moreover, whereas the civilian doctrine was premised on the notion that *force majeure* rendered a breach non-culpable, the English doctrine was based on a notion of an implied term in the contract between the parties, which would discharge it when it became impossible to perform. English

⁵⁵ ‘Une cause étrangère qui ne peut lui être imputée’: Art. 1147 *Code civil*.

⁵⁶ Art. 1302 of the code also made provision for the destruction of ascertained goods.

⁵⁷ See D.44.7.1.4, C.4.65.1, D. 19.2.36.

⁵⁸ See D. 19.2.15.2 on whether the lessor or the tenant was to bear losses caused by various kinds of accident, from the flooding of rivers to earthquakes. On these issues, see Paul du Plessis, *Letting and Hiring in Roman Legal Thought 27 BCE - 284 CE* (Brill, 2012), 38ff and his *A History of Remissio Mercedis and Related Institutions* (Kluwer, 2003).

⁵⁹ See C MacMillan, ‘*Taylor v Caldwell* (1863)’ in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, 2008) and M Lobban, ‘Contractual Terms and their Performance’ in W. Cornish et al, *The Oxford History of the Laws of England* vol. XII (Oxford, 2010), 508-521.

judges tended to focus on whether the parties could be seen to have agreed on the circumstances under which a contract would be discharged, rather than asking whether the event was such as to remove the presumption that the party in breach had committed a fault.

The war raised new questions about the ambit of *force majeure* and frustration, as governments throughout Europe began to prohibit trade with enemy states and requisition supplies, and as the disruption of trade, as well as wartime inflation, made it increasingly difficult for contracting parties to fulfil the engagements they had originally entered into. Although (as has been seen), there was much legislation providing for the adjustment of contractual obligations, the civil law courts also had to consider how far parties were to be held strictly to their contractual obligations, and how far parties could be relieved from what had become severe burdens. One immediate question to be answered was whether the war itself constituted *force majeure*. As David Deroussin and Catharine MacMillan show, neither the French nor the English courts were sympathetic to arguments that the mere fact of war excused the performance of contractual obligations. Judges were keen to uphold contracts wherever possible, from a fear of the consequences of allowing parties to evade obligations which had simply become more onerous. In general, courts sought to resolve these problems by resorting to traditional private law doctrine, rather than developing wider policies which might attempt to reconcile the interests of traders and the wider nation. In France, there was much debate over whether courts should apply the theory of *imprévision*, according to which a judge could modify the terms of a contract which had become seriously onerous to one of the parties, as a result of new circumstances which could not have been foreseen. As Deroussin shows, some trial courts (as well as administrative courts) favoured excusing the performance of contracts which had become unduly onerous; but the appeal courts rejected this approach, preferring a stricter interpretation of *force majeure*. In England (as MacMillan shows), judges hearing the

early requisition cases evidently sought to find a solution which was financially fairest to both parties, but they were not keen to develop a new, broad theory of frustration beyond the 'implied term' theory. As the war progressed, judges showed themselves increasingly willing to discharge contracts which had been disrupted by state action - most usually where ships had been requisitioned - but were not willing to discharge them where the interference was not related to government action, as (for instance) when it became impossible (as a result of the war) to procure a supply of goods. The war thus provided an impetus for the development of the law of frustration - inevitably so, given the large amount of litigation generated by the war - but it did not lead to a major rethinking of the foundations of the doctrine. Judges were keen to maintain 'private law as normal', so far as was possible.

A more equitable or interventionist approach was taken elsewhere. In Italy (Latini argues), the war did see a significant extension of the doctrine of *force majeure*, allowing parties to discharge contracts not only which had become impossible, but those which had become prohibitively expensive. In Austria, the supreme court also allowed for the discharge of contracts not only when performance was impossible, but also where it could impose unreasonable costs on one of the parties. The war also had a major impact on rethinking these notions in Germany, where courts moved away from an earlier strict approach to questions of *vis maior* to a more equitable one. The German civil code, the BGB, contained various clauses regarding impossibility of performance,⁶⁰ though it had deliberately omitted any *clausula rebus sic stantibus*. However, it did contain provisions that the contract had to be performed in good faith.⁶¹ Though in the early years of the war, German courts were unwilling to allow

⁶⁰ S 275: 'The debtor is released from his obligation to perform insofar as the performance becomes impossible as a result of a circumstance, for which he is not responsible, arising after the inception of the obligation'.

⁶¹ Art. 242: 'The debtor is bound to carry out performance in the manner required by good

parties to evade contractual obligations simply because of an increase in prices, as the war went on, judges became more willing to intervene and set aside contracts which had become disproportionately onerous to one of the parties.⁶² Although historians have often argued that it was in the era of the Weimar Republic that judges changed their approach increasingly towards one invoking good faith, Hans-Peter Haferkamp argues here that it occurred earlier, during the Great War. In contrast to English judges, German judges saw themselves as having a distinct role in stabilising the home front when faced with economic crisis, looking beyond the settled parameters of traditional private law doctrine. They developed an open and independent policy when dealing with cases relating to pressing economic questions. In an era when the legislature seemed unable to respond adequately, the judges in the *Reichsgericht* sought to maintain the ‘inner unity’ of German society, and to ensure that people did not seek to promote their own private interests at the expense of the wider interests of the war economy: for instance, they used the general clauses of the BGB to void contracts where one side sought to make an excessive profit.

The disruption caused to the economy by war also had serious effects on the contracts of traders in neutral countries, forcing the courts to rethink *force majeure*. In the Netherlands, as Willem van Boom shows, the outbreak of war among foreign states clearly did not constitute *force majeure*, nor was trading with the enemy illegal: but (as in other countries), contracts were interfered with by requisitioning and restrictions imposed by the state. As in the belligerent countries, so in the Netherlands the courts strove to maintain contractual

faith, commercial usage being taken into account’; Art. 157: ‘Contracts are to be interpreted in the manner required by good faith, commercial usage being taken into account.’

⁶² On this, see John P Dawson, ‘Effects of Inflation on Private Contracts: Germany, 1914-1924,’ (1934-5) 33 *Michigan Law Review* 171-238 and Michael L Hughes, ‘Private Equity, Social Inequity: German Judges React to Inflation, 1914-24’ (1983) 16 *Central European History* 76-94.

performance, even where the provision of supplies had become extremely difficult.⁶³ Dutch traders were expected to make provision for possible wartime problems: they could not argue that they were not to be expected. However, the wartime cases did spur Dutch scholars to rethink the law regarding extraordinary, unforeseen events which render contractual performance far more onerous than anticipated, leading them to look to applying the principle of good faith, found in the Dutch civil code. In the 1920s, both courts and scholars in the Netherlands pondered whether to accept an approach akin to the French theory of *imprévision* - but (as in France), the superior courts resisted the idea of modifying contracts in light of changed circumstances until the last quarter of the twentieth century. As in other countries, so in the Netherlands new wartime problems made jurists reconsider old problems - as war conditions revealed inadequacies in old doctrinal frameworks - though without inducing them in the short term significantly to recast the law.

Besides making it impossible or extremely onerous to perform many contracts, the war also rendered many contracts illegal - particularly in the case of those effected with enemy buyers or sellers. At the beginning of the war, different countries had different views regarding trading with the enemy. Neither Germany nor Austria prohibited trading with the enemy, and allowed enemy aliens the right to sue and be sued in local courts. The English common law took a tougher view. At common law, trading with alien enemies was illegal - any contract made with an alien enemy was void.⁶⁴ A Royal Proclamation of 5 August confirmed this by warning the king's subjects from trading in goods destined for Germany, and it was followed within two

⁶³ Compare the English decision in *Blackburn Bobbin Co Ltd v TW Allen and Sons Ltd* [1918] 1 KB 540 (concerning an interrupted supply of Finnish timber, discussed by Macmillan) with the 1919 Dutch case *Simon v Holst* (Hof Amsterdam 9 October 1919, NJ 1920, p. 249) concerning 'Belgian oak', discussed by Willem van Boom in this collection.

⁶⁴ *Willison v Patteson* (1817) 7 Taunt 439.

weeks by a Trading with the Enemy Act. In France, a decree of 27 September 1914 prohibited all commerce with the subjects of enemy states and nullified any contract made with an enemy subject since the outbreak of war, while also allowing those entered before this time to be voided. Germany and Austria both responded with an ordinance prohibiting the making of payments to Britain and France and their colonies; and laws followed which dealt with the seizure of goods, the sequestration of property, the annulment of contracts with enemy aliens and the winding up of enemy undertakings.⁶⁵ France also responded with a decree declaring null and void any contract made with the subject of any enemy state, as well as subjects of states (such as the Ottoman empire) not formally at war with France.⁶⁶ Enemy property was also sequestered. In Britain, an Order-in-Council at the outbreak of the war placed three German and two Austrian banks under the supervision of a controller, whose task was to realise assets to be able to pay the banks' English, allied and neutral creditors arising from pre-war transactions (and ultimately, after 1916, to liquidate the banks).⁶⁷ The Board of Trade was given the power to take over enemy owned firms, where it was in the public interest for the business to be carried on.⁶⁸ The state acquired considerable powers in the war to take over and wind up companies who were thought to be trading with the enemy, whether directly or indirectly.⁶⁹ All businesses owned by enemy subjects were investigated, and in many cases

⁶⁵ For the decree, see Scobell Armstrong (n 5) 21. See also (1914) 59 *Solicitor's Journal* 22, 39. On the outbreak of war, the German ambassador told the Foreign Office that British demands against Germans would be suspended unless the British changed their rule: *Porter v Freudenberg* [1915] 1 KB 857 at 879.

⁶⁶ See Deroussin's contribution to this collection.

⁶⁷ See 'Enemy Banks: London Agencies' PP 1916 [Cd 8430] V.1 and 1917-18 [Cd 8889] V.9.

⁶⁸ For the first case, see *In re Meister Lucius & Brüning (Ltd)* in *The Times* 21 October 1914, p. 3.

⁶⁹ Trading with the Enemy Amendment Act 1916. This act was later taken to suspend any right the Crown had in wartime to seize the property of enemies: *In re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch 107.

foreign-owned firms were transformed into British companies, by being sold off to local investors.⁷⁰ French decrees in October 1914 also allowed for the sequestration of enemy property. Germany retaliated to the measures taken against its banks by the British in September 1914, by making provision for enemy controlled undertakings to be put under state supervision. Further decrees followed allowing for the state to take control of undertakings controlled by French and British nationals, with the administrator being given power to carry on, lease or wind up the business. However, rather than liquidating such firms, the policy of the government was to ‘preserve the businesses in question as an asset for meeting the indemnities to be exacted from the enemy upon the termination of the war.’⁷¹ However, in July 1916 (in retaliation for the British policy of winding up enemy firms, embodied in the 1916 Trading with the Enemy Act), a decree was issued authorizing the winding up of any British-owned or -controlled undertaking. Germany also appointed a Custodian of Enemy Property in 1917 (two and a half years after the British had done so). Austria also passed a decree in October 1914 to allow government control of enemy corporations, and passed further decrees during the course of the war to allow these companies to be liquidated or sold.

Complex questions remained over who was an alien enemy. In England, at the end of August 1914, a Treasury memorandum giving guidance confirmed the view from existing case law that what mattered was not the nationality of the person, or firm, being dealt with, but its location.⁷² It was illegal to deal with any individual or firm resident in an enemy country, but there was no objection to dealing with German or Austrian firms established in British or

⁷⁰ See Trading with the enemy. Report to the President of the Board of Trade by the committee appointed to advise the Board of Trade on matters arising under the Trading With the Enemy Amendment Act, 1916: PP 1918 [Cd. 9059] XIII 783.

⁷¹ Scobell Armstrong (n 5) 8.

⁷² See also *Janson v Driefontein Consolidated Mines* [1902] AC at 505.

neutral territory, or even with branches of German firms operating in England, provided that there was no transaction with the head office. This meant that a German national who had registered under the Aliens Restriction Act 1914 was permitted to sue in the courts of England, by virtue of a licence from the crown,⁷³ though alien enemies lacking this licence could not sue. By contrast, an alien enemy could be sued in the English courts, for while it was thought to go against good policy to allow an enemy to use the King's courts to enforce his rights, it made perfect sense to allow the King's subjects to enforce their rights in court against the enemy.⁷⁴

Questions were also raised over what counted as an enemy company. In Britain, corporate entities were regarded as entirely distinct from their shareholders,⁷⁵ which suggested that a corporation registered in England should be regarded as an English firm, even if all its owners were German or Austrian. Early in the war, some in the legal community, who were keen to maintain business as usual, argued that this rule was a good one, and that no account should be taken of the nationality of shareholders in a company in determining whether it was unlawful to deal with the firm.⁷⁶ Although the Trading with the Enemy Act 1914 had given the Board of Trade power to inspect the books (and if necessary to appoint a controller) where more than 1/3 of a company's capital was owned by enemies, the Royal Proclamation of September 1914 had only prohibited trade with companies incorporated in enemy countries. However, in 1916, in the context of increasing demands in the country and in parliament for German owned, but

⁷³ *Princess Thurn and Taxis v Moffitt* (1914) 31 TLR 24.

⁷⁴ *Porter v Freudenberg* [1915] 1 KB 857 at 880. See also *Robinson & Co v Continental Insurance Company of Mannheim Ltd* [1915] 1 KB 155.

⁷⁵ *Salomon v A Salomon & Co* [1897] AC 22. But note the criticism in (1914) 137 *Law Times* 559-60: 'To treat the association as necessarily capable of continuance, because English law created it, is to beg the question. English law, as Maitland showed, did not create it. It only recognised it, and accorded it certain privileges'.

⁷⁶ (1914) 59 *Solicitor's Journal* 84.

British registered companies to be treated as alien enemy entities, the House of Lords confirmed that the nationality of the shareholders was relevant: war allowed for the tearing away of the corporate veil.⁷⁷ In the view of this court, the key question was not the country of a company's registration, but the question of control. 'The acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority,' Lord Parker of Waddington ruled, 'are the company's acts and may invest it definitively with enemy character.'⁷⁸ German companies were permitted to sue in French courts under the Treaty of Frankfurt of 1871, but this right could not survive the outbreak of a new war. After 1914, courts had to determine if the company was French or German, and - like the English - courts here began to debate whether a company's nationality was determined by the location of its registration or by the nationality of its owners. As Deroussin shows, this question was a subject of contention among judges and courts, with the view generally prevailing that it was the company's domicile, rather than the question of control, which determined its nationality.

Complex questions were also raised about the impact of war on a contract with an enemy alien. Legislation early in the war in Britain made the Public Trustee was made Custodian of enemy property, to receive and hold all moneys, such as profits or dividends, due to alien enemies

⁷⁷ The question whether a British registered company might be regarded as an enemy had been raised in the Prize case *The Tommi. (No. 14.) v The Rothersand (No. 69.)* [1914] P 251. It had already been decided that enemy shareholders were not entitled in wartime to exercise their rights of voting in respect of shares in English companies. *Robson v Premier Oil and Pipe Line Company, Ltd* [1915] 2 Ch 124.

⁷⁸ *Daimler Company v Continental Tyre and Rubber Company (Great Britain) Ltd* [1916] 2 AC 307 at 307 at 340. On the case, see David Foxton, 'Corporate Personality in the Great War' (2002) 118 *Law Quarterly Review* 428-57. As he demonstrates, the Lords' decision did not rest on this point; but it was applied in later cases: see *Clapham Steamship Co Ltd. v Naamlooze Vennotschap Handels-en-Transport-Maatschappij Vulcaan of Rotterdam* [1917] 2 KB 639, *In re Badische Co Ltd* [1921] 2 Ch 331.

until the end of the war, when Orders in Council would determine the fate of the property.⁷⁹ One a business had come into the hands of the Controller, it was safe enough to deal with it. But what of other traders of enemy alien origin? From the beginning of the war, English lawyers took the view that while executory contracts were voided by the war, executed ones, in which there was money owing to alien enemies, were suspended until the end of the war. German shareholders in British companies would continue to be entitled to their dividends, but would only be able to collect them at the end of the war.⁸⁰ Courts continued to take the view that at common law, existing property rights were only suspended.⁸¹ The common law view that all parties should be restored to their property when peace came was of course highly qualified by the role of the Custodian, and the fact that what happened to enemy property would be determined by the result of peace negotiations: but the courts of private law continued to apply pre-war principles to property. By contrast, executory contracts with alien enemies were held not simply to have been suspended for the duration of the war, but to have been terminated.⁸² When contracts specifically included suspension clauses, they were held to be void as being against public policy.⁸³ However, much might depend on the particular contract in question:

⁷⁹ Trading with the Enemy Amendment Act 1914. This legislation sought to create further safeguards to prevent alien enemies obtaining or controlling their property.

⁸⁰ (1914) 58 *Solicitor's Journal* 778. The journal also took the view that payments could be made to German firms for work which had already been completed, though it would have to be made through neutral channels. *Ibid.* 796.

⁸¹ See, e.g., *Hugh Stevenson & Sons Ltd v Aktiengesellschaft für Cartonnagen-Industrie* [1917] 1 KB 842, affirmed by the House of Lords in [1918] AC 239.

⁸² *Distington Hermatite Iron Company v Possehl & Co* [1916] 1 KB 811.

⁸³ A suspensory clause which kept a contract alive 'not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present' were void since they in effect hampered the trade of the British party, who would have to maintain a stock for the buyer which could not be used for the nation's needs. *Ertel Bieber & Co v Rio Tinto Co. Ltd* [1918] AC 262 at 275 (Lord Dunedin). See also *Zinc Corporation, Ltd v Hirsch* [1916] 1 KB 541, *Naylor, Benzoni & Co. Ltd v Krainische Industrie Gesellschaft* [1918] 2 KB 486. But contrast *Halsey v Lowenfeld* [1916] 2 KB 707, where the owner of the Prince of Wales's Theatre was allowed to sue his Austrian

thus, for instance, it was held that an alien enemy could keep a life assurance policy effected with a British firm going during the war. Since there could be no pay-out until the end of the war, there would be no benefit to any alien enemy, while it maintained a policy on which an interested British party might be able to sue.⁸⁴

III

Faced with the unprecedented demands presented by the Great War, the legal response of governments in these countries was often very similar, with the pre-war systems of *laissez-faire* replaced by strong state intervention in the economy, and contractual formalism tempered by equitable intervention. Nonetheless, as shall be seen, the responses - particularly to the development of existing private law doctrine - were far from uniform. In some countries, judges and jurists embraced new equitable or interventionist notions more enthusiastically than in others. Equally, some judges took a more policy-minded view than others, for whom wartime litigation simply presented a greater variety of cases to accommodate within traditional intellectual frameworks.

As the papers in this collection show, the war had an immense impact on the sphere of private law. In many areas, freedom of contract and sanctity of property were displaced by a regulated war time regime. The very realm of private law seemed in many areas to have been displaced. The courts themselves fell relatively silent - the English county courts, for instance, saw only a

lessee for rent due for the summer of 1915. Here, the payment of the rent did not require any co-operation from the British lessor, who would therefore not breach any Proclamation against trading with the enemy.

⁸⁴ *Seligman v Eagle Insurance Company* [1917] 1 Ch 519.

quarter of the number of cases in 1918 which they had heard in 1913. How long-lasting this impact was is another question. In countries such as Great Britain, at the end of the war private law largely resumed where it had left off. Private law as a whole was not reshaped by the war - even the doctrine of frustration had not yet been put on sure doctrinal foundations - and many of the regulatory interventions proved to be temporary. The common law tradition continued to develop in its old casuistic, meandering way. Similarly in Austria, the shape of private law turned out to be largely unaffected by the war, even if the shape of the old Austro-Hungarian empire had been irrevocably changed. But elsewhere - as in the Netherlands and especially in Germany - the war had a longer term impact on judicial attitudes to the private codes, and how they were to be applied and interpreted.