Volume 106
Issue 1 *Dickinson Law Review - Volume 106, 2001-2002*

6-1-2001

Unified Private Law for the European Internal Market

Unified Private Law for the European Internal Market

Dr. Ulrich Drobnig*

I. Introduction

The European Communities have existed for more than 40 years. By the end of 1992, a European market without internal borders for the movement of goods, services, persons and capital was largely achieved.[1] Nevertheless, at present, domestic sales are still governed by fifteen different national sales laws. Not even intra-European cross-border sales are subject to a unified regime in all member countries because Portugal, the United Kingdom and Ireland have yet to ratify the United Nations Sales Convention of 1980. For negotiable instruments, such as bills of exchange and checks, two major regimes exist side by side: the European Civil Law countries and the Scandinavian countries adhere to the Uniform Laws of Geneva of 1930/1931, while the United Kingdom and Ireland subscribe to the British Bills of Exchange Act of 1882.

The picture is even worse in almost all other areas of commercial and civil law. General contract law, banking, insurance, secured transactions, and proprietary security rights are governed by sixteen separate, and sometimes quite disparate, national legal systems. For intra-European cross-border transactions in all of these essential fields, the governing law must be determined by potentially divergent national conflict of laws rules, except insofar as the Rome Convention on the Law Applicable to Contractual Obligations[2]

* Max Planck Institute for Foreign & International Private Law, Hamburg, Germany.

1. Treaty Establishing the European [originally: Economic] Community of March 25, 1957, as amended Nov. 10, 1997, O.J. (C 340) 173 (1997) [hereinafter TEC]; TEC art. 7a, as inserted by the European Single Act of 1986; since 1999 art. 14; *cf.* TEC art. 3(1)(c), where the internal market, defined in the same way, is mentioned as one of the major goals of the Community.

2. Convention on the Law Applicable to Contractual Obligations, signed in Rome on June 19, 1980.

furnishes a set of uniform, general conflicts rules. This limited uniformity, however, applies only to the field of contract law.

II. European Private Law Legislation

A. Primary Functions of European Law

The current state of affairs runs counter to all historical experiences regarding the unification of domestic law in multi-jurisdiction countries. In France, Germany and Italy, commercial law was the forerunner of the general unification of private law. In Spain, commercial law is uniform, although general civil law can be derogated by regional *fueros* to some degree.[3] In the United States, the Uniform Commercial Code, which has been adopted by every state except Louisiana, has created an almost completely uniform regulatory environment. Why do developments in the European Community differ?

The primary purpose of the Treaty of Rome of 1957, which established the European Economic Community, was to remove public barriers to economic exchange. The Community's long catalog of activities focuses on the following three measures:

- the abrogation of customs duties by establishing a customs union;
- the abrogation of quantitative restrictions on the import and export of goods; and
- the abrogation of all other measures having the same effect as import and export restrictions.[4]

Efforts towards the removal of non-tariff barriers remain a permanent task because member states often feel internal pressure to maintain or introduce rules protecting domestic industry or trade. A special regime was introduced in order to facilitate the harmonization of the national laws by measures aimed at "the establishment and functioning of the internal market."[5]

In practice, the emphasis of the measures taken between 1986 and 1992 was on removing border controls for goods and persons, lifting technical restrictions, and harmonizing indirect taxes, especially by introducing a unified value-added tax and by guaranteeing free competition. Yet, there has been no word on harmonizing commercial law.

---

3. Constitución de España art. 149(1) no. 6 and 7.
4. 1957 Treaty of Rome, Article 3(a).
5. *See* TEC Article 100a, now Article 95.

B. The Limited Role of European Private Law Legislation

Nevertheless, mandates contained in the Treaty Establishing the European Community (TEC) have allowed for some harmonization of civil and commercial law.[6] First, nine Directives have been issued and another five have been or will be drafted on the basis of TEC Article 44(2)(g), which provides for the protection of members of corporations and of third parties.[7]

Second, core areas of civil law are affected by the European Community (EC) legislation on consumer protection. Two routes can be used to achieve the required "high level"[8] of consumer protection: through measures incident to realizing the internal market,[9] or by specific measures supplementing national consumer protection policy.[10] Since 1985, seven Directives of the latter type have been issued in this field, some dealing with specific methods of concluding contracts (such as doorstep transactions and distance marketing), others dealing with certain types of contracts (such as time-sharing rights in immovables, package tours, consumer credit, and guarantees in consumer sales), and one directive dealing generally with abusive clauses in consumer contracts.[11] Because of the supplementary role of EC legislation in this field, the Directives can set only minimum standards. Member states are permitted to maintain or introduce rules of consumer protection in these fields that go beyond the minimum standards established by the Directives.[12] This results in only partial harmonization in the fields of civil law affected by the aforementioned Directives.

Third, apart from some clusters of EC legislation in marginal fields of private law, such as in labor law and intellectual property, attempts at harmonization are limited to dispersed individual

---

6. For a complete survey as of 1996, *see* Ulrich Drobnig, *Private Law in the European Union* (Forum Internationale 22, 1996).

7. *See, e.g.*, V. EDWARDS, EC COMPANY LAW (Oxford 1999); DE PASQUALE & FRINGO, DIRITTO COMMUNITARIO DELLA SOCIETA (Padua 1997); Blaurock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377 (1998); G.C. SCHWARZ, EUROPAISCHES GESELLSCHAFTSRECHT (Baden-Baden 2000).

8. TEC art. 153(1).

9. TEC art. 153(3)(a) and 95(3).

10. TEC art. 153(3)(b).

11. *See, e.g.*, VERS UN CODE EUROPÉEN DE LA CONSOMMATION (F. Osman ed., Brussels 1998); CURRENT AND FUTURE PERSPECTIVES ON EC CONSUMER LAW (Gormley ed. London, 1997); NORBERT REICH, EUROPÄISCHES VERBRAUCHERSCHUTZRECHT (3d ed., Baden-Baden 1996).

12. TEC art. 153(5).

measures, such as the Directives on delays of payment, transborder transfers of payment, product liability, and independent commercial agents, among others. These Directives are based upon various general sources of legislative jurisdiction, such as the general clause for the harmonization of law,[13] the specific clause for harmonization to achieve the internal market[14] and the general stopgap clause of Article 308.

Finally, a new jurisdictional source for private international law and international civil procedure must be mentioned. Article 65 of the Amsterdam version of the TEC creates new Community jurisdiction in matters of cross-border judicial cooperation in civil matters. Article 65 is of paramount interest for intra-European cross-border legal relationships, especially those of a commercial nature. Article 65 includes within its scope various aspects of international civil procedure including service of process, taking of evidence, jurisdiction of courts, enforcement of decisions and the "compatibility" of conflict of laws rules. The member states have concluded revisions of several conventions on various aspects of international civil procedure and on the Rome Convention on the Law Applicable to Contractual Relations. These revisions will result in the conversion of these treaties to EC regulations. This conversion has already occurred with the EC Draft Convention on Transborder Insolvencies.[15] New EC regulations have also emerged from a convention on the jurisdiction and recognition of decisions in matrimonial matters and in proceedings relating to parental responsibility for children,[16] from the important and successful Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judicial Decisions in Civil and Commercial Matters.[17] Work continues with respect to a regulation on the Law Governing Torts. Thus, in this very particular area, the door has been opened to harmonization and the full unification of the conflict of laws in the broad sense of the word.[18]

---

13. TEC art. 94.

14. TEC art. 95.

15. Regulation no. 1346/2000 on Insolvency Procedures of May 29, 2000, 2000 O.J. (L 160) 1.

16. Regulation no. 1347/2000 on the Jurisdiction and the Recognition and Enforcement of Decisions in Matrimonial Matters and in Proceedings Relating to Parental Responsibility for Common Children of the Spouses of May 29, 2000, 2000 O.J. (L 160) 19.

17. Regulation no. 44/2001 of December 22, 2000, 2001 O.J. (L 12) 1.

18. *See* Basedow, *The Communitarization of the Conflict of Laws Under the Treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687 (2000); Drobnig, *European Private International Law After the Treaty of Amsterdam: Perspectives for the Next*

C. *Criticism on Private Law Legislation at the European Level*

The situation created by the present state of European legislation on substantive private law has been widely criticized. Most of the criticism has been directed at laws at the European level, although some criticism has focused upon the impact of the European law on the national systems of private law.

Two major types of criticism can be identified, one against the gaps in European private law, and the other against its inconsistencies.

1. Fragmentation. The vast majority of private law instruments are focused on relatively small topics that, for one reason or another, have attracted the attention of the European legislature. Except in the fields of corporations, consumer contracts and intellectual property, European private law is a patchwork of individual measures aimed at specific economic or social needs. One author has aptly described the current state of EC legislative progress as "European islets in the oceans of national private law systems."[19]

A major consequence of the fragmented nature of European private law legislation is that most areas of commercial intercourse are still subject to divergent national laws. Merchants are forced to either incur transaction costs associated with ascertaining the law in many countries or risk non-compliance. Typically, the economically weaker party will suffer more from this uncertainty than the stronger party. In addition, discrepancies between national civil and commercial laws distort competition.[20]

Even worse is the situation where the crossing of national borders results in a change of applicable law, since this change may lead to a diminution of rights or even the complete loss of some rights. This typically occurs in the context of export transactions where goods are sent into the importer's country. The exporter's proprietary rights in the goods, especially retention of title under the new *lex situs*, may be reduced or eliminated under the law of the importing country. The same risk may affect collateral in which a

---

Decade, 2000 KING'S COLLEGE L. J. (2000).

19. Kötz, *Rechtsvergleichung und Ggemeineuropäisches Privatrecht*, in GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT 149, 151 (Müller-Graff ed., 2d ed. 1999).

20. Kirchner, *A European Civil Code: Potential, Conceptual and Methodological Implications*, 31 U.C. DAVIS L. REV. 671, 672, 677 (1998).

bank has a security interest and which may be moved without the bank's knowledge into another member country.

2. *Inconsistencies.* Another consequence of the ad-hoc nature of the creation of private law instruments is that they may be drafted by different Directorates-General and spread over large spans of time. Inconsistencies are bound to arise because of the lack of a unified "system" of private law. Inconsistencies have even been found in the directives on consumer contracts despite the fact that one Directorate-General has recently reviewed these directives.[21]

D. *Negative Impact of European Private Law upon the National Legal Systems*

In assessing the impact of European private law legislation upon the national legal systems, one must distinguish between the two methods of European legislation—regulations and directives.

A regulation adopts European law making that law directly effective in the member states.[22] The member states cannot amend the regulation. Until recently, the use of regulations was uncommon, but several European instruments have been enacted in the form of regulations in 2000 and 2001. Most of these regulations relate to treaties between member states on private international law or international civil procedure[23] and therefore do not affect substantive private law.

In contrast, most private law measures have been enacted by directives. Directives require the member states to adopt the substance of the directive into national law, although the form and means for achieving this purpose is left to the discretion of the member states.[24] This flexible method enables each member state to "translate" the Directives into national private law while avoiding major inconsistencies with the external forms and means of national legislation. The substance of the directives, however, may not be amended. The potential conflict between form, substance and procedure sometimes creates substantive inconsistencies. From the

21. Thus, a consumer's right of withdrawal from a contract expires according to the various directives, either seven days, seven working days, or ten days after the making of the contract. *See* Ulrich Drobnig, *Neue Rechtliche Konzepte für den Europäischen Verbraucherschutz*, in NEUES EUROPÄISCHES VERTRAGSRECHT UND VERBRAUCHERSCHUTZ 201, 202 (W. Heusel ed. 1999).

22. TEC art. 249(2).

23. Convention on the Law Applicable to Contractual Obligations *supra* note 2, at 14-16.

24. TEC art. 249(3).

national perspective, therefore, European private law is frequently regarded as an "intruder" that creates unpleasant disharmonies.

A glaring example of inconsistency is furnished by the recent Directive on Guarantees for Consumer Sales.[25] This Directive is based on a progressive system of remedies for breach of contract embodied in the 1980 UN Convention on the International Sale of Goods (CISG). In converting the provisions of the Directive into national law, problems arise because the sales law of many continental European nations is based on centuries-old classical Roman sales law rather than the sales law as envisioned by the 1980 Vienna CISG. One can easily imagine the resulting confusion and inconsistency.

III. Principles of European Patrimonial Law

A. Desiderata and Resistances

The preceding survey of the present state of European private law reveals three major *desiderata*: first, gaps in European private law must be filled; second, existing inconsistencies must be reconciled; and third, new inconsistencies in future EC legislation must be avoided. The only way to achieve these three ends seems to be the elaboration of a systematic set of rules for European private law.

For the time being, this set of rules should be applied to those areas in which unification appears possible and most urgent, for example, in the law of obligations and movable property. In Civil Law categories, this field comprises contracts, non-contractual obligations, and movable property. By contrast, unified rules relating to immovables, family law and succession law, appear less realistic and less urgent.

Until a few years ago, such a program would have been unthinkable. However, the picture is changing. In the last four years, more and more European lawyers have embraced the idea of a European Civil Code[26] and numerous articles have been published

25. Directive no. 1999/44 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees of May 25, 1999, 1999 O.J. (L 171) 12.

26. *See* Alps, *The European Civil Code: E Pluribus Unum*, 14 TUL. EUR. & CIV. L.F. 1 (1999); Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337 (1999). *See also* Kirchner, *supra* note 20 for an interesting methodological analysis of the problems raised by, and possible approaches to, the drafting of a code.

on the topic.[27] Sceptics of course, do exist. A few passionate foes argue that the cultural identity of a nation will be endangered if its civil law, whether codified or not, is supplemented or absorbed by European rules.[28]

Subjective feelings and the proverbial conservatism of lawyers aside, most continental countries with old civil codes ought to, and some do, admit that a thorough modernization of both their codified and enacted civil law is necessary. In fact, in many Continental countries the codified rules on contracts, non-contractual obligations, and movable property have remained in essentially the same form since their original enactment. The French Civil Code still reflects the patrimonial law as enacted in 1804 and based upon *Pothier's* books. The same is true for the Spanish Civil Code of 1889 and the German code of 1900. Even the Italian code of 1942, although more modern than the "oldies," is based upon the legal thinking of the pre-World War II period. The only truly modern Civil Code that has generalized the provisions of the 1980 CISG is the Dutch Civil Code books III-VII, which were enacted in 1992.

B. Principles, Not a Code

Concerted efforts at codification must wait because an unambiguous basis for legislative jurisdiction of the European Communities to enact comprehensive private law legislation is lacking at present. A more modest and realistic aim is to elaborate, based upon thorough comparative research, European Principles of Patrimonial Law, which may later serve as the basis for a codification.

In fact, European-minded comparative lawyers have been working in this direction since the early 1980's. A private group, the Commission for European Contract Law, consisting of experts from all member countries, has formulated and published 130 Principles of European Contract Law so far.[29] It consists of black-letter rules, comments, and notes, the latter presenting the major solutions to the issue(s) covered by the respective Principle found in the various member states. A further set of some 40 Principles is under discussion and will conclude the general rules on contracts.

---

27. TOWARDS A EUROPEAN CIVIL CODE (Hartkamp et al. eds., 2d ed. 1998).

28. *See, e.g.*, Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. DAVIS L. REV. 799, 803-805 (1998).

29. Principles of European Contract Law (O. Lando & H. Beale eds., 2000); Lando, *European Contract Law*, 31 AM. J. COMP. L. 653 (1983).

A broader follow-up project using a different and more continuous working method started near the end of 1999. This project ventures into new fields: important types of specific contracts (such as sales, services, personal guarantees and insurance); non-contractual obligations (*negotiorum gestio*, unjust enrichment, and torts); and certain aspects of movable property (transfer of title and security rights in movables). The resulting Principles will be presented in the same way as the European Principles of Contract Law, with the latter being integrated into the project.

C. *Relevant EC Legislation and Consumer Protection Integrated*

In order to fulfill one of the aforementioned desiderata, any relevant EC legislation on private law will be integrated into the Principles. In this respect, the new set of Principles differs from the Principles of European Contract Law, which pursue a somewhat different goal. The desirable integration of certain features of EC private law legislation, especially in the field of conclusion of contracts, must be undertaken retrospectively.

The integration of EC private law legislation already implies the integration of consumer protection rules. This integration may be difficult for two reasons: first, consumer protection rules have developed in rather different ways in the member states; and second, European harmonization has been selective as to subject matter and limited to setting minimum standards.

D. *International Conventions on Uniform Private Law*

It goes without saying that mere Principles of European private law are subject to international conventions unifying private law, whether binding upon a single member state or all member states.

Future codifications should grant priority to all international conventions that unify private law and that are binding upon all member states over any new private law legislation enacted by the European Communities. For "old" conventions concluded before 1958 or, for acceding states, prior to their accession, this principle is laid down in Article 307, paragraph 1 of the TEC. This principle should be extended to all subsequent private law conventions since these, by their nature, do not conflict with the purposes of the TEC. The reason for the priority suggested here is that, in the interest of simplification, any existing unified regimes should, as far as possible, be uniform for both intra-European and extra-Community cross-

border commerce and private exchanges. Conventions, and preferably EC legislation supplementing such international conventions, are of course possible.