

## A COMMON CONTRACT LAW FOR THE COMMON MARKET

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### 1. European private law and European culture

“There is no discipline of legal science which has such a distinctly European character as the discipline of private law. . . .” These are the opening words written by the famous scholar Paul Koschaker in his book *Europe and the Roman Law*, published about half a century ago.<sup>1</sup> The present-day reader is stunned: do these words refer to that very nationally-minded academic treatment of private law which we know today? Can a “distinctly European character” be ascribed to an academic discipline which frequently does not even notice what is going on abroad in its own domain?

It is true that this confinement within domestic limits is often explained by the historical and positive character of the law,<sup>2</sup> but isn't this explanation, given in an era of national legislation, the outright negation of a European mind? Koschaker himself was aware of the progressive national contraction of legal science and of private law; he based his judgement exclusively on the fact that, for more than 850 years, the discipline of private law was “a not unessential cornerstone in the construction of that form that we call Europe today”.<sup>3</sup> Is the identity of European private law no more than the identity of its historical roots? Is European private law a mere relic, pathetically mourned after the European catastrophe of the second world war? The aftermath of the

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1. Koschaker, *Europa und das Römische Recht*, 3rd. ed. (1958), p. 1.

2. Canaris, “Theorienrezeption und Theorienstruktur”, in *Festschrift Kitagawa* (1992), pp. 59, 93.

3. Koschaker, op. cit. *supra* note 1, p. 1.

war was characterized by political statements whose pathos is unknown in present discussions. Take the words of Hallstein, the first president of the European Commission: "In the whole of the great Community area equal facts must be treated equally, and that as a matter of law!" In his view, the harmonization of laws showed that divisive forces had lost their authority: "the unity of the European character which we believed to have faded away is seeing the light again".<sup>4</sup> These words reflect the ideas of the founding fathers, who wanted to resurrect a former community of legal thinking and to revitalize a historical unity of legal culture.

At the time of the *ius commune*, the law was conceived as common to the whole of Europe, due to its classical sources and to the authority of certain writers who were respected all over Europe. Today, a revitalization of that community of legal thinking cannot be expected from jurisprudence and academic writing alone. Several essential changes make that impossible: (1) The common academic language of Latin has perished: at present we lack a neutral linguistic vehicle for legal thought. The community of legal thinking has to be re-established in a multilinguistic environment. Although some Community languages are "more equal than others", they will not replace Latin as it functioned historically. In the larger Member States in particular, there are thousands of lawyers who would not even read a text written in a foreign language. (2) Roman law as the final legitimation of *ius commune* has stepped back into legal history; it may be revived as an ideal authority, but not as a binding source of law. (3) The age of enlightenment put law at the disposal of political leaders; the ultimate authority is no longer ascribed to an unfathomable tradition, but to deliberate legislation. Although the binding force of statutes may be curbed, for instance by the development of general principles of law, the return to a prepositivistic age is barred. A common law can only be achieved by common legislation, notwithstanding various additional conditions

4. Hallstein, "Angleichung des Privat- und Prozeßrechts in der Europäischen Wirtschaftsgemeinschaft", 28 *RabelsZ* (1964), 211, 230.

such as the harmonization of legal education, of the structure of the legal profession, of legal methods, etc.<sup>5</sup>

Legislative unification and harmonization of laws is suffering from ill repute, even though ultimately it has to take the leading role. Formerly fervent supporters of the unification of laws have pointed out the failures and costs of unification throughout the last decade,<sup>6</sup> which are mainly due to the method of harmonization of laws used by the European Community. Although directives harmonize the substantive policies contained in the various national statutes which transpose them, they do not make lawyers aware of that underlying link. In applying national statutes based on EC directives, most lawyers are not even aware of the European background. Consequently, there is only a cultural integration insofar as the lawyers of the Member States deal with directly applicable provisions of the EC Treaty and of regulations, but not when it comes to the application of national rules which are supposed to transpose EC directives. Moreover, directives work in a fragmentary way which fits very badly with the private law of Member States, since the latter is often characterized by broad systematic structures or even codification.<sup>7</sup> The more the European Community has dealt with private law, and this has happened increasingly since the Single Market Programme of 1985, the more conspicuous has become the lack of coordination between the various directives treating similar subjects, and the more disturbing is the friction between these “pointillistic” directives and the national systems of private law. The plea for coordination is heard more and more frequently, and particularly so in the area of contract law, where the Community has been especially busy enacting directives *inter alia* on contracts of commercial agents,<sup>8</sup>

5. For the non-legislative prerequisites of the unification of laws, cf. 56 *RabelsZ* (1992), 215 with contributions by Kötz, Mertens, Flessner, Lando, Bonell, Storme and Remien.

6. Kötz, “Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele”, 50 *RabelsZ* (1986), 1 *passim*.

7. See Kötz, *loc. cit.*

8. Council Directive of 18 Dec. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC), O.J. 1986, L 382/17.

contracts concluded outside business premises,<sup>9</sup> abusive clauses in consumer contracts,<sup>10</sup> time-sharing contracts<sup>11</sup> and consumer credits.<sup>12</sup>

However, this criticism will probably not change very much. The consolidation, coordination and systematization of law is primarily a cultural target for legal scholars and some practitioners, but in the past has rarely led to successful political initiatives by the Community. The legal policy of the Community is part of its economic policy, in particular the Single Market Programme. Although the gradual codification of contract law at the Community level has already been called for twice by the European Parliament in the political arena,<sup>13</sup> this call will only be successful insofar as a need can be proven with regard to the completion and functioning of the single market. Anyone wishing to assert such a need traditionally argues that national rules of private law – and this refers almost exclusively to mandatory provisions of private law – somehow inhibit the realization of the system of undistorted competition and of the basic Community freedoms; this will be discussed in section 2 *infra*. It appears however, that private law is not only an obstacle to the realization of markets. It is submitted here that private law is much more, i.e. an essential prerequisite for the very formation of markets. In order to elaborate on this proposition, I will sum up some ideas concerning the essential elements of markets (section 3) and will shed some light on the significance of uniform private law, and in particular of uniform contract law, for the operation of mar-

9. Council Directive of 20 Dec. 1985, to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC), O.J. 1985, L 372/31.

10. Council Directive of 5 April 1993, on unfair terms in consumer contracts (93/13/EEC), O.J. 1993, L 95/29.

11. Directive 94/47/EC of the European Parliament and the Council of 26 Oct. 1994 on the protection of purchases in respect of certain aspects of contracts relating to the purchase of the rights to use immovable properties on a timeshare basis, O.J. 1994, L 280/83.

12. Council Directive of 22 Dec. 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102/EEC), O.J. 1987, L 42/48.

13. See the Resolutions of 26 May 1989 in (1993) ZEuP, 613 and of 6 May 1994 in (1995) ZEuP, 669; cf. Tilmann, "Zweiter Kodifikationsbeschluss des Europäischen Parlaments" (1995), ZEuP, 534.

kets (section 4) before discussing some economic (section 5) and legal counter-arguments to the proposition made (sections 6-8).

## 2. National private law as a restriction

According to the official understanding of the EC Treaty in Brussels, the Community at present lacks the powers for comprehensive legislation in the area of private law. As Commissioner Bangemann writes: "The European Treaties draw narrow limits to the possibility of creating a European private law as a perfect whole. There is no provision in the treaty which empowers the European Union to unify private law which would be, however, indispensable for an initiative of the European Union under the principle of specific legal competences"<sup>14</sup> Moreover, Ivo Schwartz (who has been in charge of the harmonization of laws within the European Commission for many years) points out that the Treaty does not deal with the harmonization of private law as such but that it grants the powers to harmonize laws to the Community only for purposes of market integration, i.e. for the realization of the basic freedoms. This specific integrative target is said to explain "why the harmonization of laws by the Community embraces . . . only *sectors* (my emphasis, J.B.) of private law. Even the description of [those sectors as] business law would be too wide. Different provisions in the areas of private law and civil procedure restrict the freedom or distort competition in the Single Market only by way of exception".<sup>15</sup>

This statement draws our attention to two legal bases for harmonization of laws. One of them depends upon the finding that provisions of national private law restrict the free movement of persons, goods, services or capital. The other presupposes that competition in the Single Market is distorted by differing regulations of private law in the Member States. Both arguments draw from the Community's mandate to create a common market, characterized by the free movement

14. Bangemann, "Privatrechtsangleichung in der Europäischen Union" (1994), ZEuP, 377, 378.

15. Schwartz, "Perspektiven der Angleichung des Privatrechts in der Europäischen Gemeinschaft" (1994), ZEuP, 559, 570.

of resources and a system of undistorted competition. Both can be traced in the recitals preceding various directives concerning private law. Some of these directives stress the restriction of free movement resulting from national provisions, such as the directive on products liability,<sup>16</sup> others, like the Directive on abusive clauses in consumer contracts, focus on the distortion of competition brought about by differences between the laws of Member States,<sup>17</sup> and still others refer generally to the effects which differences in the law might have on the functioning of the common market in a given area.<sup>18</sup>

The harmonization of laws does appear to be firmly linked with the mandate to realize the Single Market. However, the consequences drawn from such a link by the Commission and Council are not always cogent and precise. It is certainly true that not all national rules of private law restrict the basic freedoms; therefore, a comprehensive harmonization of private laws is not mandated in order to enforce these freedoms.<sup>19</sup> In this context, it is sufficient to refer to the well-known statement of the Court of Justice in *Alsthom Atlantique v. Sulzer* that the seller's warranty for defective products under French law does not restrict the freedom of trade since it could be contracted out by the choice of foreign law as the proper law of the contract.<sup>20</sup> Indeed, rules of law which may be modified or evaded by agreement of the parties only comprise a framework offered to the participants in the market, and by their very character cannot be regarded as a national restriction of trade in goods and services.

This does not mean, however, that such rules of private law which yield to the agreements of the parties cannot distort competition between

16. Recital No. 1 of Directive 85/374/EEC, *infra* note 23.

17. Recital No. 2 of Directive 93/13/EEC, *supra* note 10.

18. See Recital No. 2 of Council Directive of 14 Feb. 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of businesses (77/187/EEC), O.J. 1987, L 42/48.

19. See Schwartz, *op. cit. supra* note 15, at 570; in the same sense Remien, "Denationalisierung des Privatrechts in der Europäischen Union? Legislative und gerichtliche Wege" (1995), *ZfRvgl.*, 116, 121.

20. Case C-339/89, *Alsthom Atlantique v. Sulzer*, [1991] ECR I-107, para 15.

competitors established in different Member States. Suppose for example that the term of warranty for construction companies is 15 years in Member State A and only 5 years in Member State B and that those terms may be modified by contract. In order to achieve the same competitive position as the company from State B, the undertaking from State A must urge its clients to expressly agree upon a shorter term. The competitor from State B can confidently lean back and trust that his own law will be applied under Article 4(2) of the Rome Convention on the law applicable to contractual obligations of 1980<sup>21</sup> and that he will therefore be able to avail himself of the short term of 5 years, whereas the company from State A must draw its client's attention to the fact that it expects him to give up certain rights from which the client would otherwise benefit as a matter of law. It would be surprising if the client were to agree without consideration. Dealing with the company from State B the client might not even think of the term of warranty as a relevant issue, and if he does it is up to him to ask for a contractual modification of the legal rules which otherwise apply, and eventually to pay a price for it. As this shows, bargaining always takes place "in the shadow of the law", and the bargaining position is not the same for two competitors established in States whose private laws differ.

Moreover, rules of private law that yield to contractual agreements always express the ideas of contractual justice prevailing in a given country and which have an impact on the enforcement of contractual clauses by its courts. Thus, the interpretation of an agreement very much depends on what lawyers regard as the legal rule which would be applicable without any contractual modification. And, even more importantly, courts will usually not endeavour to set aside contract clauses as unfair or unconscionable which are in harmony with the legal rules being applicable in the absence of contractual alterations. This is very clearly shown by Article 1(2) of the Directive on abusive clauses in consumer contracts, which excludes from its scope of application clauses which reflect binding rules of law; recital 13 of the directive makes it clear that this exclusion also refers to those legal rules which only apply if the parties have not agreed otherwise. The reason for this

21. O.J. 1980, L 266/1.

exception, as stated in recital 13, lies in the presumption that clauses which accord with legal rules are not abusive. If this is true, it might very well occur that a certain clause is regarded as abusive in one country but not in another, where it corresponds to the rules of domestic contract law. Thus, differences between rules of contract law may very well distort competition between companies from different Member States in the Single Market, even if those rules are only applicable in the absence of an agreement of the parties.

Furthermore, it appears far from consistent that, in various directives, the European Commission has found the prerequisites for a harmonization of private law to exist only for consumer contracts and that it has limited its legislative proposals correspondingly. This regards the directive on abusive clauses in consumer contracts<sup>22</sup> and the directive on product liability;<sup>23</sup> the new proposals for measures regarding warranties on consumer goods are also exclusively concerned with consumer sales.<sup>24</sup> The limited scope of these measures interferes with the comprehensive regulation that national private law provides for the respective areas, and in practice entails a distressing split in the national legal systems. The price that the Member States have to pay in terms of completeness and harmony of their laws is high, and should only be paid if the Community's powers are indeed limited to consumer contracts.

But this is not the case. It is certainly true that Article 100A(3) EC puts the Community under an obligation to guarantee a high level of consumer protection in the harmonization of laws. However, this provision as such does not confer powers on the Community but presupposes such powers. It depends upon the prior condition that the harmonization

22. See *supra* note 10.

23. Council Directive of July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), O.J. 1985, L 210/29, cf. Art. 9, 1st sentence lit. b.

24. Cf. the Greenbook on warranties on consumer goods, etc., EC Doc. COM (93) 509 fin. of 15 Nov. 1993, cf. (1994) ZEuP, 515; for a detailed discussion cf. Schnyder and Straub, "Das EG-Grünbuch über Verbrauchsgütergarantien und Kundendienst – Erster Schritt zu einem einheitlichen EG-Kaufrecht?" (1996) ZEuP, 8-74, see also the recent draft Directive on this matter, O.J. 1996, C 307/8.

of laws can be based upon Article 100A(1) EC, i.e. that it is required for the realization and functioning of the Single Market.<sup>25</sup> To take the example of standard contracts, the true issue therefore is whether differences between the national laws of Member States distort competition exclusively in the area of consumer contracts or whether similar distortions can be identified in commercial transactions. Undoubtedly the latter is true.<sup>26</sup> Suppose a German producer has stipulated, in the standard contracts made with his franchisees, high lump sum damage awards due in case of breach. If such clauses could be reviewed by a court under the German Act on General Conditions of Contract whereas a French competitor who has made similar contracts does not run the same risk, the French company evidently disposes of a much more efficient tool for maintaining the discipline of its franchisees, and this may be a decisive advantage for its distribution network.

It follows that if the necessity of harmonizing private law is accepted for consumer contracts it will generally also exist with regard to commercial transactions of the same kind, as long as such contracts are concluded between businessmen at all. A further consequence is that the Community can avail itself, under Article 100A EC, of comprehensive legislative powers in the areas concerned. Notwithstanding certain particularities of commercial transactions, there is not the slightest reason to limit the scope *ratione personae* or *ratione materiae* of Community directives to consumer contracts. In any case, rivalry between the different units within the Commission is not a sufficient reason.

To sum up, it can be said that, even on the basis of the prevailing interpretation of Article 100A EC, the Community's legislative compe-

25. See Schricker, "Zur Werbepolitik der EG – Liberalisierung und Restriktion im Widerstreit" (1992) GRUR Int., 347, 348 et seq.; similarly Basedow, "Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft", in *Festschrift Everling* vol. 1 (1995) pp. 49, 67 et seq. Heiss, "Verbraucherschutz im Binnenmarkt: Art. 129a EGV und die wirtschaftlichen Verbraucherinteressen" (1996), ZEuP, 625–647, at 627; see however Reich, "Zur Theorie des Europäischen Verbraucherrechtes" (1994), ZEuP, 381–407, at 384 who characterizes Art. 100A(3) EC as an "indirect basis of competence" for EC legislation.

26. See the case note by Kieninger, "Die Kontrolle von Allgemeinen Geschäftsbedingungen im kaufmännischen Verkehr", (1996) ZEuP, 468, regarding Cass. 23.5.1994 (Italy) and Cass. 24.1.1995 (France).

tence in the area of private law is much larger than commonly assumed. Since Article 100A not only confers powers but also obligations on the institutions of the Community, the direction of its future policy is predetermined, although it is difficult to predict the progress in realizing this. Nevertheless, it may seem doubtful whether the Community's powers suffice for a comprehensive codification of private law in general, or at least of the entire field of contract law. This is because not all differences among dispositive legal provisions of the Member States are capable of distorting competition in the European Single Market. Does this mean that pointillistic legislation is the inescapable destiny for European private law? This might be disastrous for the rule of law as such. The national systems of private law are losing their efficiency and usefulness as special statutes enacted for the transposition of directives destroy the coherence of general principles. This does not only refer to the continental systems of codified private law, but also to the common law systems which have developed over centuries as coherent bodies of rules and principles. It is therefore necessary to search for a new comprehensive competence of the Community in the area of private law. Since the EC Treaty primarily aims at the creation of a Single Market, the inquiry must start with the theoretical preconditions for the existence of markets.

### **3. Private law as a constitutive element of markets**

The formation and the scope of markets primarily depend upon economic conditions. The valuation of scarce goods and services by demand must exceed the costs incurred for production, communication, transportation and distribution. This condition is most readily fulfilled where the said marketing costs are low, i.e. in a limited geographical area irrespective of national boundaries. For example the German-French-Swiss valley of the upper Rhine is more likely to form a coherent market for many products than the national area of any one of the three States. It is due to the nationalization of economic thought in the nineteenth century and to the intervention of the nation State by trade law and other regulations that economic data were distorted, that

homogeneous transboundary markets were divided into their national components and that these components were apportioned to the respective national markets. As a result, products of the same kind whether toothpaste or mineral water, pocket knives or instant coffee, still differ considerably in Basle, Freiburg and Colmar.

Integration as programmed in the Treaty of Rome aims in the first place at the removal of interventions of national trade law and of all measures having the same effect. This programme is apparently inspired by the assumption that goods will freely flow to and fro across the intra-community boundaries once all restrictions have been removed. But this assumption is flawed. It does not take into account the significance of private law for the constitution of markets. As public law regulations on markets are being abolished it becomes clear that the formation, the functioning and the scope of markets do not only depend on economic data, but also on other conditions such as those created by private law. The significance of private law can only be ignored where primitive barter transactions between partners present at the time of the agreement are thought to be sufficient, but this would of course reduce commerce to a minimum. For long-distance trade, for financing, and for other services of all kinds an elaborate system of private law rules appears to be indispensable.

Throughout recent decades, modern theory of economic law has, although with differing political valuations, consistently indicated the private law prerequisites of a modern market economy. For the constitution of markets, four types of rules have to be framed by legislation or the judiciary:<sup>27</sup> (1) The law of persons and corporations has to identify the agents in the market and has to free them from incapacities to contract as far as possible. (2) The freedom of contract and the binding force of contracts have to be established with the widest possible scope. (3) The law has to define the objects of commerce, i.e. money, title to land and goods, intellectual property rights, etc. This three-part-system is reflected in the divisions of many civil codes such as the French one, which contains three books, on (to translate literally) the

27. The following discussion has been elaborated in: Basedow, *Von der deutschen zur europäischen Wirtschaftsverfassung* (1992), pp. 15 et seq.

law of persons, the law of things, and the acquisition of things.<sup>28</sup> (4) The experience of the 19th and early 20th centuries have shown that markets based upon these three private law pillars are exposed to the risk that the actors, by using their freedom of contract, restrict their own and other people's liberties until individuals have practically no liberty left at all, but are entirely in the hands of more powerful (economic) operators. To prevent such a self-induced collapse of private law and the market economy, markets have to be supported by a fourth legal pillar designed to safeguard individual independence: the protection of competition against restrictions.

The private law rules listed above cannot be regarded as state interventions in the market process, but are prerequisites for the very formation of markets. In this sense the economists Fritsch, Wein and Ewers described the role of the law of property in a book on market failure and economic policy: "A necessary prerequisite for the exchange of property rights in markets is the definition of these rights, and the possibility of their enforcement".<sup>29</sup> Thus it becomes clear that market and State are not in an inescapable opposition to one another, but that the market "presupposes a certain minimum of State for the monitoring of the abidance by existing legal rules" and, as one should add, for their creation.<sup>30</sup> The German deregulation commission has therefore distinguished general "regulations that on principle affect everyone" and which "are contained in the general legal system, as we encounter it in civil law, namely property law and law of contract . . ." from "specific regulations [which] usually apply only to certain groups". The former are characterized as "constitutive regulations. . . , in that without general rules. . . autonomous individuals cannot live and work together and prosper".<sup>31</sup> Apart from competition law, the European Community has so far enacted constitutive regulations of its own only to a very limited extent. This raises two questions:

28. For the historical background of the system cf. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990), pp. 29 et seq.

29. Fritsch et al., *Marktversagen und Wirtschaftspolitik* (1993), p. 5.

30. *Ibid.*

31. Deregulierungskommission, *Marktöffnung und Wettbewerb* (1991) No. 4.

- Is it sufficient for the creation and functioning of the Single Market that constitutive private law regulations are enacted by Member States, which by necessity implies that these regulations vary in different parts of the Single Market?
- If not, can the EC Treaty be interpreted to the effect that it allows a comprehensive legislation of the Community in the area of private law?

These issues will now be discussed with regard to the law of contracts.

#### **4. Uniform contract law as a constitutive element of a single market**

There is no doubt that the law of contract is a constitutive prerequisite for the formation of markets. It provides the legal form for the market process. The confidence in the binding force and the enforceability of contracts is the basis on which parties conclude contracts instead of insisting on the immediate exchange of their respective performances or of foregoing any commitment whatsoever.

It is a not uncommon view that the operation of a market is sufficiently guaranteed if the two principles of freedom of contract and the binding force of contracts are recognized in all parts of the market; since they are in fact accepted in all Member States, no detailed unification of contract law would be required in the Community. This line of reasoning appears correct at first sight, but it does not take into account the extreme uncertainty which characterizes the environment of transnational contracts. Small and medium-sized undertakings in particular will not usually ask for legal advice on their proposed transactions before making the contract. These businesses are, in fact, often deterred from entering into the risks of import and export commerce.<sup>32</sup>

32. Cf. e.g. Zonderland, *Indeling, uitlegging en regeling van overeenkomsten* (1976), at p. 216, who stresses that the nations “met hun nodeloos verschillende regelen voor contractenrecht toch wel degelijk een remmende werking uitoefenen op het tot stand komen en afwickelen van overeenkomsten” [with their unnecessarily differing rules on contract law really do impede the conclusion and carrying out of agreements]. Similar statements may be found in any book on uniform private law.

The uncertainties of foreign languages and customs, of private international law and the foreign substantive law, often erode the commercial incentive of foreign trade. Undertakings abstain from transactions which could have been beneficial and which would have come about had the parties trusted the orderly operation of foreign commerce. The Community cannot overcome the differences in language and customs which reflect the cultural variety of Europe; but a common legislation on contracts could stimulate and strengthen the confidence of market actors in the orderly functioning of the Single Market. Multilingualistic as it would be, such a legislation might also help to reduce the uncertainties due to the diversity of languages; in case of dispute the parties could refer to the same text, although each in his own language.

It is sometimes said that good advice on the contract law of a foreign country involved in an international transaction could have the same effect, but this objection is not convincing. First of all, the great majority of commercial transactions are not valuable enough to justify the costs of legal advice preceding the making of the contract. Second, legal counsels in the Member States are simply not qualified to give their clients precise information on foreign contract law and the essential points in which it differs from domestic law. In practice, legal advisers recommend choice of law clauses which almost invariably refer the case to domestic law, and this advice is usually due to pure ignorance of alternative options offered by foreign legislation. Moreover, the adviser knows that, in case of dispute with his foreign counterpart, he will be in a superior negotiating position if he succeeds in asserting his own law in the choice of law clause. A European contract law would create a neutral platform which could be accepted by each party as being its own law since it is binding on both parties in both countries, but for each in its own language. For this very reason, the lawyers involved could identify themselves with such a European source of law much more easily. Thus, in exchanging their opinions on the issues raised by a common source of law legal advisers might develop a sense of professional community across intra-community frontiers, and the same would occur for law students if they are taught a central subject such as the law of contracts on the basis of a European statute.

To sum up, the differences between the national rules on contract law can be expressed as costs incurred because undertakings are deterred by the risks mentioned above and abstain from transactions in international commerce. But a European contract law would not only help to intensify commercial exchange in the European Single Market, it would also be a point of crystallization for the professional community of European lawyers, which can hardly develop on the basis of directives on toys or drink additives, and regulations on the marketing of fruit and wine. Since the European Community is in the first place a legal Community, the consciousness among lawyers from different countries of being part of one professional group could play a key role for further integration.

This cultural effect of a unification of European contract law is politically important, although it does not provide a legal basis for such a unification under the present Treaty. On the other hand it does not impair a Community competence which might otherwise exist. The crucial issue therefore is whether a legislative act which does not remove national restrictions of Community freedoms, but helps to reduce individual resistance against participation in international commerce can be based on Article 100 or Article 100A of the Treaty. The answer has to be affirmative. Article 100A EC concerns the harmonization of laws “for the achievement of the objectives set out in Article 7A”, and under Article 7A(1) the Community has to act “with the aim of progressively establishing the internal market”. As defined in Article 7A(2) this aim refers to “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured . . .”

This definition has often been interpreted to the effect that the internal market is exclusively characterized by freedom from national restrictions, as if Community officials could retire happily as soon as the last restriction has been abolished. Such an interpretation would not allow for measures which are simply designed to strengthen the confidence of citizens in the orderly operation of the internal market, i.e. which are designed to break down psychological barriers preventing the participation of individuals and undertakings in intra-community commerce. It is submitted, however, that making the internal market equivalent to the absence of national restrictions is too narrow a view.

Under Article 2 EC, the establishment of the Common Market purports to promote, *inter alia*, an accelerated raising of the standard of living, which is only possible if the individuals and undertakings effectively make use of their market freedoms. The task of establishing the internal market consequently comprises all measures which actually promote market integration. This proposition is not contradicted by the definition of Article 7A(2) of the Treaty. It is not a sufficient, but merely a necessary precondition for the establishment of the internal market that the fundamental freedoms are ensured. The decisive element of the internal market is the absence of internal frontiers, and this includes legal frontiers.<sup>33</sup> As a result the task of harmonization of laws under Article 100A EC is wide enough to embrace, beyond the removal of national restrictions, all measures which encourage private individuals and companies to effectively partake in intra-community trade, in particular those acts which help to overcome psychological trade barriers. It includes the harmonization of the law of contracts in general, even including dispositive rules of contract law.

## **5. Unification and the competition of legislations**

The proposals made in this paper will undoubtedly meet objections regarding both their political content and the legal basis and form of unification.

As to the substance, the unification of laws runs counter to the idea of competition among national legislations. Some economists praise this competition as an appropriate procedure for enhancing our knowledge about the most efficient laws and regulations.<sup>34</sup> The practice of national legislation gives ample evidence that the experience gained from

33. Schwartz, *op cit. supra* note 15, at 570.

34. Cf. Donges, "Wieviel Deregulierung brauchen wir für den EG-Binnenmarkt?" 36 *Beihefte der Konjunkturpolitik. Zeitschrift für angewandte Wirtschaftsforschung* (1990), 169, 178 et seq.; Streit and Mussler, "Wettbewerb der Systeme zur Verwirklichung des Binnenmarktprogramms?" Max-Planck-Institut zur Erforschung von Wirtschaftssystemen Jena, Discussion paper 03/95.

comparative law is in fact used by law-making agencies.<sup>35</sup> Would the world of law and economics not be impoverished if a uniform European text replaced the rich variety of national contract laws? Would the parties not be prevented from choosing a more efficient legislation as the proper law of their contract if only one legislation were left? And would the law not petrify if it were no longer possible to compare it with corresponding laws in neighbouring countries?

A closer look reveals that these apprehensions are mainly unfounded and that the benefits expected from competition between legislations are greatly overestimated in the field of contracts. Since this paper is concerned with the comprehensive unification of *dispositive* rules of contract law, competitors throughout the Community would have the advantage of a common legal background to their negotiations, they would all be able to “bargain in the shadow of the same law”, but would not be deprived of their right to avoid its rules by agreeing on what they think to be more efficient ones. In a world with two hundred independent States and even more jurisdictions they could still choose from a vast range of contract laws. The great variety of this comparative experience would also be available, if the legislature wanted to change the law – which is hardly more difficult for European institutions than it is for those in single Member States.<sup>36</sup>

It is very doubtful, after all, whether the idea of a permanent competition between legislations in the field of contracts has anything in common with the practice of national legislatures or private negotiators. The nearly worldwide recognition of choice of law clauses in the conflict of laws allows for a rational choice at low cost and thereby encourages parties to make the best of that alleged competition. Even so, parties almost invariably try to implement their own law as the proper law of the contract (see *supra* section 4). Nor do legislatures appear to be constantly searching for better solutions in contract law. How could it otherwise be explained that the basic provisions on contracts in the Civil Codes of many European countries, although differing pro-

35. Cf. Drobnič and Dopffel, “Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber”, 46 *RabelsZ* (1982), 253 et seq.

36. See the references to modifications of directives given by Remien, op. cit. *supra* note 19, at 120 et seq.

foundly, have remained unchanged for up to 200 years? Competition between legislations helps to discover more efficient laws in the field of mandatory regulations such as tax law, labour law, and market regulations, and the concept has been developed for these areas, but it is not appropriate for legal rules which do not purport to restrict the freedom of individuals and can be contracted out at any time.

## **6. The legal basis: Article 100A or Article 235?**

It has been suggested above that the Community enacts a European Code of Contract Law as a single text binding in the Member States which would replace the national law. This Code would necessarily take the form of a regulation and should be enacted on the basis of Article 100A of the Treaty. It is clear that such a legislative action would be highly unusual, both for its legal basis and for the extent of harmonization. This raises various legal issues.

Opponents would certainly fear that objections raised by single Member States in the Council could be overruled by a qualified majority under Article 100A. They can refer to the precedent of other private law regulations which were based on Article 235 and therefore required the unanimous approval by all Member States in the Council: the regulations on the European Economic Interest Grouping,<sup>37</sup> on the Community trade marks,<sup>38</sup> and on Community plant variety rights.<sup>39</sup>

It should be borne in mind, however, that Article 235 can only serve as the basis to Community legislation, if the "Treaty has not provided the necessary powers" elsewhere. In other words, Article 235 is subsidiary to other Treaty provisions and is not applicable where a Community action falls within the scope of another legal basis.<sup>40</sup> This applies to

37. Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping, O.J. 1985, L 199/1.

38. Council Regulation (EC) No. 40/94 of 20 Dec. 1993 on the Community trade mark, O.J. 1994, L 11/1.

39. Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, O.J. 1994, L 227/1.

40. Case 45/86, *Commission v. Council* (re. General Preference System), [1987] ECR 1493 para 13; cf. Schwartz in von der Groeben, Thiesing and Ehlermann (Eds.),

the proposed Code of Contract Law. Unlike the regulations mentioned above, the Code would not only supplement national laws by creating an additional set of rules which private individuals and companies may avail themselves of if they choose to do so. Rather the Code would affect and eventually replace national laws. Its promulgation would therefore be an act of harmonization covered by the Treaty Chapter on the approximation of laws (Arts. 100-102) which would bar the application of Article 235.<sup>41</sup>

## 7. Unification by regulation under Article 100A

Opponents to the Code and the implementation outlined above might further argue that the concept of harmonization of national laws allows neither for an outright unification nor for a substitution of national laws by a Community measure and that a regulation enacting the Code therefore cannot be based upon Articles 100 or 100A. As to the first point, it appears today to be generally accepted that the term “approximation” (*rapprochement, Angleichung*) used in Articles 100 and 100A does not restrict harmonization efforts to a minor degree of intensity, and that a total unification is not excluded where required for “the establishment and functioning of the internal market” (Article 100A(1)).<sup>42</sup> This view is reflected by the legislative practice of the Community in areas such as the technical harmonization of goods, which often covers all the details and precludes an independent national regulation *de facto*.

While the respective directives are binding upon individuals only by the intermediary of national implementing legislation, the Code is conceived as a substitute for national contract laws and would have to

*Kommentar zum EWG-Vertrag*, 4th ed. (1991), Art. 235 paras. 52 et seq. with further references.

41. Cf. Case C-350/92, *Spain v. Council*, [1995] ECR I-2003 paras. 26, 40.

42. Cf. Langeheine in Grabitz and Hilf (Eds.), *Kommentar zur Europäischen Union* (looseleaf edition, as updated by 1995) Art. 100 EC, paras. 8, 14 with further references; Kapteyn and VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen*, 4th ed. (1987), p. 313; Leleux, “Le rapprochement des législations dans la Communauté Economique Européenne” (1968), CDE, 129, 131.

be enacted by regulation. But this would not appear to be impossible. Unlike Community legislation under Article 100, legislation under Article 100A is not confined to directives and may adopt other forms of “measures”, *inter alia* the form of regulation where appropriate and required for the functioning of the internal market.<sup>43</sup> In the area of private law, Council Regulation 1768/92 on a supplementary protection certificate for medicinal products gives an example of a regulation based on Article 100A.<sup>44</sup> When it was attacked – in vain – by Spain in the Court of Justice for lack of legal basis, the enactment of a regulation instead of a directive was not even criticized.<sup>45</sup>

It is true that the Member States, when agreeing upon Article 100A as part of the Single European Act in 1987, adopted a declaration which suggests that the Commission should couch its legislative proposals in the form of directives by preference where these proposals imply changes of legal provisions in one or more Member States.<sup>46</sup> But the choice of the appropriate legal form of an act has to be made in the light of the purposes of Article 100A in the first place. It is therefore primarily determined by the requirements of the internal market of the Community. Where these requirements cannot be coped with by the adoption of directives, the enactment of a regulation may be necessary and will be lawful under Article 100A. This holds true in particular where the great number of and the formal and systematic differences between national acts designed to implement one and the same directive are such as to frustrate the integrative purpose of the Community measure. Thus, the territorial limitations of national law, e.g. in the field of industrial property rights, may render a Community-wide protection of such rights overly expensive if they have to be registered in each Member State under its domestic laws.<sup>47</sup>

43. Cf. de Ruyt, *L'acte unique européen*, 2nd. ed. (1989), p. 168; Kapteyn and VerLoren van Themaat, *op. cit.*, p. 309.

44. Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, O.J. 1992, L 182/1.

45. Case C-350/92, *supra* note 41.

46. O.J. 1987, L 169/24.

47. Cf. Schwartz, “30 Jahre EG-Rechtsangleichung”, in *Eine Ordnungspolitik für*

Similar considerations require the promulgation of the Code in the form of a regulation. It should be recalled that a main target of the harmonization of dispositive contract law would be to overcome psychological trade barriers created by the unfamiliarity of foreign private law (see *supra* section 4). Indeed, the web of general concepts and principles, of rules and exceptions, is so intricate and distinct in each legal system of contract law that it is almost impenetrable for those who have not received their education in the respective legal system; even experts of comparative law would prefer the safe haven of their own law when it comes to the choice of law for a transnational contract. If traders are supposed to engage in transboundary intra-community commerce with the same intensity and willingness as in domestic commerce, they and their legal advisers must above all be sure that the rules and principles governing their transactions are the same, and that they are not curtailed by other rules and principles unknown to them. Harmonization by means of directives cannot achieve this goal: since the national statutes transposing them are adapted to the particular legal systems, they vary from State to State. To start with, the foreign lawyer does not know where to find them, whether in a special statute or in a law having a broader scope. Once he has traced them, he needs to be lucky enough to get hold of a copy of the respective act, which will usually not be readily available in the libraries of his own country. Once he finally succeeds in getting his hands on the statute, will he understand the text if it is not written in one of the major languages of the Community? Even if he does, he will not be able to scrutinize the precise legal bearing of the foreign statute as a part of the above-mentioned web of general concepts and principles, of rules and exceptions of the foreign law.

To sum up these observations it can be said that under present circumstances, the making of transnational contracts often amounts to flying blindfold, both for the parties and their counsel. This would not change if harmonization were put into effect by means of directives. Risk-averse traders will therefore often abstain from such contracts

and will stay outside the Single European Market. The latter cannot be regarded, for the purposes of Article 100A, as “established” as long as those psychological trade barriers persist. They can only be overcome by the implementation of a Code of Contract Law in the form of a regulation.

## 8. Subsidiarity

Since the adoption of the Maastricht Treaty in 1992, Community action must follow the principle of subsidiarity, and a far-reaching harmonization project such as the creation of a Code of Contract Law would almost certainly be criticized as being in conflict with that principle. But the legal significance of subsidiarity is much smaller than the sweeping use made of it by some politicians and scholars would suggest.<sup>48</sup> Under Article 3B, second sentence, of the Treaty, the Community shall, “outside the areas of its exclusive competence, take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”. So far, the Court of Justice has given no guidance to clarify the meaning of these words. The legal literature on the subject is voluminous and cannot be analysed in depth here.<sup>49</sup> Some remarks which are essential to the harmonization of contract law must suffice.

The first question raised in this context is whether the harmonization of contract law as a measure proposed for the establishment of the internal market would fall within the exclusive competence of the Commu-

48. Cf. the critique of “Geschichtsklitterung” (a biased account of history) by Pescatore, “Mit der Subsidiarität leben”, in *Festschrift Everling* Vol. 2 (1995), pp. 1071, 1075.

49. See e.g. Toth, “The principle of subsidiarity in the Maastricht Treaty”, 29 *CML Rev.* (1992), 1079; Schwartz, “Subsidiarität und EG-Kompetenzen. Der neue Titel ‘Kultur’. Medienvielfalt und Binnenmarkt”, 24 *Archiv für Presserecht* (1993), 409; id., “EG-Kompetenzen für den Binnenmarkt: Exklusiv oder konkurrierend/subsidiär?”, *Festschrift Everling*, Vol. 2 (1995), pp. 1331 et seq.; Pescatore, op. cit. *supra* note 48; F.I.D.E. XVIth Congress, vol. I *Le principe de subsidiarité* (1994). All with further references.

nity. If this is the case, subsidiarity may be set aside. The Commission has in fact advocated an exclusive competence of the Community for all actions which purport to establish the internal market,<sup>50</sup> whereas a growing number of authors criticize a confusion between exclusive competence and the mandate to establish the internal market; they consequently favour a concurrent competence of the Community and the Member States in this area.<sup>51</sup> It is indeed difficult to understand why the Community should have an exclusive competence for the harmonization of contract law, whereas it has rarely been active in this field outside the area of consumer protection.

A second point regards the test of comparative efficiency provided for in Article 3B, second sentence. It does not relate to certain areas of the law, such as the law of contract, but to the "objectives of the proposed action". It would in other words be up to legislators to check whether the objective deduced by the institutions of the Community from the mandates of Articles 7A, 100A of the Treaty could be better achieved by the Member States or the Community. Article 3B, second sentence, does not support a reading which deprives the Community's institutions of their right and obligation to define the political objectives in accordance with the Treaty, nor can any curtailment of these defining powers be deduced from that provision.<sup>52</sup> If the Commission followed the views expressed in this paper, the unification of contract law would be the target which serves as reference for the comparative efficiency test.

It is clear that a single Member State cannot bring about European uniformity by its own laws and that this objective can much better

50. Cf. European Commission, "The principle of subsidiarity. Communication by the Commission to the Council and the European Parliament", Bull. EC 10-1992, 118, 122-123.

51. Cf. Schwartz in Festschrift Everling, *op. cit. supra* note 49, pp. 1341 et seq., p. 1347 with further references.

52. As has been suggested however by von Bogdandy and Nettessheim in Grabitz and Hilf (Eds.), *op. cit. supra* note 42, Art. 3B EC, para 33, who explicitly reject any objective of unification since it would a priori exclude actions by Member States. This is an untenable restatement of the principle, as can be seen from the fact that the Community has extensively legislated in the field of uniform law, cf. *supra* at notes 36-38 and 43.

be achieved by Community action. But would the traditional way of making uniform law, i.e. the adoption of international conventions by Member States,<sup>53</sup> not be a suitable alternative to Community action? Whether intergovernmental co-operation can be taken in consideration at all in the application of the comparative efficiency test is an open and debated question.<sup>54</sup> Even those who do not exclude such a possibility altogether must admit, however, that an international convention is a highly unreliable instrument for bringing about uniformity in a Community of fifteen States within a reasonable timespan. The experience of the Council of Europe conventions shows that only very few of them have received more than ten ratifications out of 39 of its Member States.<sup>55</sup> In practice, international conventions therefore cannot be regarded as an alternative instrument by which Member States can better achieve the objective of uniform law. Community action would consequently be in line with the principle of subsidiarity.

## 9. Perspectives

In 1957, the Treaty of Rome set out a programme which primarily focused on an integration of markets to be effected by the removal of national restrictions in the Member States and by the simultaneous policing of private restrictions of competition. Europe has made considerable achievements in this direction. Intra-community boundaries have become more permeable than ever, but have not disappeared. As national restrictions by Member States are abolished, others – and in particular psychological barriers – become visible which impede the participation of individuals in intra-community trade. This includes uncertainties regarding the applicable contract law and its content. We

53. Cf. Kropholler, *Internationales Einheitsrecht* (1975), pp. 93 et seq.; de Ly, *Europese Gemeenschap en privaatrecht* (1993), pp. 57 et seq.

54. Cf. in favour Toth, *supra* note 49, at 1099; contra: Schwartz, *Archiv für Presserecht*, *supra* note 49, at 412 with further references.

55. See the figures reported by Taschner, *Richtlinie oder Internationale Übereinkommen? Rechtsinstrumente zur Erreichung der Ziele der Europäischen Union*. Rheinische Friedrich-Wilhelms-Universität, Zentrum für Europäisches Wirtschaftsrecht. Vorträge und Berichte No. 66 (1996), p. 13.

see the repetition of a process which Germany went through in the 19th century, when the customs union of 1834 abolished the most essential restrictions imposed by the single German States on intra-German trade as a first stage before “the need for a uniform German commercial law asserted itself . . . as trade developed”.<sup>56</sup> The 19th century codification movement in other European countries<sup>57</sup> may equally be interpreted as a response of the legal system to the formation of nationwide markets brought about by the development of modern communication and transportation.<sup>58</sup> Today we see more and more clearly similar inconsistencies between the claims of a European Single Market and the lack of a uniform law of contracts which provides the legal form of the market process.

Mestmäcker has incidentally referred to the unification of European private law as a very long-term task (“säkulare Aufgabe”).<sup>59</sup> This characterization points out both the special importance of the target and the patience and perseverance needed to reach it. The making of a European contract law will be a difficult and time-consuming project indeed, since we are dealing with the nucleus of legal systems which is inspired by marked and ancient legal principles and convictions differing on the European level; several legal traditions would have to be reconciled. On the other hand, there is no other area of the law that has been prepared for a European initiative by comparative research and other unification projects to the same extent as the law of contracts. The UN Sales Convention, the Unidroit Principles of International Commercial Contracts<sup>60</sup> and the principles of European contract law of the so-called

56. Rehme, “Geschichte des Handelsrechts”, in Ehrenberg (Ed.), *Handbuch des gesamten Handelsrechts* Vol. I (1913), pp. 28, 238.

57. Cf. Coing, *Europäisches Privatrecht II: 19. Jahrhundert* (1989) pp. 15 et seq.

58. Cf. Schmidtchen, “Territorialität des Rechts, Internationales Privatrecht und privatautonome Regelung internationaler Sachverhalte”, 59 *RabelsZ* (1995), 56, 108; Drobnig, “Ein Vertragsrecht für Europa” in *Festschrift für Ernst Steindorff* (1990), pp. 1141, at 1146.

59. Mestmäcker, “Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts”, in id., *Recht in der offenen Gesellschaft* (1993) pp. 60, 73.

60. Cf. Bonell, *An International Restatement of Contract Law* (1994) pp. 201 et seq.

Lando Commission<sup>61</sup> give evidence, as a kind of *ratio scripta*, of the results of comparative contract law.<sup>62</sup>

Of course, one would have to discuss the procedure to be followed in the preparation of a European text. This would include intense consultations at the Community level, followed by discussions in the legal public of the Member States, and long transitional periods which would allow for a new generation of lawyers to be educated on the basis of a future European contract law. But this would also be necessary in case of a new national codification, which has been suggested in some countries<sup>63</sup> and effectively put into force in the Netherlands. One should recall that, from the time Prof. Meijers was commissioned by the late Queen Wilhelmina to prepare a new Dutch civil code in 1947, it took 45 years before the essential parts of this code took effect in 1992.

Several provisional measures which might help to introduce the final text are conceivable. At a first stage, the Code could be published as a recommendation under Article 189(5) of the Treaty or as a regulation under Article 235 which would not supersede national contract law, however, but create an additional set of rules available to those parties who make the pertinent choice of law in their contract (see *supra* section 6). At a later stage, this text would have to be transformed by a regulation under Article 100A into the one, single, dispositive contract law of the Community. As a preparatory step it might also be helpful if the European Court of Justice very soon received jurisdiction to give preliminary rulings on the interpretation of such conventions on uniform contract law to which all or the majority of Member States are a party, e.g. on the UN Sales Convention and certain conventions in the

61. See O. Lando (Ed.), *Principles of European Contract Law – Part I* (Dordrecht, 1995). Cf. Zimmermann, “The Principles of European Contract Law, part I” (1995), ZEuP, 731.

62. See the extensive discussions in Hartkamp et al. (Eds.), *Towards a European Civil Code* (1994), in particular the contributions by Hartkamp, Van Erp, Van Rossum, Storme, Lando, Tallon, and Kortmann/Faber.

63. Cf. for English Law, Goode, *Commercial Law* 2nd ed. (1996), p. 1208, and for German Law, Bundesminister der Justiz (Ed.) *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992).

field of transport such as e.g. the CMR.<sup>64</sup> Such rulings being available in each official language of the Community would undoubtedly favour the establishment of judge-made common principles of contract law. As of now, national tribunals can foster that development by asking the Court of Justice for preliminary rulings on the interpretation of EC directives regarding the law of contracts.

At the present stage, it is essential that the Community – in accordance with the resolutions of the European Parliament – accept the unification of contract law as its own task and make a schedule for the legislative procedures to be followed. To this effect, a special emphasis in the Maastricht II Treaty might have been helpful, but, as shown above, it is not indispensable.

64. Cf. Basedow, "Europäisches Privatrecht: das UN-Kaufrecht vor dem EuGH!" (1992) *EuZW*, 489.