

Divergence in European Contract Law and its Significance for Europeanisation

Introduction

The topic of Europeanisation¹ of private law, and of contract law in particular, has been much discussed in recent years. Prompted by several initiatives within the institutions of the European Union, academics have relished the undoubted challenge which European integration presents in this field. Productivity in this area has been such that it is difficult to break new grounds. This essay thus has the more modest aim of emphasising some often neglected perspectives. Two themes will be important: first the importance of comparative law analysis to the Europeanisation process, and the importance of distinguishing between the various hard and soft law mechanisms which exist to promote Europeanisation.

The first section will give a brief account of the Europeanisation process which has taken place so far. The second will explore briefly the economic justifications which have been adduced to support the process. The third section will undertake some comparative analysis of the major European systems of contract law. Some of the major hard and soft law tools which the Europeanisation process might utilise will then be analysed in the light of these comparative reflections, and some comments made on the possibility of a “hybrid” hard and soft law harmonisation process.

1 History of Europeanisation of Contract law

The first element of the Europeanisation process to emphasise is that which takes place without any intervention at a European level. All European systems recognise (to a greater or lesser extent) a category of relationship by which parties may voluntarily assume rights and duties going beyond those governed by the rules of tortious responsibility. While there is a great degree of variety among the rules which apply in the various systems, it is important to remember that there are common starting points

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¹ It should be stated immediately for reasons of clarity that the term “Europeanisation” in this paper will be used interchangeably with the term “harmonisation”, and is intended to convey the meaning of a convergence in European contract law rules and practices, whether gradual or immediate.

which show that the Europeanisation process has existed for as long as contract laws have been in place. Many systems display similarities with the Roman law of contracts. All legal systems reflect at least an element of the liberal idea that the individual should have the freedom to determine his own relationships and obligations, subject to certain restrictions. The discipline of comparative law has increased the extent to which legal systems have converged. The extent of convergence which has taken place, and the extent of divergence which remains, will be examined in detail in section 3.

The Community has enacted harmonising legislation relatively extensively on a piecemeal, sector-specific basis which has been particularly active in the area of consumer law². Moves towards a more general harmonisation began in 1989 when the European Parliament called for work to be started on the drawing up of a common European Code of Private Law³. Since 1989, several study groups have undertaken research towards draft Codes of Contract Law, notably the Commission on European Contract Law⁴ (hereafter the Lando Commission) and the Academy of European Private Lawyers⁵ (the Pavia Group).

In 2001, the European Commission published a Communication to the Council and the European Parliament, intended to “broaden the debate on European Contract law involving the European Parliament, Council and stakeholders, including businesses, legal practitioners, academics and consumer groups.”⁶ The Communication set out a number of possible options which the EC could pursue with regard to European contract law:

1. to take no action;
2. to promote the development of non-binding common contract law principles leading to more convergence of national laws;
3. to improve the quality of piecemeal legislation already in place; or
4. to adopt new comprehensive harmonising legislation at EC level.

The responses to the Communication were wide⁷, and almost unanimously approved of options 2 and 3, and rejected the option of comprehensive harmonising legislation (option 4). As a result of the consultative process, the Commission produced a further

² At least seven Directives have been produced in this area. This body of legislation will be examined more closely below, section 4.

³ OJ C 158, 26.6.1989, p400 (Resolution A2-157/89)

⁴ O Lando and H Beale (eds.), *Principles of European Contract Law Parts I and II*, Kluwer Law International, 2000.

⁵ Academy of European Private Lawyers, *European Contract Code – Preliminary Draft*, Pavia, 2001.

⁶ *Commission Communication*, COM (2001) 398 Final, 11.07.2001, p2.

⁷ The responses sent to the Commission can be found at:

http://www.europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/index_en.htm

action plan⁸ which proposed to follow the general consensus towards improving sector specific legislation and promoting the development of non-binding common contract law principles. At the same time, the Commission also proposed to continue research into the possibility of a non-sector specific European instrument. Codification has not yet been ruled out therefore, and may be a long term objective.

2 Reasons for Europeanisation

The reasons given for harmonising contract law in Europe have been almost exclusively economic. This is unsurprising given that the most powerful competence of the Community lies in the achievement of an internal market. The argument is based on transaction costs: variety in legal rules across borders may cause inconvenience to businesses, who may often have to employ local legal experts to grapple with different and sometimes incompatible rules. The result of this may be increased expenditure and/or an unwillingness to enter the market in a different country. The fact that an agreement concluded in one country may not be valid or may have different effects in another may cause further problems. Harmonisation may thus enable many linguistic barriers to be broken down or weakened. The power of this argument is easy to grasp for a person who has attempted even the simplest of contractual transactions in a foreign Member State.

However the argument should not be automatically accepted without entering a caveat. Some commentators underline the value of the possibility of forum-shopping: in a community of varying legal systems, parties are able to choose the most appropriate law for their transaction⁹. However recourse to the conflict of laws rules is not a satisfactory solution to the economic problem identified above. Parties which are not well-acquainted with the systems of law will have increased transaction costs, and in transactions involving a cross-border element the parties will generally find themselves with differing preferences, which will be resolved according to bargaining power¹⁰.

There are also reasons to promote Europeanisation of contract law which are not based in economics. It is clear that a uniform law represents a level of cultural unity among peoples. A common European contract law would therefore both contribute to

⁸ Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law - An Action Plan, COM(2003) 68 final, 12.2.2003

⁹ See the Rome Convention on the Law Applicable to Contractual Obligations, 19 June 1980.

¹⁰ See, e.g., O Lando, 'Some Features of the Law of Contract in the Third Millennium', 40 *Scandinavian Studies in Law*, 343-402 (2000); The Joint Responses of the European Commission on Contract Law and the Study Group on a European Civil Code; Response of Sir Roy Goode. The latter two documents are both available on the Commission web site, cited above note 6.

and constitute evidence of a common European cultural identity. There is a simple reason why this argument has not been extensively relied upon in the literature¹¹: it is clear that such a justification for the harmonisation project would not be of any help with regard to the legitimacy of any European legislation, as there is no competence in the European Treaty to legislate on such grounds¹².

3 Divergence in European national systems

This section, which draws mainly on comparative law techniques, will explore the level of convergence and divergence which exists among European national systems of contract law, with a view to then analysing (in section 4) whether this prevents, impedes or aids the process of Europeanisation in its different forms. Three categories of diversity will be discussed here: divergence in legal rules between States, divergence in legal styles, and divergence in procedural rules¹³.

3.1 *Divergence in legal rules*

The extent to which rules of contract law vary between Member States is not easy to quantify. While it is obvious that the doctrines used to regulate contracts vary enormously between legal systems, it is equally obvious that different legal doctrines may be used to achieve a similar result to a given situation. For this reason there is controversy about the level of diversity of rules which exists in the European Union. While analysis of the doctrines of Contract law of the Member States is beyond this article, a few comments will be made with the aim of pointing out how such divergence as might exist would impede Europeanisation.

The basic division between Common law and Civil law exists also in comparative contract law. On the continent, the main influence of the law of contract has been Roman law. While the Roman law of contract was not highly developed in terms of general principles, the influence of Roman law led to the development of a complex law

¹¹ For an exception, see MA Eisenberg, 'The Unification of Law', in M Bussani, and U Mattei (eds), *The Common Core of European Private Law* (2002).

¹² Among others, see C Schmid, 'Legitimacy Conditions for a European Civil Code', 8 *Maastricht Journal of Comparative Law* 277 (2001).

¹³ An initial comment should be made on the concept of legal families which will be used in the following discussion. While grouping of systems into families is frequently used in comparative law and indeed is a very useful tool for comparing groups of legal systems without indulging in endless complexity and length, at the same time it is important to remember that the use of such a tool does involve a degree of simplification. The division of European legal systems into Common law or Civil law categories, or into Common law, Romanistic or Germanic systems does not do justice to the degree of variation that exists within these families, and often within individual systems. This is a point which is even more important when one considers the accession of ten new states from 2004 onwards.

of contract by the canon lawyers, the schools of natural law and of voluntarism, leading finally to the influential French Code civil. On the other hand in English law the rules of contract law have taken longer to develop, and Roman law is generally taken not to have had the same influence. For this reason one finds many doctrines in the English Common law governing contracts which are alien to continental systems, and vice versa. Examples are the English doctrines of consideration and privity of contract, and the civil law doctrines of good faith and judicial adjustments of contracts. Further, even where the same doctrines exist they may have considerably different scope or effects.

However, despite such formal differences, there is a great deal of hidden convergence¹⁴, both in doctrine (a notable example is the requirement of offer and acceptance for the formation of a contract, found in both Civil law and Common law systems), and in the result achieved by differing doctrines. The latter observation is critical to modern comparative law techniques which point out convergence among legal systems, based on the analysis of factually equivalent litigated situations¹⁵. On this basis it has often been observed that some apparent differences in doctrine are no barrier to Europeanisation¹⁶. Notable also is the ease with which many of the bodies set up to establish common rules have arrived at rules which satisfied all parties¹⁷. This observation suggests that there is less divergence between national systems than might be expected.

While substantial convergence may thus exist, it is clear that some divergence in contract law does exist. Even in areas where comparative studies have shown a degree of

¹⁴ While the influence of Roman law on Civilian systems is often highlighted, often neglected is the important influence that Roman law has had on the Common law. Some analysis of this can be found in R Zimmerman, *Roman Law, Contemporary Law, European Law, The Civilian Tradition Today* (2001). Further there are several examples of comparative influence throughout the development of English contract law. Savigny and Pothier, among others, had a great influence on English judges, and thus the evolution of English contract law. A summary can be found in B Markesinis, 'Our Debt to Europe, Past, Present and Future', in B Markesinis *The Coming Together of the Common Law and the Civil Law*, above note ...

¹⁵ This comparative technique may be termed the "common core" technique, and has been extensively used since the Cornell project conducted by Professor Rudolf Schlesinger in the 1960s. See R B Schlesinger, *Formation of contracts, a study of the common core of legal systems*, New York, 1968, and M Bussani, U Mattei, 'The Common Core Approach to European Private Law', (Vol. 3 1997/98) *The Columbia Journal of European Law* 339.

¹⁶ Several comparative studies concentrating on the common core of European systems have come to the same conclusion: see H Kötz, *European Contract Law*, 1997 (translated by T Weir); B Markesinis, *The Coming Together of the Common Law and the Civil Law*, above note ...; H Beale, A Hartkamp, H Kötz, D Tallon (eds), *Cases, Materials and Text on Contract Law*, 2002; the Trento Common Core of European Private Law Project: Reinhard Zimmermann, Simon Whittaker, *Good Faith in European Contract Law*, 2000; James Gordley, *The Enforceability of Promises in European Contract law*, Cambridge, 2001.

¹⁷ See O Lando, 'Optional or Mandatory Harmonisation', (2000) *European Review of Private Law*, p.59, at p.65.

convergence (such as good faith¹⁸), fundamental differences in both approach and result still exist between different systems, and especially between the Common law and Civil law families. The extent to which this might resist or impede Europeanisation is unclear. This question is caught up with the more complex one of how far rules of contract law go to the heart of a society's identity. Contract law rules represent the choice of a particular society as regards social values and how to regulate certain situations, thus suggesting that Europeanisation will be difficult without first achieving a high level of cultural homogeneity in the Community. For a European uniform law to effectively replace national laws to perform the relevant social functions, common ideas about the social effects of contractual regulation must exist in Europe¹⁹. Such effects concern distributive justice (the redistribution of wealth via contracts) and the support of social practices. It is submitted that no such consensus exists in Europe at the present time (the slow progress of the European Social Programme bears this out). While this conclusion would suggest that Europeanisation will be difficult, it does not follow that it will be impossible, but rather that a more subtle approach is required than simply harmonisation of the rules of contract law. This theme will be continued in the next section.

3.2 *Divergence in legal styles*

Discussion now turns to difficulties which arise due to diverging legal *styles*. It is argued that the different legal systems and legal families which exist in the European Union have distinctive legal styles, or *mentalité*. Put at its most blunt, the three legal families identified above place different emphases on the role of judges, legislation and academic contributions. Broad distinctions have been made between the English system (which is based around judge-made law), the French system (which is heavily reliant on legislation) and the German system (which takes full advantage of academic contributions to the law)²⁰. Further comparative law analysis of such issues is necessary to determine to what extent these distinctions are true.

The English system is greatly reliant on case law to shape the principles of its contract law. Indeed there is very little statute law in this area, and that which does exist

¹⁸ R Zimmermann, S Whittaker, *Good Faith in European Contract Law*, 2000. The authors conclude that there is a significant degree of convergence between Common and Civil law systems in this area, although this conclusion is criticised powerfully by L Nottage, 'Convergence Divergence and the Middle Way in Unifying or Harmonising Private Law', REFERENCE.

¹⁹ H Collins, 'European Private Law and the Cultural Identity of States', (1995) ERPL 3: pp.353-365.

²⁰ R C Van Caenegem, *Judges, Legislators and Professors, Chapters in European Legal History*, Cambridge University Press, 1987 Italian translation ..., W Van Gerven, 'A Common Framework of Reference and Teaching', European Journal of Legal Education 2004 (forthcoming).

is piecemeal and often sector specific. Pierre Legrand has gone further and identified the lack of codification in English private law as a manifestation of a particular cultural phenomenon: “the English definitely feel uncomfortable with systems of rigid rules ... the English pride themselves that many problems can be solved without formal rules.”²¹ On the other side of this coin lies the suggestion that French and German laws (along with those European systems which can be placed to some extent into these families) place greater reliance on codification and statutory law. Legrand argues that this derives from “the deep-seated conviction held by civilian jurists that the lived experience ought no longer to be privileged ... that the lived experience can be reduced to propositional knowledge in the form of a panoptic and autarkic body of rules of law.” Van Gerven²² and Nicholas²³ point at the practice of English lawyers to look to cases rather than general principles when resolving a dispute, contrasting with this the French practitioner’s habit of looking to the Code.

Such observations are important. However such a basic analysis is insufficient to reveal the level of convergence which exists in the judicial and legislative roles in European legal systems, and private law systems in particular. Instructive in this respect are the studies of comparative lawyers who have attempted to identify similarities between legal systems rather than differences²⁴. Specifically, a convergence may be observed both in the use of judge-made law and precedent structures. On the one hand, so-called Civil law systems have begun to place significant emphasis on the role of the judge (a prominent example would be the development of the French law of torts, which is almost entirely judge-made). Equally, while in many civilian systems there is no doctrine of binding precedent, a similar effect is achieved by the consistency of the court system²⁵. On the other hand, the strictness of the English doctrine of precedent is undermined by two factors: first, the decision of the House of Lords that they would not be strictly bound by their own decisions²⁶, and secondly, the flexible practice of distinguishing precedents. Under the latter doctrine a precedent is binding only where its “ratio decidendi” covers precisely the facts of the case in hand. The application of this principle is subject to value judgments, allowing great flexibility. Indeed Cross argues that

²¹ P Legrand, *Against a European Civil Code*, (1997) 60 MLR 44.

²² W Van Gerven, above no ..., at p. ...

²³ B Nicholas, ‘Rules and Terms’, (1974) Tulane Law Review 946.

²⁴ See generally N MacCormick and R Summers (eds.), *Interpreting Precedent - A Comparative Study*, 1997; also *Interpreting Statutes, A Comparative Study*, 1991.

²⁵ Although c.f. M Cappelletti, ‘The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference – Or No Difference at All?’, *Festschrift Zweigert* (1981) 381.

²⁶ Practice Statement of the Lord Chancellor, [1966] I WLR 1234.

the practice of distinguishing a precedent is so flexible that the idea of a rigid doctrine of precedent “exists only in the minds of academic lawyers”²⁷. In terms of the importance of legislation to contract law doctrines, it should be noted that there is an identifiable tendency of the English system of contract law to rely more heavily on legislation²⁸, while such intervention is still piecemeal. There is thus a great deal of convergence between the major legal families of the Community in terms of the judicial and legislative roles in law making.

The same cannot be said however of the style with which judges approach cases²⁹. The phenomenon of judicial style is related to the question of the role of judge-made law in a given legal system, in the sense that the way in which a judge perceives his role in a legal system and society in general will be demonstrated by the language and depth of analysis used.

Although it might be argued that the method of judicial interpretation has converged significantly in recent times, given the growing role of statutes in the Common law and the increasing influence of European law³⁰, the divergence in the style of judicial opinions is very clear in the major European states: English judgments are generally lengthy and thus readable for the general public, and often may even verge on the lyrical. On the contrary, German judges seem to “march at times to pitiless conclusion under the prod of a remorseless logic which is supposed to leave no alternative”³¹ and French judges “are trained to keep their thoughts to themselves”³². These varying styles certainly present difficulties for the harmonisation project, especially given the obvious difficulty of consistent interpretation of a Civil Code.

A further element of divergence may be observed in the level of academic involvement in law-making. The jurist plays an important part in the development of several continental legal systems (e.g. German and Italian law), both because the Civil Codes are generally prepared by academics rather than legislatures and because judges pay greater attention to academic writing. English judges do not pay the same level of attention to the contributions of jurists. Markesinis³³ attributes this both to judicial mentality and the reluctance of the Bar to include academic references in their

²⁷ Cross, ..., 82 LQR p.203 (1966), at p.214.

²⁸ E.g. Law Reform (Frustrated Contracts) Act (1943), Misrepresentation Act (1967), Unfair Contract Terms Act (1977), Contracts (Rights of Third Parties) Act (1999).

²⁹ B Markesinis, ‘A Matter of Style’, (1994) 110 LQR 607.

³⁰ See K Zweigert and H Kötz, *An Introduction to Comparative Law*, 3rd edition (translated by T Weir), Oxford 1998, at p.265.

³¹ B Cardoso, *The Growth of the Law*, 1924, p.215.

³² B Markesinis, above note ... at p. ...

³³ Above, note ...

arguments.

3.3 *Divergence in legal procedures*

Several commentators have underlined the importance of enforcement rules to contract law³⁴. In economic terms, enforcement rules provide an incentive to the party which has not performed its side of the agreement to do so. Without the possibility of efficient enforcement, parties would be tempted to indulge in opportunism³⁵. Enforcement rules thus enhance market efficiency by increasing the number of completed transactions. They may also reduce transaction costs of the parties by avoiding the need to establish self-enforcement procedures. For this reason divergence in civil procedure rules among Europe would be an important impediment to the successful functioning of a non-discriminatory internal market.

Two important areas of divergence may be identified³⁶. First, the methods of granting access to justice to civil litigants vary widely. While there has been an element of convergence of basic procedural rights³⁷ due to the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁸, signed by all Member States of the EU, such convergence has only limited effect on civil procedure. Fundamental questions of access to justice, such as costs of litigation, small claims, and speed of justice are dealt with in very different ways by different European systems. Such divergence raises fundamental questions for enforcement of a European contract law.

Secondly, the methods of conducting civil litigation vary. Here the Common law/Civil law divide is evident. Under the adversarial procedure followed in Common law countries, the trial takes place in a single continuous hearing, and the role of the advocates assumes great importance. The philosophy underlying this procedure is that the best way to arrive at justice is by allowing the separate parties to compete: “[i]n

³⁴ U Mattei, ‘Efficiency and Equal Protection in the New European Contract Law: Mandatory, Default and Enforcement Rules’, 39 *Virginia Journal of International Law*, p. 537 (1998-1999); A Schwartze, ‘Enforcement of Private Law: The Missing Link in the Process of European Harmonisation’, *ERPL* 1:135-146, 2000.

³⁵ Here lies an overlap with the question of contract law rules as to performance of the contract, the exploration of which is beyond the scope of this article. It should be noted however that some systems of contract law encourage opportunistic behaviour by contractual parties more than other systems, not only by their procedures but also by their rules. An obvious example is the importance of the English remedy of ‘termination’ in comparison to ‘specific performance’.

³⁶ See generally, M Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford 1989, especially chapter 6.

³⁷ Examples are *nemo iudex sine actore*; *ne eat iudex ultra petita et alegata a partibus*, *nemo iudex in re sua, audiatur et altera pars*.

³⁸ See especially Article 6 of the Convention.

litigation as in war.”³⁹ This is in stark contrast to many continental procedural techniques, which generally give a more prominent role to the judge, whose task is to discover the truth. A result of this difference is that the law of evidence does not apply in most continental systems, as judges are trusted to hear everything. The adversarial procedure may be regarded as paying greater attention to judicial impartiality, but it has been criticised⁴⁰ on the grounds that it leads lawyers to attempt to distort cases and its continued existence may be attributed to careful control of its excesses. In any case the existence of such procedural divergence may present difficulties for the Europeanisation process.

4 Mechanisms of Europeanisation

This section will consider the various mechanisms which exist for achieving Europeanisation of contract law. Two approaches can be identified among academics: those who support codification, and those who believe codification to be unnecessary or ineffective to achieve successful Europeanisation, and who thus argue for a different approach. The approaches thus equate to those who support the use of “hard law” to achieve Europeanisation, and those who support the use of “soft law”. The difficulties which the Europeanisation process faces very much depend upon which of these mechanisms is brought into play. The two positions are generally assumed to be mutually exclusive, indeed Ole Lando often begins his numerous articles on the subject with a comparison to the debate between Professor Thibaut of Heidelberg and Professor Savigny of Berlin over the codification of German private law⁴¹. However it has been pointed out⁴² that these positions, rather than being antithetical, may not necessarily be so, and may indeed be complementary. While the argument here will reject the desirability of immediate codification, it will be argued that a complementary role for hard and soft law mechanisms is not only possible, but also necessary to achieve a coherent and efficient Europeanisation.

4.1 *Hard law*

The expression “hard law” needs some clarification. In this article it will be used to describe mandatory law which is introduced into the legal systems of Member States,

³⁹ Per Lord Denning in *Burmah Oil Co. v Bank of England* [1979] 1 WLR 473, at 484.

⁴⁰ E.g. Langbein, ‘The German Advantage in Civil Procedure’, 52 U. Chi. Rev. 823 (1985).

⁴¹ E.g. O Lando, above note ...

⁴² E.g. M Bussani, ‘Integrative Comparative Law Enterprises and the Inner Stratification of Legal Systems’, (2000) ERPL p. 85, at p.92.

whether by the institutions of the European Community acting in their legislative capacity, or by the Member States acting autonomously via a separate Treaty. It includes therefore harmonisation mechanisms via sector-specific Directives (Option 3 as described by the Commission Communication), and a broader code of Contract law or Private law (Option 4 of the Communication).

The sector-specific legislation which has taken place so far has been important to break down some of the economic barriers caused by divergent rules. However many criticisms can be levelled at the current state of affairs. First, the “Classic Community Method”⁴³ of legislation is not ideally suited to legislation in this area, given that contract law spans a number of different Directorate Generals in the Commission. This has led to a high level of inconsistency among the Directives themselves. Further the use of directives as a legislative instrument (arguably chosen due to political considerations) means that much divergence in implementation both by national legislatures and courts is not prevented. Further directives are not horizontally directly effective, and thus individuals cannot rely on them in most contractual disputes where the directive has not been effectively transposed into national law⁴⁴. There is thus much room for improvement in the existing ‘*acquis communautaire*’ of contract law.

Several commentators have argued for the drafting, enactment and implementation of a European Contract Code⁴⁵. The main advantage of such an approach is its ability to answer the economic questions posed by divergent systems of rules (discussed above in section 2). A uniform code has the ability to decrease transaction costs, provided that mandatory rules are restricted to those which are absolutely necessary⁴⁶. However it is submitted that codification is not the correct solution for the current problems of European integration in this area for several reasons. The question of administrative costs of such a project⁴⁷ or the legitimacy of the EU institutions to legislate in this way⁴⁸ will not be considered here, although some commentators would add these to the list of problems. The discussion will focus on the problems which existing divergences will pose to the codification process. The three types of divergence identified above will be

⁴³ J Scott and D Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’, *ELJ* 8/1:1-18 (2002).

⁴⁴ On these difficulties see U Mattei, above note ...

⁴⁵ O Lando, above note ... ; U Mattei, ‘Hard Code Now!’, 2:1 *Global Jurist Frontiers*, Article 1 (2002).

⁴⁶ U Mattei, above note ...

⁴⁷ See, e.g., G Wagner, ‘The Economics of Harmonization: The Case of Contract Law’, *Common Market Law Review*, Volume 39, pp.995-1023; R Van Den Bergh, ‘Forced Harmonisation of Contract Law in Europe: Not to be Continued’, in: S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law*, Kluwer, The Hague, 2002, p. 245-264.

⁴⁸ On which see C Schmid, ...

taken in turn.

Divergence of legal rules means that acceptance of a code will not always be straightforward, but more importantly the connection between the rules of contract law and cultural identity means that a coherent set of European contract rules must establish values of distributive justice to replace those already in existence in each Member State. Given the lack of any consensus among Member States in the area of Social Protection, it is submitted that political agreement may prevent a European code from achieving the required level of coherence. For this reason any European code must be combined with measures intended to establish a common European culture in the area of contract regulation.

Divergence of legal styles has even graver effects on the implementation of a code. Arguments that the diversity of legal styles is such as to prevent any meaningful Europeanisation⁴⁹ are exaggerated. Divergence does not necessarily prevent future convergence. However, the reflections on the diversity of legal styles in the Member States (above, section 3.2) lead to the conclusion that a uniform law in the books would not easily translate to uniformity of law in action. Given the differing styles of judicial law-making, interpretation and style of judgments, it is clear that a European code or other hard law would not overcome much diversity⁵⁰. For this reason, many of the extra transaction costs caused by different legal systems would remain in place: local lawyers would nonetheless have to be consulted in cross-border transactions. Unity could only be achieved in this area by methods of coordination or institutional reform: a European private law Court is essential to maintain the coherence of the system⁵¹.

An even greater problem is the divergence in legal procedures: unified rules of contract law would not be economically effective or socially acceptable without a unified system of enforcement. Although it would be open to some parties to choose the procedural rules which suited them best, this is only a partial solution, as the less-well informed parties, as well as parties with weaker bargaining power, would not be able to do so. For this reason it is submitted that any scheme of codification must be accompanied by harmonisation of civil procedure⁵². A glance at American contract

⁴⁹ See P Legrand, above note ...

⁵⁰ This point is reinforced by the fact that many of the existing Directives in the area of contract law have given rise to lack of uniformity in their interpretation by national legislatures and judges. A prominent example is the Directive on Unfair Contract Terms. See G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', 61 MLR 11 (1998).

⁵¹ See the proposals of C Schmid, above note ... and A Schwartze, above note ... on this.

⁵² Some general procedural harmonisation projects have been undertaken, although as yet no great progress has been made. See M Storme (ed.), *Approximation of Judiciary Law in the European Union*,

enforcement backs this up.

Finally, it is submitted that the economic problems which have been outlined do not, of themselves, necessitate codification. It has been pointed out that some level of private law diversity has not been incompatible with a successful internal market in the United States⁵³. While the advantages of a uniform contract law may be regarded as clear, it does not follow that these advantages outweigh the problems which codification would encounter, given the current state of divergence among Member States. It is necessary to increase convergence in the three areas identified (rules, procedure and style) before codification can be a realistic target.

4.2 *Soft law*

Given the criticisms of the codification mechanism, many authors have proposed softer measures by which to promote Europeanisation of contract law. Many commentators have underlined the importance of creating a European contract law culture in order to facilitate the process of Europeanisation. Such a task will not be easy and involves many stages. The first is the identification of European contract law through academic works: textbooks and casebooks. Some important steps have already been taken in this direction⁵⁴. Also important is to encourage the study of European contract law in Universities across Europe⁵⁵. This is one of the notable lessons which can be drawn from US contract law: while there is plenty of divergence in between the law of each State, students are educated with the common US contract law⁵⁶. Such projects are very much in their infancy in Europe and many commentators have rightly urged greater attention to a common framework of teaching in European contract law⁵⁷. Another step in the process of creating a common European culture of contract law is to encourage judges in national contexts to undertake comparative study. This is also a rare art at the

Nikhoff, Dordrecht et al, 1994; and F K Juenger, 'Some Comments on European Procedural Harmonisation', 45 (1997) *AmJCompL* 932.

⁵³ O Kahn-Freund, 'Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation', in M Cappelletti (ed.) *New Perspectives for a Common Law of Europe*, European University Institute, Leyden/London/Boston, 1978, pp137 et seq; Lord Goff, 'Coming Together – The Future', in B Markesinis (ed.), *The Coming Together of the Common Law and the Civil Law*, Hart, Oxford, 2000.

⁵⁴ H Kotz, *European Contract Law*; H Beale (et al), *Cases, Materials and Text on Contract Law*; see also the books produced by the Trento Common Core Project, above note ...

⁵⁵ Highlighted by B Markesinis, above note ...

⁵⁶ The importance of this to US legal unity is described by MA Eisenberg, above note ...

⁵⁷ B Markesinis, above note ..., W Van Gerven, above note ...; H Kötz, 'A Common Private Law for Europe: Perspectives for the Reform of European Legal Education', in B De Witte, C Forder (eds.), *The Common Law of Europe and the Future of Legal Education*, Kluwer, 1992, and the follow up book M Faure, J Smits, and H Schneider (eds.), *Towards a European Ius Commune in Legal Education and Research*, Maastricht, Metro, 2002.

moment, although there are some indications that even English judges may be open to take into account foreign doctrines in private law situations⁵⁸.

The US model alone is enough to show that such projects are immensely important to creating legal unity. While a European contract law culture must be established in order to facilitate convergence, the exercise of comparative law by judges will allow mutual learning and promote convergence both in legal rules and style. However, such techniques alone are not sufficient to create a sufficient level of unity to remove the economic problems of transactions costs that exist in Europe⁵⁹. For this reason those commentators who do not support codification of European contract law often propose an optional model which would promote greater convergence. Such a model might take the form of a Restatement of European contract law⁶⁰, drawing again on the US example. Such a mechanism of Europeanisation would have the advantage of allowing much greater comparative work to be done by the national legislators as well as the courts, in adapting their laws to fit a European framework. While a Restatement is by no means legally binding, the US example shows that it can be very influential in leading to convergence in legal rules. Convergence in procedure could also be brought about by similar means⁶¹. However some commentators have insisted that even such a measure is not able to achieve sufficient legal unity to overcome economic barriers⁶². While convergence in European contract law would be promoted, recourse to local lawyers would still be necessary and transaction costs would not be significantly decreased.

5 Conclusion: a hybrid?

It is clear that the mechanisms above are all flawed in some way. While Europe is not 'ready' for codification due to excessive divergence, soft law mechanisms are insufficient to meet the needs of modern day European integration and the piecemeal legislation is highly flawed. At this point it is useful to look at more general discussions of European integration outside the area of contract law. The conflict between commentators

⁵⁸ An example in tort law is the decision of the House of Lords in Fairchild v Glenhove (20 June 2002), in which Lord Bingham undertook extensive comparative law analysis of a problem which afflicts all legal systems, that of multiple causation.

⁵⁹ O Lando, above note ...

⁶⁰ An interesting proposition in this nature is made by C Schmid, above note He emphasises the importance of the legitimating authority of the institution to draw up such a Restatement.

⁶¹ Proposed by A Schwartze, above note ...

⁶² U Mattei strongly criticises such "soft" initiatives as symptomatic of a shift in the relationship between the law and the market: "[t]he soft cultural attitude, typical of postmodernist scepticism, irony and loss of faith, is functional to a new legal and economic order in which the market governs the law rather than the other way around", above note ...

promoting hard law and soft law appears also in the context of the European Social Programme, some commentators promoting the use of the Classic Community Method, while others promote softer mechanisms of convergence, such as the Open Method of Coordination⁶³. The former assume that without central legislation there will be a race to the bottom in social standards, while the latter sees diversity as a lucky solution to be taken advantage of in the search for new solutions to seemingly intractable problems. However recent observations have shown that the conflict between hard and soft law is misleading: greater convergence can be obtained by combining both types of mechanism⁶⁴. This has been recognised by the European Convention: “[t]he existence of Community legislation in a given area does not however necessarily rule out recourse to policy coordination”⁶⁵. These insights are equally applicable to the discussion on European contract law: while the role of hard law is vital to break down the economic barriers caused by divergent rules of contract law, soft law must be employed to coordinate the legislative process and to increase convergence among the Member States⁶⁶. At the same time other “soft” initiatives are vital to the creation of a common European culture of contract law, in order to enhance the acceptance of European legislation in this area. Convergence and uniformity in European contract law is desirable, but it cannot be successfully achieved by immediate codification, despite the desirability of such a simple solution. European integration in this area is not simple, and must be achieved by more subtle means.

⁶³ On this tension, see G De Bùrca, ‘The Constitutional Challenge of New Governance in the EU’, (2003) 28 ELRev 814.

⁶⁴ D Trubek and L Trubek, ‘Hard and Soft Law in the Construction of Social Europe’, paper prepared for presentation at the SALTSA, OSE, UW Workshop on “*Opening the Open Method of Coordination*”, EUI, July 2003.

⁶⁵ Convention Secretariat, WG VI, WD 015, Brussels, 26 September 2002, at p.16.

⁶⁶ On the possibility of utilising the Open Method of Coordination to coordinate both the Europeanisation process and divergence in interpretation of contract laws, see F Cafaggi, ‘Una governance per il diritto Europeo dei contratti?’, in F Cafaggi (ed.), *Quale Armonizzazione per il Diritto Europeo dei Contratti*, 2003.