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ANATOMY OF AN EXPERIMENT: CONSOLIDATION OF EU CONTRACT LAW

LJILJANA BIUKOVIC*

I. INTRODUCTION

In December 2007, the Study Group on a European Civil Code (“SGECC”)¹ and the Research Group on European Community (“EC”) Private Law (“the Acquis Group”)² together published “Principles, Definitions and Model Rules of European Private Law”, the Interim Outline Edition of the Draft Common Frame of Reference (“the DCFR”),³ in response to the European Commission’s 2003 *Action Plan for a More Coherent European Contract Law*.⁴ The members of the two research groups insist that the DCFR is an

* BCL., LL.M., Ph.D., Associate Professor, Faculty of Law, University of British Columbia. A preliminary draft of this paper was first given at the Commercial Contracting Symposium, National Business Law Centre, Faculty of Law, UBC (Vancouver, October 2007). The research is funded by the Jean Monnet Module Grant.

¹ The Study Group on a European Civil Code (“SGECC”) is a network of European legal scholars working in the area of private law of their member states, and cooperating on the project to produce the “Principles of European Law for the law of obligations and core aspects of property”. See online: The Study Group on a European Civil Code: <<http://www.sgecc.net>>.

² The Research Group on EC Private Law (“the Acquis Group”) led by Professor Gianmaria Ajani focuses on existing EC law in the field of contracts. See European Research Group on Existing EC Private Law, online: The Acquis Group <<http://www.acquis-group.org>> [*The Acquis Group*].

³ Christian von Bar *et al.*, eds., *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition* (Munich: Sellier, 2008). The electronic version of the DCFR is available online: Sellier <<http://www.law-net.eu>> [*DCFR*].

⁴ EC, *Communication from the Commission to the European Parliament and the Council; A More Coherent European Contract Law (Action Plan)*, COM(2003) 68 final, [2003] O.J. C 63/1, online: Official Journal of the European Union <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0068:FIN:EN:PDF>> [*Action Plan*].

academic rather than a politically authorized text.⁵ A compilation of over 25 years of independent research by numerous European academics and private law experts, the DCFR should be considered simply as an initiative for the consolidation and harmonization of European Union (“EU”) contract law, leaving the issue of possible legislated codification to a competent political body of the EU and its member states.⁶ The current edition of the DCFR is offered to academics, legal practitioners and politicians for their comments and criticism. Its authors indicate that the text will be revised and supplemented with more detailed notes and cross-references to other sources, and that the final DCFR will be published by the end of December 2008.⁷ This outline edition, inspired by a number of other international and European projects on the harmonization of private law in general and contract law in particular, focuses on providing the Commission with a possible model for a “political” Common Frame of Reference (“CFR”), on facilitating “legal science, research and education,” and inspiring solutions for private law questions, including possible projects on the modernization of national contract law in Europe.⁸

This article analyzes the process of harmonization of Contract Law in the EU in the context of the general debate on the need for international harmonization of commercial law on one hand, and, on the other hand, in the context of the integration of the European market and the omnipresent European discussions on the need for harmonization, appropriate methodologies for reform and on the institutional competence to pursue the harmonization process. Part II of the article establishes interrelationships between major international harmonization efforts in the area of contract law. Part III focuses on the current situation in the EU in regards to harmonization of contract law. It starts from the premise that one of the main integration tools of the EU is its own legal order and *acquis communautaire*,⁹ and focuses on several soft law harmonization

⁵ “Introduction”, *DCFR*, *supra* note 3 at 5.

⁶ *Ibid.*

⁷ *Ibid.* at 37–39.

⁸ *Ibid.* at 7, para. 7.

⁹ The *acquis communautaire* is a unique body of community law that binds the 27 member states of the EU. It has accumulated over the years of development of the EU. For a quick introduction see EUABC Dictionary, online: EUABC

attempts that have been made by European legal scholars utilizing the Principles of European Contract Law (“the PECL”)¹⁰ and the CFR related projects. Part IV discusses the DCFR project. The article closes by commenting on the DCFR’s potential to influence international and national law reforms, especially in multi-jural states such as Canada.

II. EVOLVING INTERNATIONAL UNIFICATION AND HARMONIZATION EFFORTS

Many international initiatives to harmonize areas of contract law begin with the premise that there is a need to reduce differences in national laws on private contracting by creating a harmonized set of rules and that these rules should also form the basis for judicial and arbitral interpretation of private transactions.¹¹ The need is usually justified by assertions that diverse national laws interfere with the performance of international business transactions and the functioning of a global market, and that national laws are not appropriate means to regulate such complex international transactions.¹² These assertions lead to the general conclusion that the existing national legislation affecting private transactions is in immediate need of reform and that contract rules especially, which are central to international business transactions in that they make private agreements efficient and enforceable, should be consolidated and harmonized, and perhaps even unified. Such consolidation is usually done at the international level through the legislative process

<<http://en.euabc.com/word/12>>. For more on the concept see Christine Delcourt, “The Acquis Communautaire: Has the Concept had its Day?” (2001) 38 C.M.L. Rev. 829.

¹⁰ *Principles of European Contract Law* (1998). online: Pace Law Database <<http://www.cisg.law.pace.edu/cisg/text/textef.html>> [PECL].

¹¹ See also Ole Lando, “Optional or Mandatory Europeanisation of Contract Law” (2000) 8 E.R.P.L. 59.

¹² Ewan McKendrick, “Harmonisation of European Contract Law: the State We Are In” in Stefan Vogenauer & Stephen Weatherill, eds., *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice* (Oxford and Portland: Hart Publishing, 2006) at 14–17. David Goldman argues that “globalization makes it difficult to govern global spaces by traditional territorial means and laws”. See David B. Goldman, *Globalisation and the Western Legal Tradition, Recurring patterns of Law and Authority* (Cambridge: Cambridge University Press, 2007) at 39.

of enacting international treaties (the hard law approach), by proposing model laws, standards and principles for states' and private parties' consideration, voluntary adoption, and more or less selective adaptation (soft law), or through judicial harmonization, in which courts and tribunals consistently interpret and apply harmonized or uniform law.

Legislative consolidation and reform initiatives, which could originate at the international, regional or national level, are usually interrelated, often overlapping, though not necessarily conflicting. Two such international initiatives should be mentioned here since they were major sources of inspiration for European research groups involved in projects considering the codification of the EU Contract Law. The first is the *United Nations Convention on Contracts for the International Sale of Goods* ("CISG"),¹³ signed by 70 countries¹⁴ and applicable to all contracts for the international sale of goods between parties from the signatory countries¹⁵ except where the contracts explicitly exclude CISG application.¹⁶ The CISG was initiated by the United Nations Commission on International Trade Law ("UNCITRAL"),¹⁷ which is in charge of the harmonization and unification of international trade rules, and despite the fact that its harmonization results have been called into question,¹⁸ the CISG has become a point of reference in academic debates and in the ongoing efforts to codify or harmonize national sales laws. It is important to note that the CISG governs only certain parts of a contractual

¹³ 11 April 1980, 1489 U.N.T.S. 3 [CISG]. CISG came into force on 1 January 1988.

¹⁴ Status as of 6 October 2007 available via UNCITRAL Texts & Status, online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts.html>.

¹⁵ CISG, *supra* note 13, Art. 1(a).

¹⁶ *Ibid.* Art. 6.

¹⁷ UNCITRAL was established by the UN General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966). The Commission has 60 members selected by the General Assembly of the United Nations. See *Origin, Mandate and Composition of UNCITRAL*, online: UNCITRAL <<http://www.uncitral.org/uncitral/en/about/origin.html>>.

¹⁸ See e.g. Robert A. Hillman, "Applying the United Nations Convention on Contracts for the International Sale of Goods: the Elusive Goal of Uniformity", online: (1995) Cornell Review of the International Convention on Contracts for the International Sale of Goods 21 <<http://www.cisg.law.pace.edu/cisg/biblio/hillman1.html>>.

transaction between parties, leaving the other part(s) of the transaction to be governed by the national rules. The PECL, one of the EU initiatives discussed below, has considered the CISG extensively.¹⁹

The CISG followed the path taken by another well known international initiative, the International Institute for the Unification of Private Law (“UNIDROIT”).²⁰ UNIDROIT has worked on at least two international conventions related to contract rules—the so-called Hague Conventions—that is, the *Uniform Law on the International Sale of Goods* and the *Uniform Law on the Formation of Contracts for the International Sale of Goods*. Despite being ratified by only a handful of countries in the 1970s, these two conventions have inspired other international unification and harmonization projects such as the CISG in the 1980s and the PECL and UNIDROIT’s own *Principles of International Commercial Contracts* in the 1990s.²¹ The UNIDROIT Principles,²² themselves partly inspired by the CISG,²³ have created a sort of an international restatement of contract law since their main achievement is the codification of principles that have already been adopted in international documents, including rules already established in the CISG.²⁴

¹⁹ But note that the two texts use different consolidation methods. For more on the relation between the CISG and the PECL see McKendrick, *supra* note 12 at 7–9.

²⁰ UNIDROIT is an independent intergovernmental organization first established in 1926 as a body of the League of Nations and then re-established in 1940 on the basis of the *UNIDROIT Statute*, with a mandate to “study needs and methods for modernising, harmonising and coordinating private and in particular commercial laws between States and groups of States.” UNIDROIT online: UNIDROIT <<http://www.unidroit.org/dynasite.cfm?dsmid=84219>>.

²¹ McKendrick, *supra* note 12 at 6–8.

²² The 2004 revised text of the UNIDROIT Principles is available in English, French, Italian and Spanish online. See *UNIDROIT Principles of International Commercial Contracts 2004* (Rome: UNIDROIT, 2004), online: UNIDROIT <<http://www.unidroit.org/english/principles/contracts/main.htm>> [*Unidroit Principles*].

²³ Michael J. Bonell, “The CISG, European Contract Law and the Development of a World Contract Law” (2008) 56 *Am. J. Comp. L.* 1 at 17 [Bonell, “CISG”].

²⁴ Giuditta C. Moss, “International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith” (2007) 7:1 *Global Jurist Advances*, Art. 3, available online: <<http://www.bepress.com/gj/vol7/iss1/art3>> at 21; *UNIDROIT Principles, supra* note 22.

The CISG and the UNIDROIT Principles differ in their method of consolidating international sales law,²⁵ and in the scope of their application and the stage(s) of the contract to which they apply. The CISG is a hard law instrument for the unification of international sales law, imposing a mandatory set of rules unless the parties specifically exclude its application to their contract. Yet its unification effects are very limited because of the limited scope of its application. The UNIDROIT Principles provide optional guidelines, a soft law method of consolidating contract laws. They provide a model law for national legislators, and for the courts and tribunals deciding disputes arising out of international contracts, and they offer private parties rules by which to govern their transactions.²⁶ While the UNIDROIT Principles apply to all types of commercial contracts and require that the parties act in good faith both during the pre-contractual negotiations and in the performance of the contracts, the CISG applies only to the sale of goods and imposes the duty of good faith on parties only in their performance of the contracts.²⁷

In sum, even though the above mentioned international initiatives have influenced the development of contract law in the EU primarily by influencing the development of national contract law in the EU member states and inspiring European research and work on the development of European Contract Law, they have failed to sufficiently facilitate coherent and far reaching harmonization either because of the scope or of the method of harmonization.

²⁵ For a detailed discussion on the CISG and the UNIDROIT Principles methods of harmonization of international contract law see Bonell, "CSIG", *supra* note 23. Bonell refers to the CISG as to "international legislation" and to the UNIDROIT Principles as "international restatements" because it is "proceeded merely to 'restate' (or whenever appropriate 'pre-state') international contract law and practice". See *ibid.* at 16.

²⁶ See Michael J. Bonell, "The UNIDROIT Principles and Transnational Law" (Paper presented at the Seminar on "The Use of Transnational Law in International Contract Practice and Arbitration" organized by the Centre for Transnational Law ("CENTRAL"), Münster (Germany), 4–5 May 2000), online: UNIDROIT <<http://www.unidroit.org/english/publications/review/articles/2000-2.htm>>.

²⁷ For a comparison between the Principles of European Contract Law, the UNIDROIT Principles and the CISG, see Figure 2 as compiled by Larry A. DiMatteo, "Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law" (2002) 43 Harv. Int'l L. J. 569 at 574.

III. THE EU EXPERIENCE IN HARMONIZING CONTRACT LAW

Since the late 1950s, regional economic integration in Europe has been at the centre of academic debate and there has been an ongoing international attempt at full harmonization of private laws (including contract laws). The general theme behind such attempts in the EU has been to facilitate the functioning of the internal market by creating a set of legal rules that would replace the national laws of the member states.²⁸ The European Economic Community (“EEC”) was initially created in 1957 as a common market among its member states,²⁹ with the ultimate goal of creating a customs union. The existence of diverse national laws was seen as a possible non-tariff barrier to the free movement of persons, services and capital.³⁰ Therefore, the EU has directed its legislative efforts on unification and harmonization mainly to the area of commercial law, relying primarily on the enactment of numerous directives regulating

²⁸ For the purpose of this report the terms EU and EC will be used interchangeably though the author is aware of the important distinction between the two entities.

²⁹ *Treaty Establishing European Economic Community*, 23 March 1957, 298 U.N.T.S. 11, 1973 Gr. Br. T.S. No. 1 Cmd. 5179-II (entered into force 1 January 1958) [*Treaty of Rome*]. See especially Art. 2: “The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.” Please note that unless indicated otherwise, throughout this article the term “TEC” refers to the consolidated version of the *Treaty on European Union and of the Treaty Establishing the European Community*, 29 December 2006, [2006] O.J. C 321 E/1, online: Official Journal of the European Union <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf>> [TEC].

³⁰ Ole Lando, “Contract Law in the EU: The Commission Action Plan and the Principles of European Contract Law” (16 May 2003), a response to the 2003 Action Plan, unpublished manuscript, online: <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-31.pdf>. But see law and economics based arguments that legal diversity has some advantages since it induces regulatory competition to the benefit of private parties: Fernando Gómez, “The Harmonization of Contract Law Through European Rules: a Law and Economics Perspective” (2008) 2 *European Review of Contract Law* 89.

particular fields of private law, such as contracts, company law, labour relations and consumer protection.³¹

EU law, created by the Community institutions, is unique in its method of reconciling the quest for uniformity of law with respect for the diversity of 27 national legal cultures.³² The EU has developed a complex three-pillar constitutional structure.³³ There is lingering doubt about the legislative powers of the EU institutions because they are limited to specific areas of the first pillar in which the member states agreed to transfer their competences to the EU institutions (the so-called attributed competences).³⁴ In all other

³¹ Jurgen Basedow, "The Renaissance of Uniform Law and Its Components" (1998) 18 L.S. 121 at 123. For more on the EU piecemeal approach to unification of private law see also Martijn J. Hesselink, "The Politics of European Contract Law: Who has an Interest in What Kind of Contract Law for Europe?" (2002) 2 Global Jurist Frontiers, Article 3 [Hesselink, "Politics of European Contract Law"]; Anna M. Lopez-Rodriguez, "Towards a European Civil Code Without Common European Legal Culture? The Link Between Law, Language and Culture" (2003-2004) 29 Brook. J. Int'l L. 1195 at 1197-1206.

³² For a general review of the EU legal system see Joseph H.H. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999). For a more detailed overview of the member states' legal diversities see Jan Smits, "Convergence of Private Law in Europe" in Esin Örucü & David Nelken, eds., *Comparative Law: A Handbook* (Oxford and Portland: Hart Publishing, 2007) at 219-40.

³³ *The Treaty on European Union [Treaty of Maastricht]*, 29 July 1992, [1992] O.J. C 191/1, (signed in February 1992) created the EU by moving the integration process from what was initially only an economic union, into a three-pillar structure—the economic area (consisting of the European Coal and Steel Community ("ECSC"), the European Community of Atomic Energy ("Euratom"), and the European Economic Community, later the EC, with the common institutional framework based on the three Treaties founding the three communities) constituted the first pillar while new areas of common foreign and security policy ("CFSP"), and home and justice affairs ("JHA") occupied the second and third pillars respectively. Even though the terms EU and EC are often used interchangeably (even in this paper) they are references to different institutional structures. The EC, or main part of the first pillar, is the area of legislative competences of the Community institutions and its acts are subject to review of the European Court of Justice. The other two pillars remain mainly intergovernmental. Thus, the EC and the EU coexist but their competencies and decision making powers are distinct. For more on the nature of the EU's constitutional structure see Gráinne de Búrca & Paul Craig, *EU Law: Text, Cases and Materials*, 4th ed. (Oxford: Oxford University Press, 2008) at 14-36.

³⁴ *TEC*, *supra* note 29, Art. 5(1).

areas each member state applies its own national laws, which currently implies the existence of 27 different national contract laws within the EU. This cultural diversity has important legal consequences in addition to political ones.³⁵ It has often been pointed out that diversity is an important characteristic of the EU and that it should be preserved regardless of the depth of integration achieved.³⁶ In that context, the EU is seen as a union of different ethno-cultural groups “with their own views of what is fair.”³⁷

The principles of direct effect, supremacy and subsidiarity have transplanted the basic ideas of legal pluralism found in the Western legal tradition into the EU legal order,³⁸ ensuring that Community law, enacted when necessary and within the limits of the EU competencies,³⁹ is observed not only by its own institutions but also by the national courts. This is especially so when protecting the rights of individuals as conferred by Community legislation.

³⁵ Ruth Sefton-Green, “Cultural Diversity and the Idea of a European Civil Code” in Martijn W. Hesselink, ed., *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) at 71–88.

³⁶ *Ibid.*

³⁷ Jan Smits, “Editorial; A Principled Approach to European Contract Law” (2000) 7 M.J.E.C.L. 221 at 222.

³⁸ Goldman, *supra* note 12 at 260. The principles of direct effect and supremacy are established by the Court of Justice of the European Communities (the “ECJ”) case law while the principle of subsidiarity is embedded in the treaty—see *TEC*, *supra* note 29, Art. 5(2). In brief, the case of *Van Gend en Loos v. Nederlands Administratie de Belastingen*, case 26/62, [1963] E.C.R. I–1, established the principle of direct effect finding that the EC is “a new legal order” and “Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage” suggesting that certain EU laws are to be interpreted as “creating individual rights which national courts must protect.” The principle of supremacy of EU law as established by the ECJ to ensure that in the case of conflict between the community laws and laws of the member states, it is the Community law that should be applied (*Costa v. ENEL*, case 6/64 [1964] E.C.R. I–585), irrespective of whether the EU law was enacted prior to or subsequent to the relevant national provision (*Simmmenthal SpA v. Amministrazione delle finanze*, case 70/77 [1978] E.C.R. I–629).

³⁹ *Treaty of Rome*, *supra* note 29, Art. 3(b) mandates that the Community acts within the limits of the powers “conferred upon it by this Treaty and of the objectives assigned to it therein.” In addition, Arts. 94 and 95 empower the Council to enact directives aimed at the approximation of laws in order to facilitate the establishment or functioning of the internal market.

The Treaty of Rome conferred the main legislative powers to “make regulations ... issue directives, take decisions, make recommendations [and] deliver opinions” upon the Council of the European Union (“Council”), the European Parliament (“Parliament”) and the European Commission (“Commission”)⁴⁰ while giving the Court of Justice of the European Community (“ECJ”) the power to ensure that the EC treaties and its secondary legislation are uniformly interpreted and applied in all member states.⁴¹ The ECJ is therefore entrusted with the task of judicial harmonization of the EU, which task is performed primarily by the ECJ interpreting EU law through the process of preliminary rulings,⁴² but also by the various national courts’ interpretation of the principles established by ECJ case law in a manner that accords with the objectives of the relevant EC directives⁴³ and is independent of the particular nation’s interpretation of the principles.⁴⁴

Despite its intense legislative and judicial activity, the EU has not achieved complete unification of contract law. Its unification efforts with respect to commercial law have been fragmentary, limited to those areas in which its institutions have exclusive legislative powers and have relied almost exclusively on the issuance of directives in

⁴⁰ *TEC*, *supra* note 29, Art. 249. See also *TEC*, *ibid.*, Art. 211 on the powers of the Commission to submit legislative drafts and *TEC* Arts. 192, 251 and 252 on the role of the Parliament in the law making process.

⁴¹ *Ibid.* *TEC* Arts. 220 and 234.

⁴² *Ibid.* *TEC* Art. 234 obliges national courts against whose decisions there is no remedy in national law to refer to the ECJ issues of interpretation of the treaty and interpretation and validity of the acts the community institutions, and to decide the case in which the issue has arisen on the basis of such ECJ interpretation.

⁴³ For the principle of indirect effect, or interpretation in the light of the relevant directive see the ECJ judgment in *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, case 14/83, [1984] E.C.R. I-1891. See also Peter Rott, “What is the Role of the ECJ in EC Private Law? A Comment on the ECJ Judgments in *Océano Grupo*, *Freiburger Kommunalbauten*, *Leitner* and *Veedfeldt*” (2005) 1 *Hanse Law Review* 6 at 7–8.

⁴⁴ The principle of autonomous interpretation of EC law as established by the ECJ in *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, case 75/63, [1964] E.C.R. I-379. On the autonomous interpretation of EC law see in particular Rott, *ibid.*

order to achieve its legislative goals.⁴⁵ In its *Tobacco Advertising* judgment(s) the ECJ held that the Community institutions lack general power to regulate the internal market and are instead limited to specific measures “intended to improve the conditions for the establishment and the functioning of the internal market”.⁴⁶ Thus, the EC lacks general regulatory power in contract law too. Consequently, EU contract law has remained confined to a relatively small number of directives related to specific type of contracts or to specific parts of a contractual relationship rather than to general contract law rules: for example, the various separate directives on contracts negotiated away from business premises,⁴⁷ on distance contracts,⁴⁸ on E-commerce,⁴⁹ on unfair terms in consumer contracts,⁵⁰ on sale of consumer goods and associated guarantees,⁵¹ on combating late payment in commercial transactions,⁵² on

⁴⁵ It is not clear that the Commission and the Council have any authority under the current Treaty to adopt any European Civil Code or European Contract Code. See the EC Contract Law Database of the Society of European Contract Law (SECOLA), online: SECOLA <<http://www.secola.org/statutes.htm>>.

⁴⁶ *Germany v. Parliament and Council*, C-376/98 (decided in 2000) [2000] E.C.R. I-08419 at para. 83; *Germany v. Parliament and Council*, C-380/03 (decided in 2006) [2006] E.C.R. I-11573 at paras. 37–38. In both cases the ECJ interpreted *TEC* Art. 95 which empowers the Council to enact directives aimed at the approximation of laws in order to facilitate the establishment or functioning of the internal market.

⁴⁷ EC, *Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises*, [1985] O.J. L 372/31.

⁴⁸ EC, *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts*, [1997] O.J. L 144/19.

⁴⁹ EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, [2000] O.J. L 178/ 1.

⁵⁰ EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] O.J. L 95/29.

⁵¹ EC, *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees*, [1999] O.J. L 171/12.

⁵² EC, *Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions*, [2000] O.J. L 200/35.

consumer credit,⁵³ on timeshare contracts,⁵⁴ on distance marketing of financial services,⁵⁵ on unfair commercial practices,⁵⁶ etc.⁵⁷

Directives, as a means of approximation of national laws, prescribe the objective or result that needs to be achieved but leave up to the member states the choice of the appropriate implementation method.⁵⁸ That means that, unlike international treaties or EU regulations that create uniform law to replace national law in the particular area that they cover, directives have to be transposed into national legal systems through rules enacted by national legislation. That flexibility in implementation opens the door to “significant variations between national implementing measures”⁵⁹ and to inconsistency in application of rules.

Transposition of directives into national law could be a complex task for member states, particularly if they are required to implement a legal concept that is foreign to their national legal cultures or if a convergence of different legal traditions is required.⁶⁰ The

⁵³ EC, *Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit*, O.J. L 42/48, repealed by *Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC*, [2008] O.J. L 133/ 66.

⁵⁴ EC, *Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis*, [1994] O.J. L 280/83.

⁵⁵ EC, *Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services*, [2002] O.J. L 271/16.

⁵⁶ EC, *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market*, [2005] O.J. L 149/22.

⁵⁷ For EC Contract Law Database see online: Society of European Contract Law <<http://www.secola.org/statutes.htm>>.

⁵⁸ *TEC*, *supra* note 29, Art. 249.

⁵⁹ The Council Report, *Annex: Reactions to the Communication on European Contract Law of the Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law (An Action Plan)*, COM(2003) 68 final at 27.

⁶⁰ For an analysis of the differences between common law and civil law see for example Pierre Legrand, “European Legal Systems are not Converging” (1996) 45 *I.C.L.Q.* 52.

consequence is usually that the interpretation and implementation of such directives may differ among member states because a new legal concept is being imposed on different legal culture which utilize different legal procedures and different institutional (including judicial) structure.⁶¹

The principle of good faith, for instance, has been recognized as a general obligation in some member states but not in others,⁶² and this is seen as one of the major points in the civil law/common law divide (although it is also clear that the approaches taken by the civil law countries and by the common law countries are not particularly unified either and that there can also be regional differences within the same country).⁶³ In civil law countries, judges rely on the general principle of good faith and fair dealing as embedded in the civil codes to determine the objective concept of good faith or community norms imposed upon contracting parties, which evolve over time in keeping with the evolution of the community or society itself.⁶⁴ The goal of interpretation is to ensure that justice is achieved by implying general principles of reasonableness, good faith and fair dealing but

⁶¹ Gómez, *supra* note 30 at 102.

⁶² Ole Lando & Hugh Beale, eds., *Principles of European Contract Law, Part I* (Dordrecht: Martinus Nijhoff Publisher, 1995) at 56–57.

⁶³ The civil law/common law divide in the context of the principle of good faith is discussed in detail in Reinhard Zimmermann & Simon Whittaker, “Good Faith in European Contract Law: Surveying the Legal Landscape” in Reinhard Zimmermann & Simon Whittaker, eds., *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) 3 at 15 and James Gordley, ed., *Enforceability of Promises in European Contract Law* (Cambridge: Cambridge University Press, 2001) at 373. The principle of good faith is also seen as a constitutional principle in some civil law countries. See Irene Kull, “Principle of Good Faith and Constitutional Values in Contract Law” (2002) 7 *Juridica International* 142. The English Privy Council recently indicated in the New Zealand case *Invercargill City Council v. Hamlin*, [1996] [1996] 1 All E.R. 756, 2 W.L.R. 367 at 376, that there is no one common law and that “the ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness but one of its great strengths.”

⁶⁴ Martijn W. Hesselink, “Good Faith” in A.S. Harkamp *et al.*, *Towards a European Civil Code*, 2d ed. (Nijmegen: Martinus Nijhoff Publishers, 1998) [Hesselink, “Good Faith”]. Hesselink emphasizes that both civil and common law countries are familiar with subjective good faith, which is concerned with knowledge of facts or events. For a detailed overview of the interpretation of good faith in Norwegian, German and Italian civil law systems see Moss, *supra* note 24 at 10–19.

framework or code. Due to the fact that contract law is closely linked to those areas such as property law and intellectual property law in which the power of the EU institutions to legislate for the member states is more severely limited, contract law rules have been dispersed in numerous directives and the member states' compliance in transposition of the rules has varied depending on the general requirements set out in the directives.⁷⁵ In brief, this type of legislative approach has resulted in an incoherent set of contract rules at the EU level and in inconsistent implementation at that of the member states.

The Commission started its harmonization quest in the area of private law after the 1999 European Council in Tampere recommended greater convergence in civil law and asked, in particular, for "an overall study on the need to approximate member states' legislation in civil matters."⁷⁶ There have been three important communications (2001, 2003, and 2004, respectively)⁷⁷ from the Commission to the EU institutions and the governments of the member states to set the tone for the harmonization debates and determine the nature of harmonization projects.

In 2001 the Commission first invited the Council, the Parliament, the governments of the member states, various private stakeholders such as legal scholars, legal practitioners, and civil society groups to comment on the current state of harmonization of EU contract law and to advise the Commission on whether there is a need for further harmonization or even unification of the laws.⁷⁸ In other words, the Commission was willing to test the common assumption that legal uncertainty caused by "legal diversity causes transaction costs and

contract involved. See Jan Smits, "Editorial: A Principled Approach to European Contract Law" (2000) 7 M.J.E.C.L. 221 at 222 [Smits, "Editorial"].

⁷⁵ On the lack of coherence in directives regulating contractual issues see Smits, "Editorial", *ibid.*

⁷⁶ Tampere European Council, 15 and 16 October 1999, *Presidency Conclusions*, at para. 38, online: European Parliament <http://www.europarl.europa.eu/summits/tam_en.htm>.

⁷⁷ See *infra* notes 78, 88 and 92.

⁷⁸ EC, *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM(2001) 398 final, [2001] O.J. C 255/1, online: EU Commission <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0398:FIN:EN:PDF>> [2001 *Communication*].

lowers economic trade and welfare.”⁷⁹ Annex I of the 2001 Communication provided a non-exhaustive list of the existing EU contract law rules (the contract *acquis communautaire*) and Annex II listed international instruments relating to substantive issues in contract law, showing their implementation status in the EU member states. The Commission’s report on existing EU contract law rules showed that the majority of the directives intended to harmonize national contract rules related to consumer contract law. However, directives relating to consumer law in general do not specifically address the formation of a contract or the sanctions applicable in cases where parties fail to perform their obligation to disclose information in the pre-contractual stage as per the directives.⁸⁰ This fact supports the Commission argument that the existing method and scope of harmonization of contract law in the EU is unsatisfactory and that an EU contract law is needed. Though it is logical to expect that it would be costly to learn about 27 different legal systems, the Commission itself presented no empirical data to support claims that diversity in national laws significantly increases transaction costs. Instead, it asked businesses and practicing lawyers to provide relevant information. Moreover, the 2001 Communication did not directly address the issue of the Commission’s legal competence to carry out a new codification and harmonization process. However, the legislative competence issue remained topical, especially after the 2000 ECJ decision in the *Tobacco Advertising* case⁸¹ which confirmed that the EU has only specific, not general, competence to harmonize private law on the basis of TEC Article 95 and that that specific competence derives from the need to assist the functioning of the internal market. In this judgment, the ECJ emphasized that the mere existence of divergent national rules and some concomitant

⁷⁹ Jan Smits, ed., *The Need for a European Contract Law: Empirical and Legal Perspectives* (Groningen: Europa Law Publishing, 2005) at 27 [Smits, *Need for a European Contract Law*]. The author states that costs caused by legal uncertainty include: (a) costs of collecting information; (b) costs of legal disputes; (c) costs of setting incentives for pushing through legal claims; and (d) other transaction costs, such as costs accumulated in complaining about goods, returning goods, making warranty claims and the associated travel expenses, the time spent to pursue those claims (opportunity costs), and annoyance (negative utility). *Ibid.* at 31–32.

⁸⁰ 2001 Communication, *supra* note 78 at 19.

⁸¹ C-378/98, *supra* note 46.

abstract risk of obstacles to the functioning of the internal market does not in itself call for EU legislative action.⁸² Rather, there has to be an actual obstacle and a measure adopted on the basis of Article 95 “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.”⁸³ Thus, the Commission’s 2001 Communication showed its awareness of the importance of the market integration argument in addressing the EU’s competence to harmonize contract law and it directly asked stakeholders if and to what extent the existence of divergent national laws is an obstacle to the functioning of the internal market.⁸⁴

The Commission stressed that there have been very few international instruments relating to contract law and that some of the EU member states have chosen not to harmonize their national laws by acceding to existing international conventions. For example, the UK, Ireland and Portugal have not adopted the CISG⁸⁵ dealing with the contract formation and the rights and obligations of the seller and the buyer. Moreover, parties tend to exclude the application of CISG to their contracts.⁸⁶

The Commission’s 2001 Communication actually proposed four options for further initiatives in contract law: Option I, to take no EC action, leaving the solution of any problems up to the market; Option II, to promote the development of common contract law principles leading to greater convergence of national laws by offering non-binding common contract law principles that would be useful to private parties in drafting their contracts, to national courts and arbitrators in their decisions and to the national legislators drawing up legislative initiatives; Option III, to improve the quality of already existing EC contract law legislation by making it more coherent and

⁸² *Ibid.* at para 84.

⁸³ *Ibid.*

⁸⁴ 2001 *Communication*, *supra* note 78 at para. 23: “If such obstacles do exist, the European Institutions may be called upon to take appropriate action.”

⁸⁵ *CISG*, *supra* note 13.

⁸⁶ Jan Smits, “Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures”, (2006-2007) 67 *La. L. Rev.* 1181 at 1187 [Smits, “Law Making”]. Smits cites several branch organizations whose general conditions exclude the application of the CISG as well as the 1995 empirical data from the Netherlands showing the tendency among large Dutch companies also to exclude applicability of the CISG. *Ibid.* at 1187, n. 31.

adapting it to cover situations that were unforeseen at the time of its adoption; and Option IV, to adopt new comprehensive legislation at the EC level.⁸⁷

After reviewing hundreds of responses to its 2001 Communication, the Commission prepared its second Communication, called an “Action Plan on a More Coherent European Contract Law” in 2003.⁸⁸ This 2003 communication, which combined the second and third options of the 2001 Communication, proposed a mix of regulatory, non-regulatory and harmonization measures. The proposed strategy was first to increase the coherence and the quality of the EC contract law *acquis*⁸⁹ by “consolidation, codification and recasting of existing instruments, focussed [sic] on transparency and clarity”⁹⁰ and by the utilization of a Common Frame of Reference (“the CFR”)—a publicly accessible document establishing the common principles and terminology of European contract law.⁹¹ The 2004 Communication⁹² followed the measures proposed in 2003, clearly shifting from legislative unification/harmonization towards the creation of an optional instrument for the EU and national legislators; that is, towards a “tool-box” or soft law.⁹³ The proposal for an optional instrument

⁸⁷ 2001 Communication, *supra* note 78 at 2.

⁸⁸ Action Plan, *supra* note 4.

⁸⁹ *Ibid.* at 15.

⁹⁰ *Ibid.* at 20. “Consolidation means grouping together in a single non-binding text the current provisions of a given regulatory instrument, which are divided between the first and subsequent amending acts.” *Ibid.* at n. 55. “Codification means the adoption of a new legal instrument which brings together in a single text, but without changing the substance, a previous instrument and its successive amendments, with the new instrument replacing the old one and repealing it.” *Ibid.* at n. 56. “Recasting means adopting a single legal act, which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act.” *Ibid.* at n. 57.

⁹¹ Action Plan, *supra* note 4 at 16.

⁹² EC, *Communication from the Commission to the European Parliament and the Council: European Contract Law and the revision of the acquis: the way forward*, COM(2004) 651, online: EC Commission <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_en.pdf> [2004 Communication].

⁹³ See *ibid.* at 2 and 14. For further discussion on the evolution of the Commission’s proposals see Hugh Beale, “The European Civil Code Movement and the

community considers that there are many other factors that give rise to obstacles to cross-border transactions that are as significant as those caused by variations in legal systems and the related cost of foreign legal advice. Those factors include tax, variations in the implementation of EU law, bureaucracy and corruption, cultural differences and language.¹⁰² Finally, by showing that the majority of businesses surveyed ranked English law second only to their own national laws governing contracts,¹⁰³ the survey confirmed what many academic practitioners have been claiming—that is, that in practice, contracting parties tend to choose English law to govern their international commercial transactions more often than any other (civil or international) law¹⁰⁴ and that these contracts are often written in English and adopt English legal terminology and legal structure.¹⁰⁵

In sum, the responses to the Commission's Action Plan do not provide the empirical or analytical justification for the unification of European private law, including contract law. Nevertheless, a group of scholars led by Professor Jan Smits of the University of Maastricht has tried to address the question from an interdisciplinary perspective and to provide some quantitative analysis as to the cost of legal uncertainty caused by legal diversity. Their results published in 2005¹⁰⁶ suggest, first, that it is impossible to calculate the cost of legal diversity or the cost of creating and implementing a uniform law,¹⁰⁷ and, second, that while economic analysis does show that legal uncertainty is a barrier to trade it also suggests that there is little evidence that the problem cannot be resolved by providing

Pursue the Harmonisation of Contract Law: an Empirical Contribution to the Debate" in Vogenauer & Weatherill, eds., *supra* note 12, 105 at 125 [*Clifford Chance Survey*].

¹⁰²*Clifford Chance Survey*, *ibid.* at 3.

¹⁰³*Ibid.* at 5.

¹⁰⁴See e.g. Moss, *supra* note 24 at 1 and Smits, *Need for a European Contract Law*, *supra* note 79 and Smits, "Practical Importance of Harmonization", *supra* note 99 at 4. Smits also cited a study done by the Clifford Chance law firm to illustrate this dominance of English law as the governing law of contracts in Europe. See *Clifford Chance Survey*, *supra* note 101.

¹⁰⁵Moss, *ibid.*

¹⁰⁶Smits, *Need for a European Contract Law*, *supra* note 79.

¹⁰⁷*Ibid.* at 178.

better information on the diverse national laws instead of creating a uniform law.¹⁰⁸ Finally, the authors suggest that the best way to proceed with the development of a uniform contract law is to take a step-by-step approach and create an optional code that would allow businesses and consumers to choose these rules that best serve their interests.¹⁰⁹

In summary, it is difficult to establish the EU's competence to enact the European Contract Code on the basis of the existing treaty¹¹⁰ unless there is compelling empirical evidence that further harmonization of contract law is necessary to remove obstacles to the free movement of goods, services, people and capital and that it would strengthen the functioning of the internal market.¹¹¹ Uncertainty about its own competence could be one of the reasons why the Commission has never addressed the issue in its three seminal communications to the Council and the European Parliament.¹¹²

¹⁰⁸ Jan Smits states that costs of political decision-making, the costs of effective realization of reform and the costs of adaptation to a new regime (which include the cost of amending contracts and of educating lawyers and judges) are considerable. He gives as an example the introduction of a new civil code in the Netherlands in 1992, when the costs of re-codification amounted to almost 7 billion euros over a period of 20 years. See Smits, "Practical Importance of Harmonization", *supra* note 99.

¹⁰⁹ Smits, *Need for a European Contract Law*, *supra* note 79 at 179.

¹¹⁰ Absence of treaty provisions that would confer competence on the Commission is emphasized by a number of authors such as Elena Ioriatti, "A Methodological Approach for a European Restatement of Contract Law" (2003) 3:3 *Global Jurist Topics Art. 4* at 4; Smits, *supra* note 86 at 1190; Norbert Reich, "Some Critical Comments on the Commission Communication of 11.07.2001" (Riga, September 2001) [unpublished] at 7, online: EC <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.14.pdf>; Wolfgang Heusel, "European Contract Law: Towards a European Frame of Reference", (2006) 7 *E.R.A. Forum* 4 at 5.

¹¹¹ Some authors argue that *TEC* Art. 95 could be the basis for the EU's competence if there is evidence that divergence of laws is an "actual—or at least *probable*—obstacl[e]" to the functioning of the internal market. See Smits, "Law Making", *supra* note 86 at 1190. Vogenauer and Weatherill think that the Clifford Chance survey could be used to make a case that the Commission is competent to effect legislative harmonization on the basis of *TEC* Art. 95. See Vogenauer & Weatherill, *supra* note 101 at 136.

¹¹² Stephen Weatherill, "Constitutional Issues: How Much is Best Left Unsaid?" in Vogenauer & Weatherill, eds., *supra* note 12, 89 at 97–100. Weatherill argues that the primary reason that the Commission in 2001 wisely avoided the

It is noteworthy that in addition to activities related to the harmonization of EU contract law, the Commission has been pursuing the consolidation of its consumer *acquis* and the modernization of its private international law rules, especially, the law applicable to contractual and non-contractual obligations.

In brief, since the earliest days of European integration problems arising out of the diversity in laws have been dealt with under the conflict of law rules. The first avenue explored in the mid-1960s was the adoption of conventions on the law applicable to contractual and non-contractual obligations and the mutual recognition and enforcement of judgments in civil and commercial matters among the then six member states.¹¹³ Since the Treaty of Rome did not confer on the Community institutions the legislative power to regulate those areas, the work had to take the form of an international treaty negotiation. The resulting *Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* was signed by the six founding member states in 1968 with the objective of facilitating the establishment of the common market by making it possible for a “judgment given in any member state to be recognized and enforced as easily as possible”¹¹⁴ in all other member states and setting out rules identifying the member states whose courts have jurisdiction to hear and determine a cross-border dispute.¹¹⁵ However the negotiations on the harmonization of the complementary rules on the law applicable to contractual obligations proved to be complicated and it took more than a decade, until 1980, for the *Convention on the Law Applicable to Contractual Obligations* (“the Rome Convention”)¹¹⁶ to be ready for signature by the member states.¹¹⁷ It

competency discussion was that it was too early in the debate to address this issue, at least not when four options were still on the table. The second reason was that in 2001, prospects for a new treaty with new, broader competences for the Commission seemed positive.

¹¹³For an overview of the harmonization of private international law in civil and commercial matters in the EU see European Commission, *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations* (“Rome II”), COM(2003) 427 final at 2–4.

¹¹⁴*Ibid.* at 2.

¹¹⁵*Ibid.*

¹¹⁶[1998] O.J. C 27/34 (consolidated version).

finally entered into force in 1991. Subsequent amendments to the constitutional structure of the EU in the 1990s by the Treaties of Maastricht and Amsterdam facilitated further harmonization efforts by giving additional powers to the community institutions in the areas of judicial cooperation (the home and justice affairs pillar) which resulted in the Commission's intense activities to turn the two conventions into EU regulations and thus unify the rules of private international law covered by the Brussels and Rome I Conventions and to prepare the draft of a possible *European Convention on the Law Applicable to Non-contractual Obligations*. Thus, the final stages of the EU unification of private international law parallel the Commission's work on the harmonization of Contract Law: the Brussels Regulation came into force in 2001¹¹⁸, the Rome II and Rome I Regulations were adopted by the Parliament and the Council in 2007 and 2008, respectively.¹¹⁹

Another area of the EU harmonization action is its consumer *acquis*. The EU started developing consumer protection legislation in the mid 1980s and by 2001 the Commission moved on to propose in its *Green Paper on European Union Consumer Protection*¹²⁰ a reform that would strengthen the regime of protection based on sectoral directives establishing minimum level of harmonization. In an approach similar to that taken in the *2001 Communication on*

¹¹⁷The first preliminary draft of the rules on the law applicable to contractual and non-contractual obligations was prepared in 1972, though the Commission had initiated work with European legal experts as early as in 1969. In 1978 it was decided that due to differences among member states only the conflicts of laws rules applicable to contractual obligations could be harmonized within a reasonable time. See *ibid.* at 3.

¹¹⁸EC, Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2000] O.J. L 12/1. Note that the Regulation is not applicable in Denmark and that the Brussels Convention remains in force in relations between Denmark and the other member states.

¹¹⁹EC, Regulation 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] O.J. L 199/40. Note that the Regulation shall apply from 11 January 2009, except for Article 29 which became applicable on 11 July 2008. EC, Regulation 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligation (Rome I), [2008] O.J. L 177/6 adopted on 24 July 2008 and entered into force on the 20th day from the date of publication in the Official Journal, applicable to contracts concluded after 17 December 2009.

¹²⁰COM(2001) 531 final.

European Contract Law,¹²¹ the Green Paper asked shareholders to identify obstacles to consumer protection and, particularly, to indicate whether the existence of different national laws on consumer protection were creating barriers for consumers and businesses within the internal market. If such barriers were being created, the stakeholders were asked to suggest what reforms should be undertaken to improve the consumer *acquis*—specific, which includes enactment of new directives in the area, or more general, which aimed at a flexible and comprehensive framework directive.¹²² The review of consumer *acquis* has since been conducted separately from the project to revise the European Contract Law and there is little in the Commission documents on the two processes that indicates that the Commission's current initiative to consolidate eight consumer directives¹²³ is linked in any way with the CFR project on contract law.¹²⁴ The relationship between the two consolidation projects remains unclear, at least according to the Commission itself.¹²⁵

In sum, the Commission's work on revising and consolidating European Contract law is just one of the harmonization and consolidation activities of the Commission. It seems that the method of consolidation will be dictated by the complex constitutional issues regarding the legislative competences of the EU and its member states as well as by cultural relativism.

¹²¹ *Supra* note 78. Note that the Commission published its 2001 *Communication on European Contract Law* in July 2001 and that it published the *Green Paper on European Union Consumer Protection* in October 2001.

¹²² *Ibid.* at 10.

¹²³ EC Commission, *Green Paper on the Review of the Consumer Acquis*, COM(2006) 744 final, presented in February 2007, lists in Annex II all eight consumer directives under review.

¹²⁴ The only reference to the CFR in the *Green Paper* is at page 4 but only in the context of the Commission's activities in the area of modernization of the internal market.

¹²⁵ EC, Commission, *Second Progress Report on the Common Frame of Reference*, COM(2007) 447 final at 10–11. The Conclusions of the Second Progress Report suggest that “the relevant CFR findings will be incorporated into the EU consumer contract law review” but without further explanation. *Ibid.*

B. ACADEMIC PROJECTS

Bearing in mind the ongoing academic and political debate over the EU's and the Commission's competence to pursue codification of EU contract law, it is hardly surprising that a majority of the EU academic research projects in contract law are intended to produce restatements of European private law similar to the American Restatements on Contracts and Restitutions rather than to produce a European Contract Code.¹²⁶ The three academic projects discussed briefly below use different methodological approaches to the consolidation task.¹²⁷ In a nutshell, the Commission on European Contract Law led by Professor Ole Lando has based its proposal on the common principles found in the various European countries' national rules on contract law and referred to in international texts,¹²⁸ the Research Group on Existing EC Private Law, or the Acquis Group, led by Professor Gianmaria Ajani focuses on existing EC legislation in the field of contracts, and the Common Core of European Private Law, or the Trento Group, led by Professors Ugo Mattei and Mauro Bussani uses case studies as a means of interpreting legal rules related to specific topics of private law such as good faith in European contract law, strict liability in European tort law, security rights in movables, personal injury compensation, and so-forth.¹²⁹

¹²⁶ Martijn W. Hesselink, "The Politics of a European Civil Code", in Hesselink, ed., *supra* note 35, 143 at 155–56. Hesselink argues that in the 1990s academics favoured a long process of harmonization towards unification of private law in the EU but that the Commission's 2001 Communication initiative made some scholars to make up their minds and move faster towards the idea of a European Civil Code.

¹²⁷ This author included only three projects considering their influence on the DCFR and their methodological differences, but acknowledges several others established in the 1990s, such as the Spier/Kozioł group, the Insurance Law Group, the SGECC and the Social Justice Group.

¹²⁸ Reference is made to the CISG, and to the American Restatements on Contracts and Restitutions as an American work that greatly influenced Professor Lando. He proposed a similar restatement of European Contract law as early as in 1976. See Bonell, "CSIG", *supra* note 23 at 9–10.

¹²⁹ Ugo Mattei & Mauro Bussani, *The Trento Common Core Project* (speech delivered at first general meeting, 6 July 1995), online: The Common Core of European Private Law <http://www.jus.unitn.it/dsg/common-core/meeting_10_project.html>.

1. THE COMMISSION ON EUROPEAN CONTRACT LAW

The Commission on European Contract Law was established in the early 1980s. Its plan was to codify the contract law principles that are specifically European, drawing on the different legal cultures of the EU member states. It also intended to include extensive commentary and comparisons with the relevant national legislation in the member states. Its seminal work, entitled “The Principles of European Contract Law” (“PECL”), is presented in three volumes. Part I (1995) contains the general principles and terms of performance of contracts, rules related to non-performance, and remedies.¹³⁰ Part II (2000) is devoted to general elements of contract¹³¹ while Part III (2003) deals with additional topics.¹³² When the PECL is compared with the UNIDROIT Principles or the CISG,¹³³ it is clear that the European project is much broader and more complex in terms of the area covered and the rules provided than are its sources of inspiration. As already mentioned, the PECL is not a mandatory code that must be followed by the courts, contracting parties or governments, but it does form the basis for a future European Code of Contracts that would aid member states in the harmonization of contract law and provide a source of model terms for private contracts.¹³⁴

One noteworthy fact is that the PECL provisions have established good faith as one of the fundamental principles in the interpretation, and a mandatory principle in the performance, of contracts.¹³⁵ Another important PECL feature is the inclusion of the obligation to negotiate contracts in good faith and the rule that a contract may be

¹³⁰Ole Lando & Hugh Beale, eds., *Principles of European Contract Law, Part I* (Dordrecht: Martinus Nijhoff Publisher, 1995).

¹³¹Ole Lando & Hugh Beale, eds., *Principles of European Contract Law, Part II* (The Hague: Kluwer, 2000).

¹³²Ole Lando *et al.* eds., *Principles of European Contract Law, Part III* (The Hague: Kluwer, 2003).

¹³³See e.g. DiMateo, *supra* note 27 and Moss, *supra* note 24 at 22. Moss notes that the UNIDROIT Principles and the PECL working groups had many members in common and that it is therefore not surprising that the two sets of principles are similar in content, structure and terminology.

¹³⁴Lando & Beale, eds., *supra* note 130, “Introduction” at xvii–xviii.

¹³⁵PECL, *supra* note 10, Art. 1:102 (Freedom of Contract), 1:106 (Interpretation and Supplementation), 1:201 (Good Faith and Fair Dealing).

rendered invalid by the failure to disclose information that good faith and fair dealing require to be disclosed.¹³⁶ Thus, it seems that the PECL is proposing a broad concept of good faith for a potential European Contract Code, which is closer to the civil law than the common law tradition.

2. THE ACQUIS GROUP

Established in 2002 in response to the Commission's 2001 Communication, this group "concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*."¹³⁷ The Acquis Group principles are not intended to replace the PECL but to complement it by providing a consolidated text of the legislation already in force. The text of the Acquis Principles, available at the Group's web site indicates that they are intended to serve as a resource material in the drafting, transposition and interpretation of EC law but that they are not applicable "in the areas of labour law, company law, family law or inheritance law."¹³⁸ The work of the group incorporates three elements: (1) a general outline representing the underlying political and economic intentions of the legislation; (2) definitions of the major legal terms used in the EC legislation; and (3) general contract law rules distilled from the existing Community legislation in the area of contract law. Similarly to the PECL, the Acquis Group rules include the pre-contractual duty for contracting parties to act in accordance with good faith and their liability for loss caused to another party in the absence of good faith.¹³⁹

The Acquis text consolidates several rules related to consumer transactions given in different pieces of existing legislation. For example, it includes the unfair terms definition given

¹³⁶ *Ibid.* Arts. 2:301 (Negotiations Contrary to Good Faith) and 4:107 (Fraud).

¹³⁷ Hans Schulte-Nölke, "The Commission's Action Plan on European Contract Law and the Research of the Acquis Group", ERA Forum 2/2003, online: <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Conferences/SchulteNolke_Acquis_Group.pdf>.

¹³⁸ The Acquis Group, *The Acquis Principles*, Art. 1:101 (2)(3), online: The Acquis Group <<http://acquis.jura.uni-bielefeld.de/dms/ag/dms.php>> [*The Acquis Principles*].

¹³⁹ *Ibid.* Art. 2:101 (Good Faith) and Art. 2:103 (Negotiations Contrary to Good Faith), respectively.

in the 1993 *Directive on Unfair Terms of Contract*,¹⁴⁰ repeats that Directive's non-exhaustive list of such terms and transposes the Directive's provision on the effect of unfair terms.¹⁴¹ The Acquis text also refers to good faith in the performance of contracts as a mandatory duty of a debtor (Article 7:101), good faith in the exercise of the rights of a creditor (Article 7:102), a debtor's duty of loyalty to the creditor (Article 7:103), and both parties' duty to cooperate (Article 7:104). In sum, the work of the Acquis Group systematizes the EU content that needs to be included in the CFR along with the principles common to national laws of the member states, as set out in the PECL.¹⁴²

3. THE TRENTO COMMON CORE PROJECT

This project was initiated in 1995 at the first general meeting of a group of legal scholars who wanted to document the Common Core of European Private Law.¹⁴³ The study addresses issues that "should be addressed and covered for each legal system"¹⁴⁴ through a case law study that involves the examination of specific fact situations and resolves them in accordance with the legal traditions and existing case law of different European jurisdictions. Thus, using case law and comparative methodology, the Trento project attempts to answer the important question of whether there is a common core of EU private law. This project has already published a series of volumes on contract law, torts, and property law.¹⁴⁵

By indicating commonalities in the legal systems of the member states these important works of the Trento Group would provide a useful foundation for any future attempt to codify EU contract law. For example, it seems that in all of the national systems the functions

¹⁴⁰ *Council Directive 93*, *supra* note 68.

¹⁴¹ See *The Acquis Principles*, *supra* note 138. Art. 6:301 for definition of unfairness of terms, Art. 6:305 for an indicative list of unfair terms, and Art. 6:306 for effects of unfair terms.

¹⁴² Reiner Schulze, "The Acquis Communautaire and the Development of European Contract Law", 15 at 22-23, online: <<http://www.uni-muenster.de/Jura.iwr/Schulze/Aktuelles/Schulze%20englisch.pdf>>.

¹⁴³ Mattei & Bussani, *supra* note 129.

¹⁴⁴ *Ibid.*

¹⁴⁵ See e.g. James Gordley, ed., *supra* note 63; Zimmermann & Whittaker, eds., *supra* note 63.

accorded to the principle of good faith are those that Hesselink identified as typical for the Continental (civil law) approach—that is, to interpret, supplement and correct the rights of parties or limit/prevent abuse of these rights.¹⁴⁶

IV. DCFR

In 2005, when the SGEC and the Acquis Group contracted with the Commission to prepare the academic draft of the CFR,¹⁴⁷ it was already clear that the Commission was eager to pursue harmonization of contract law beyond the PECL, the existing international conventions and its own proposal for the Rome I Regulation¹⁴⁸ which would adapt the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*¹⁴⁹ from an international

¹⁴⁶Hesselink, “Good Faith”, *supra* note 64. Moreover, the application of those functions in the three proposals discussed above overlaps with the areas of contract law within which civil law countries typically apply, good faith—in pre-contractual negotiations to impose the duty to inform or disclose and liability for breaking off negotiations in bad faith; in relation to standard form contracts, as grounds for invalidation; in relation to the interpretation of contracts and in filling in gaps in contractual terms; in relation to unforeseen or changing circumstances and hardship; and as a basis for contractual remedies.

¹⁴⁷Hans Schulte-Nölke, Chair, Joint Network on European Private Law—*Proposal No. CIT3—513351 (CoPECL)*, online: Citizens and Governance in a Knowledge-Based Society <[ftp://ftp.cordis.europa.eu/pub/citizens/docs/copecl.ppt](http://ftp.cordis.europa.eu/pub/citizens/docs/copecl.ppt)>.

¹⁴⁸*Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)* COM(2005) 650 final (adopted 15 December 2005), online: Commission of the European Communities <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf>. The final proposal for the Regulation was recently approved by the Council (5 June 2008). Art. 24 of the proposed Regulation provides for the regulation to come into force on the 20th day after its publication and it will become applicable in all member states one year after its entry into force. Note that regulations are secondary sources of EU law, but, unlike directives, are intended to unify the law since they are binding in their entirety and are directly applicable in member states, leaving the states no discretion to choose form or method of its application. See *TEC*, *supra* note 29, Art. 249.

¹⁴⁹*Convention on the Law Applicable to Contractual Obligations*, opened for signature in Rome on 19 June 1980, (80/934/EEC), [1980] O.J. L 266/1. In brief, the Convention deals with the problem of the member states’ different national contract laws by providing clear rules on the choice of applicable law by the parties and default rules to be initialized in the absence of the parties’ choice.

treaty into EU legislation.¹⁵⁰ Since the idea of the CFR as an optional instrument was one of the four options presented in the 2001 Commission Communication, it would be possible for the parties to exercise that choice through an applicable law clause in their contract. Contracts regulating cross-border transactions within the internal market would raise the issue of the relationship between the new optional instrument and the Rome Convention. In particular, since Article 3 of the Rome Convention restricts the parties' choice of law to a choice among the different national laws and subject of debates it would be necessary for the proposed text of the Rome I Regulation to be redrafted.¹⁵¹

The December 2007 academic draft for an optional instrument (the DCFR or "Principles, Definitions and Model Rules of European Private Law") is the result of extremely complex and comprehensive work by many researchers, including members of the Joint Network on European Private Law in addition to members of the SGECC and the Acquis Group. They have been involved not only in the process of writing the DCFR but also in discussing the proposed principles with stakeholders and other scholars at numerous conferences and workshops, and in debating vigorously in their publications every aspect of the process, methodology and content of the DCFR.¹⁵²

As mentioned earlier in this article, the editors of the DCFR have explained the threefold purpose of the text: as a model for a political CFR, as an academic text for legal scholars and teachers, and as a

¹⁵⁰Hesselink, "Good Faith", *supra* note 64 at 156–158. Study Group on Social Justice in European Private Law, "Social Justice in European Contract Law: A Manifesto", *ibid.* at 181–182.

¹⁵¹This article will not discuss further the issue of the relationship between the rules of private international law and the DCFR. The issue is explored in detail in Dirk Staudenmayer, "European Contract Law: What Does it Mean and What Does it Not Mean?" in Vogenauer & Weatherill, eds., *supra* note 13, 235 at 238–240; Anna Verena Lauber, "Conference 'CFR and Existing EC Contract Law'" (2008) 16 E.R.P.L. 375 at 379; Christian von Bar, "A Common Frame of Reference for European Private Law: Academic Efforts and Political Realities" (2008) 12:1 E.J.C.L. 1 at 2 <<http://www.ejcl.org/121/art121-27.pdf>>.

¹⁵²For an introduction to the extremely high scholastic body of presentations at conferences and workshops related to the preparation of the DCFR see Europa, Consumer Affairs–European Contract Law, online: Europa <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm>; for the list of academic research groups and initiatives see European Commission, *Internal Market: Contract Law*, online: European Commission <http://ec.europa.eu/internal_market/contractlaw/links_en.htm>.

source of inspiration for the EU and national legislators.¹⁵³ This could be an important clarification, revealing that the legal scholars involved in the process have had serious doubts about whether codification should be the method of consolidation of EU Contract Law and even whether a uniform contract law is needed.¹⁵⁴ By producing the text for an optional law, its drafters have avoided dealing with issues of the EU's legislative competence and the legitimacy of top-down EU legislation during a sensitive period in the development of the EU.¹⁵⁵ As Smits rightly points out, the DFCR could now become an "experimental way of establishing the need for uniform law," showing respect for the diversity of legal cultures in the EU and the diverging preferences of nations, businesses and consumers in the EU in their choice of law.¹⁵⁶

The purpose and method of compiling the DCFR have greatly influenced its content. As a proper toolbox for dealing with practical issues related to contract law it contains principles of contract law, organized in a code-like fashion¹⁵⁷ in seven books¹⁵⁸ (divided into

¹⁵³ *DCFR*, *supra* note 3 at 6–7. Christian von Bar, Professor of Law, University of Ostabrück, one of the editors of the DFCR, recently heralded the educational impact of the DCFR, arguing that it could allow all students of European law to use a common textbook for the first time in almost 200 years. See Christian von Bar, "An Introduction to the Academic Common Frame of Reference" (19 September 2007), online: Academy of European Law <http://www.era.int/web/en/resources/5_1095_6261_file_en.8992.pdf>.

¹⁵⁴ Von Bar insists that work on the codification of contract law requires more time and knowledge about the legal systems of member states than the research groups involved in the DCFR project have had. See *ibid.* He insists that fears of codification are difficult to overcome and that "to convince lawyers that a common basis for private law in whatever legal format is a good idea, we must avoid the notion of a 'European Civil Code' at nearly any cost". *Ibid.* at 3.

¹⁵⁵ Note that the new *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007 O.J. C 306/1 [Lisbon Treaty] (successor to the already rejected Constitution), that proposed increased powers for the common institutions (though still not explicitly addressing the issue of the EU powers in the area of contract law) has just been rejected in a referendum in Ireland.

¹⁵⁶ Smits, "Law Making", *supra* note 86 at 1197–1998.

¹⁵⁷ Introduction to the *DCFR* reveals that the authors of the text wanted to retain the style of many of the newer European codifications. See "Introduction" in *DCFR*, *supra* note 3 at 21 at para. 44.

chapters, sections, subsections and articles). It also contains useful annexes. For example, there is one devoted to definitions of general applications, another setting out model rules on the computation of time¹⁵⁹ and a third with a comprehensive 70-page index for quick navigation through the very lengthy document.

The DCFR has used existing contract law-related EU legislation as the basis for its work and has also drawn on the work of the Lando Commission and its PECL. The PECL influence shows in the DCFR's content and presentation style. For example, Books II and III of the DCFR have adopted numerous PECL rules and principles¹⁶⁰ and its consolidated set of model rules of European private law starts out from ideas and principles contained in the EU member states' national laws and the *acquis communautaire*.¹⁶¹ The DCFR goes beyond the general principles of contract law, specific contracts and the rights and obligations arising from them (Book IV) and includes rules related to non-contractual obligations (Books V-VII cover benevolent intervention in another's affairs, non-contractual liability arising out of damage caused to another and unjustified enrichment). The Introduction to the DCFR also insists that it differs significantly from the Principles of European Law series, the *Aquis* Principles, and the Principles of European Insurance Contract Law, all of which have influenced the DCFR text.¹⁶²

¹⁵⁸Three additional books will be included in the final edition of the DCFR: Acquisition and Loss of Ownership in Movables (Book VIII), Proprietary Security Rights in Movable Assets (Book IX) and Trusts (Book X).

¹⁵⁹According to Nick Mallet, a member of CFR-Net and a partner of the Martineau Johnson law firm in London, UK, the model rules on the computation of time are very useful to practitioners who deal on a daily basis with the current EU legislation's inconsistencies regarding time periods. See Nick Mallett, "The European Contract Law Project 'Principles, Definitions & Model Rules of European Private Law'" (January 2008), online: <[http://www.multilaw.com/files/documents/Trade-European_Contract_Law_Project\(UK\)-Jan08.pdf](http://www.multilaw.com/files/documents/Trade-European_Contract_Law_Project(UK)-Jan08.pdf)>.

¹⁶⁰"Introduction" in *DCFR*, *supra* note 3 at 24–25, paras. 50–54, explains in detail the similarities and differences between the two texts. The DCFR even contains the Tables of Destinations and Derivations, which, without implying that the solutions are the same, precisely indicate the DCFR model rules that regulate the same legal issues as the corresponding article of the PECL. See "Table of Destination", *ibid.* at 51–58 and "Table of Derivation", *ibid.* at 58–70.

¹⁶¹Von Bar, *supra* note 153 at 4.

¹⁶²See more on the relationship between the three texts in "Introduction", *DCFR*, *supra* note 3 at 27–28 at paras. 55–59.

Notwithstanding the differences between the various groups involved this academic Common Frame of Reference and the various texts that have influenced it, it is possible to say that these texts and the DCFR project are all based on the fundamental common values underlying EU law—justice, freedom (in particular, freedom of contract), the protection of human rights, economic welfare, solidarity and social responsibility—and on some specific aims such as promotion of the internal market and preservation of cultural and linguistic plurality, and that their purpose is to achieve rationality, legal certainty, predictability and efficiency.¹⁶³ It is noteworthy that Section 3 of Book II of the DCFR (Negotiation and Confidentiality Issues), establishes the mandatory duty of parties engaged in negotiations to negotiate in good faith or to face liability for any loss caused to the other party involved in the negotiations.¹⁶⁴

In brief, the purpose of DCFR remains unclear. On one hand, its drafters indicate that it is to be an optional instrument in the harmonization of contract law. On the other hand, the Commission emphasizes the function of the DCFR as a tool box for the EU institutions working to improve existing EU contract law. If the DCFR is a comprehensive optional instrument meant to represent a 28th EU contract law regime in addition to the 27 contract law regimes of the member states, its harmonizing effects remain uncertain. In order for it to be an optional instrument for the EU institutions, it would need to become a political CFR and its relationship to the other harmonization projects underway, especially harmonization of the consumer *acquis* should also be clarified. If the DCFR represents a means for EU institutions to improve its own existing legislation by making it more coherent¹⁶⁵ than it appears as a signal that they have problems with performing its basic legislative function.

If the DCFR is an optional instrument for national legislators, it is difficult to foresee that a document consolidated in the tradition of

¹⁶³ *Ibid.* at 13 at para. 22.

¹⁶⁴ DCFR, *supra* note 3, Book II, s. 3, art. II.–3:301(2)(3). This is similar to PECL and the UNIDROIT Principles and closer to the civil law understanding of the principle of good faith as a general requirement for the parties. See “Introduction”, *ibid.* at 35–36 at para. 73.

¹⁶⁵ Option III, 2001 Communication, *supra* note 78 at 15.

the continental civil law countries¹⁶⁶ would also inspire the common law countries and the Scandinavian member states which, even though they in a broad sense belong to the civil law family, do not share the same practice of comprehensive codification of civil law as do the countries with codes based on the Code Napoleon or the German Civil Code.

If the DCFR is to operate as a toolbox or soft law, open to flexible reception by national legislators in the same sense that those parts that do not fit with the existing national legal systems may be omitted, that would turn the harmonization project into a lengthy process with an unpredictable outcome. If it is intended to facilitate contractual relations between private parties, then it should have been more user-friendly. The DCFR now comprises of eight books totaling over 400 pages. With two more books soon to be published, it is a document of a broad scope and very complex to navigate through in order to find model clauses for contracts.

V. CONCLUSIONS

Work on the development of a consolidated European contract law has continued after publication of the DCFR. The goals are to improve EU legislation and make it more coherent. Legal scholars have generated a vast amount of documentation that could support future legislative decisions at the EU or the national levels in that it represents a valuable resource for improving our understanding of the diverse national laws of the member states and the development of the *acquis communautaire* that already stretch to 100,000 pages of legislation. This documentation shows that the development of the internal market and the level of integration of the EU member states still do not necessitate full harmonization of contract law or that there is, at least, insufficient empirical evidence or political will among the member states to justify such harmonization outside of specific areas like consumer contract law.¹⁶⁷ Whether utilizing the

¹⁶⁶Some authors argue that the DCFR turned into a Law of Obligation. See Reiner Schulze & Thomas Wilhelmsson, "From the Draft Common Draft Frame of Reference towards European Contract Law Rules" (2008) 2 *European Review of Contract Law* 154 at 154.

¹⁶⁷In October 2008, The Commission proposed a new consolidated consumer contract law to regulate online selling within the EU market in order to bring more coherence into legislation that evolved on a case to case basis over the last twenty years. EC, *Proposal for a Directive of the European Parliament and of*

DCFR as an optional instrument is the appropriate method with which to achieve voluntary harmonization and greater coherence of EU contract law still remains to be seen as the specifics of the CFR, that may or may not be adopted by the Commission, are yet unclear. Opt-in initiatives, as proposed by the Commission's 2001 Communication (Option II) are long term harmonization projects whose convergence effects depend not only on the pace with which legal systems and their respective legal cultures evolve in member states and the extent to which the optional text is selectively adapted to national needs but also on competition from other nationally and internationally available soft law texts, including other restatement-like projects such as the PECL and the UNIDROIT Principles, and other models, usages and codes of conduct.

For other entities (states or forms of regional integration) with less complex constitutional structure and less diverse legal cultures, such as Canada, long and intense DCFR-like projects matter. The story of the European Union legislative project in the area of contract law is an important one in the context of international attempts to harmonize national laws and achieve legal integration to support the further economic integration of national markets. It reminds us that, before trying to determine how to deal with diversity in laws, it is necessary to clarify whether diversity in laws is an actual obstacle to the functioning of a global or otherwise integrated market(s). The Commission could not find even in the internal market where 27 national legal systems (and legal culture) remain operational the answer that would justify its comprehensive contract law related legislation. As a result, the academic CFR remains soft law that could serve many purposes for many stakeholders but it is difficult to predict whether it will lead to a higher level of harmonization of contract law any time soon.

