The Future of Uniform Private Law in the European Union: New Trends and Challenges

Pedro A. De Miguel Asensio
Professor of Private International Law
Universidad Complutense de Madrid

I. COMMUNITY LEGISLATION AS AN INSTRUMENT OF UNIFICATION: SOME LIMITS AND PROBLEMS

One of the key elements of European integration is a process of unification or harmonization of national laws which is formal and centralised, channelled as it is through the approval of binding (at least on States) rules by Community institutions, generally by means of directives. The level of normative development attained and its considerable impact on the regulation of business activity contrasts with the situation in other integration processes like the ones in progress on the

* This article is part of Research Project SEJ2005–02243/JURI, financed by the MEC.

Spanish Yearbook of International Law, Volume XI, 2007

American continent, which have not been accompanied by similar processes of approximation of laws.[1]

Harmonization directives have been used to deal with important aspects of private law in such crucial areas as intellectual property, mercantile companies, insurance contracts, misleading advertising, unfair trading practices, product liability, consumer contracts and electronic commerce. But despite that, EC Private Law remains essentially fragmented. Although in matters such as the law of contracts there is a highly significant body of directives, an overall appraisal of EC private law shows that harmonization is basically confined to isolated results in certain sectors.[2]

Inasmuch as the normative instrument used in the sphere of private law is mainly the directive, this process implies not unification but merely harmonization; this simply cuts down the plurality of rules and lends itself to distortions through incorrect or untimely transposition.[3] Also, the content of the directives is such as to encourage a complexity and wordiness of style in the transposing norms, which contrasts with the style of national law codes.[4] As a result, the endowment of directives with a measure of direct effect produces a considerable impact.[5] The shortcomings inherent in an instrument like the directive, and specifically the risk of distortions, contrasts with the efficacy of Community regulations, which do ensure unification. The use of regulations to deal with EC private law has been very limited, with significant exceptions in certain subject matters such as industrial property rights, companies, private international law, insurance and other contracts.

The preferential use of directives in the sphere of private law helps Member States to retain a certain degree of autonomy and flexibility. However, there is a tendency in the EU to replace minimal harmonization, which has traditionally been the policy in the sphere of consumer protection, with maximal harmonization as reflected in the Unfair Commercial Practices Directive of 2005.[6] This development is no mere technical adjustment but in fact has major implications for legislative

---

[1] *See* H.P. Glenn, "Harmony of Laws in the Americas", *The University of Miami Inter-American Law Review*, vol. 34, 2003, pp. 223–246, pp. 224–232, in favour of an informal model of harmonization as typically followed in American integration processes, as opposed to the formal, centralised harmonization of the EU. Nonetheless, it would seem, to the contrary, that the differences in levels of harmonization have more to do with the fact that the degree of integration attained by those models is very different.

[2] For an analysis of the subject matters concerned, see S.A. Sánchez Lorenzo, *Derecho privado europeo*, Granada, 2002, pp. 43–73; and S. Cámara Lapuente (coord.), *Derecho privado europeo*, Madrid, 2003, pp. 235–1233.

[3] For an overall analysis, see L. Niglia, "The Non-Europeanisation of Private Law", *ERPL*, 2001, pp. 575–599.

[4] Cf. J. Basedow, "Codification of Private Law in the European Union: the Making of a Hybrid", *ERPL*, 2001, pp. 35–49, p. 38.

[5] *Cf.* T. Körber, "Europäisierung des Privatrechts durch Direktwirkung des Gemeinschaftsrechts?", *EuZW*, vol. 12, 2001, p. 353.

[6] Directive 2005/29/EC of 11 May 2005.

policy and may raise reservations from Member States. When Member States are allowed to impose additional restrictions – as in the case of minimal harmonization –, systems affording different levels of protection may coexist. If harmonization is maximal or complete, such coexistence is not possible, and that will raise difficulties to the extent that there are significant differences among the various national laws.

Because of the use of directives, the rules of harmonization in contractual matters affect the laws of Member States largely in the form of the incorporation of a number of rules dealing only with some particular aspects of certain contracts. One such example is the Directive on certain aspects of the sale of consumer goods and associated guarantees (99/44/EC) of 25 may 1999, which was incorporated into Spanish law by the Consumer Goods (Guarantees on Sale) Act, Law 23/2003 of 10 July. The rules contained in the Directive cover key aspects of the regulation of sales, such as remedies for hidden defects in the object of sale contained in article 1484 of the Spanish Civil Code. However, the uniform rules have not been incorporated into the Code; a specific regulation has been introduced[7] which, in view of the Directive's aim of protecting consumers, is basically exceptional in nature, and is further mandatory, which is not usual in the general law of contracts.[8] The fact that the directives do not directly change the Code produces the impression that the general rules of contract law continue to be essentially national in character, although it is undeniable that Directive 1999/44 very significantly affects the Spanish law of obligations[9] – particularly as the Directive incorporates the notion of conformity as a decisive consideration for performance of a contract – in line with the Vienna Convention on Contracts for International Sale of Goods of 1980 – and substantially modifies the legal rules of guarantee in the sale of consumer goods.[10]

That the unifying impact of Community law on the general contract law of Member States is limited is borne out by other Directives having a particular bearing on contractual matters. One such text is the Directive on electronic commerce

---

[7] *See* J. Marco Molina, "La Directiva 1999/44/CE sobre determinados aspectos de la venta y las garantías de la venta de consumo", *La armonización del derecho de obligaciones en Europa*, Valencia, 2006, pp. 165–187, pp. 178–183.

[8] This may be a source of friction and problems in the interpretation and application of the rules; in connection with Directive 1999/44, see T. Tröger, "Zum Systemdenken im europäischen Schuldvertragsrecht – Probleme der Rechtsangleichung durch Richtlinien am Beispiel der Verbrauchsgüterkauf-Richtlinie", *ZeuP*, vol. 11, 2003, pp. 525–540, pp. 528–534.

[9] *See* M.P. García Rubio, "La trasposición de la Directiva 1999/44/CE al Derecho español. Análisis del Proyecto de ley de garantías en la venta de bienes de consumo", *La Ley*, 26 March 2003.

[10] *See* M.J. Reyes López, "La idea de conformidad en el ordenamiento jurídico español tras la entrada en vigor de la Directiva 1999/44/CE", *Derecho patrimonial europeo*, Navarra, 2003, pp. 321–338, pp. 328–338.

(2000/31/EC). Chapter Two Section 3 of this Directive (arts. 9 to 11) contains the rules regulating electronic contracts.[11] The Directive on electronic commerce only harmonizes national laws on contracts as they relate to the admissibility of contracting by electronic means and to the information to be provided before and after the formation of the contract, imposing certain obligations on information society service providers, which are generally compulsory insofar as the other party to the contract is a consumer. However, the Directive does not regulate key aspects for a general system of contractual obligations in electronic contracts, such as the moment at which a contract is deemed concluded.[12] This conclusion is generally true of other directives affecting the sphere of contracts, as for instance Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 2002/65/EC concerning the distance marketing of consumer financial services.

The foregoing reflects a situation in which harmonization directives on contracts seek only to approximate isolated aspects of the rules governing such contracts and have limited impact on the general system of contract law. Even when they regulate aspects related to that general system – such as remedies for hidden defects in Directive 1999/44/EC or the right of withdrawal in Directive 97/7/EC and Directive 2002/65/EC – they generally do so by means of specific rules for consumer contracts which are mandatory, so that the nature and scope of these rules is very different from the rules in the general system of contract law as set forth in the Spanish Civil Code and Code of Commerce.

II. SUBSTANTIVE SPHERE OF UNIFICATION

1. Mandatory contract law

The establishment and functioning of an integrated market like that of the EU, requires the unification or harmonization of national laws insofar as is necessary to remove obstacles arising from legal diversity. This is reflected in the provisions of the EC Treaty regarding the scope of the normative powers of Community institutions (especially arts. 94 and 95 EC Treaty). The needs of the internal market do not require unification of all law on obligations, or of course all private law.[13] The

---

[11] *See* P.A. De Miguel Asensio, *Derecho privado de Internet*, 3rd ed., Madrid, 2002, pp. 350–382.

[12] In fact the moment of conclusion, an issue not included in the Directive, is the only aspect of electronic contracts that the Spanish legislator has incorporated into the general legislation on contractual obligations, through the amendment of articles 1262 Civil Code and 54 Code of Commerce introduced by Law 34/2002.

[13] The limited scope of the powers founded on the adoption of measures relating to the establishment and operation of the internal market was highlighted in a very special way

formal unification or harmonization of substantive private law beyond what is necessary for the operation of the internal market would require a political decision to support that process.

In private law, the rules governing contractual obligations are of particular importance for the internal market, for Community freedoms – specifically those relating to the movement of goods and capital and to the provision of services –. Contract rules have a close bearing on cross-border expansion of the autonomy of parties, for which the contract is an essential instrument. Determination of the boundaries of autonomy – by means of mandatory rules – at a Community level (not at a national level) is already largely the norm, as illustrated by the rules on practices restrictive of competition or on consumer protection.[14]

But in fact the very diversity as regards mandatory law, which cannot be departed from nor substituted by the will of the parties, may pose a significant obstacle to cross-border commercial activities.[15] Outside this sphere, the obstacle posed by legal diversity merely imposes certain transaction costs or psychological barriers on cross-border trade but is no more far-reaching than other obstacles such as those arising out of differences in language, culture or consumer habits, or transport costs determined by geographic distance.[16] In addition, as regards non-mandatory rules, many of the drawbacks of diversity can be obviated by including a choice of law clause in the contract.

Within the Community sphere, unification of conflict of laws rules and harmonization of the rules of private law have traditionally been viewed not as mutually exclusive[17] but as complementary,[18] as illustrated especially by the situation as regards consumer contracts.[19] Moreover, with respect to private law as a whole we

---

cont.

by the ECJ judgment of 5 October 2000: case C-376/98, *Germany vs. Parliament and Council*. According to that judgment, the mere disparity of national laws and the abstract risk of obstacles to Community freedoms and the internal market are not sufficient to warrant resort to article 95 of the EC Treaty, which only authorises the adoption of measures to deal with situations entailing concrete and significant obstacles.

[14] *See* S. Grundmann, "Information, Party Autonomy and Economic Agents in European Contract Law", *CMLRev*, vol. 39, 2002, pp. 269–293, pp. 270–271.

[15] *See* G.A., Bermann, "A Commentary on the Harmonization of European Private Law", *Tulane Journal of International and Comparative Law*, vol. 1, 1993, pp. 47–58, pp. 51–52.

[16] *Cf.* "Social Justice in European Contract Law: a Manifesto", *European Law Journal*, vol. 10, 2004, pp. 653–674, p. 656.

[17] *See* S. Sánchez Lorenzo, *Derecho . . . op. cit.*, pp. 124–125; and S. Álvarez González, "Derecho internacional privado y Derecho privado europeo", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 157–190, p. 185.

[18] *See* J.D. González Campos, "Diritto privato uniforme e diritto internazionale privato", P. Picote (dir.) *Diritto internazionale privato e Diritto comunitario*, Padua, 2004, pp. 33–64.

[19] See F. Esteban de la Rosa, *La protección de los consumidores en el mercado interior europeo*, Granada, 2003, pp. 20–43.

should remember that unification of the rules of private international law – which has been encouraged by the rules introduced into the EC Treaty by the Treaty of Amsterdam[20] – could provide an adequate level of legal security. This path may therefore prove to be more in tune with the principles of proportionality and subsidiarity than a process of unification which seeks to comprehensively cover the substantive rules of broad sectors of private law.[21]

The development of uniform private law in the EU ought to be based upon harmonization or unification centralised in sectors where it is generally agreed that this may bring considerable benefits – particularly a significant reduction of transaction costs – to intra-Community commercial activity.[22] In practice, in the field of contracts this tends to confirm the desirability of unifying the rules that are mandatory and leaving aside non-mandatory rules, a category that includes the bulk of those making up the general corpus of the Member States' codes or laws regarding contractual obligations.[23] This criterion is not therefore conducive to the eventual adoption of a European civil code, inasmuch as the latter tends to be conceived as consisting basically of non-mandatory rules in line with the traditional contents of national codes.[24]

The EC Commission has been developing – typically mandatory – rules on consumer protection without regard to the attempts to establish a broad-based European contract law composed essentially of non-mandatory rules.[25] Moreover, the most recent Community directives on private law, which deal basically with aspects of consumer contracts, are drafted as unconditional and precise rules, which means that transposing rules – usually outside the Codes- are frequently confined to a literal reproduction, at most with some amendments to the terminology.[26]

The characterization of the structure of Community contract law makes it clear that the basic differentiation is between mandatory and non-mandatory rules. Moreover, Community law and the 1980 Rome Convention make specific reference to

---

[20] *See* A. Borrás, "Derecho internacional privado y Tratado de Amsterdam", *REDI*, vol. II, 19992, pp. 383–426.

[21] *See* P.A. de Miguel Asensio, "Integración europea y Derecho internacional privado", *RDCE*, 1997, pp. 413–445, pp. 424–425.

[22] *Cf.* J.A. Alfaro Aguila-Real, "La unificación del derecho privado en la Unión Europea", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 107–127, p. 114.

[23] *See* B. Lurger, "The Social Side of Contract Law and the New Principle of Regard and Fairness", *Towards a European Civil Code*, 3rd ed, Nijmegen, 2004, pp. 273–295.

[24] *See* S. Cámara Lapuente, "Un derecho privado o un código civil para Europa: Planteamiento, nudo y (esquivo) desenlace", S. Cámara Lapuente (coord.), *Derecho . . ., op. cit.*, pp. 79–80.

[25] Critical of this situation, stressing the link between consumer protection rules and the general rules governing contractual obligations, is L.A. Deflorian, "Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law – A Uniform Law?", *Global Jurist Frontiers*, vol. 2, 2002, pp. 1–40, 33–34.

[26] *Cf.* M.P. García Rubio, "Hacia un Derecho europeo de contratos", E. Pérez Carrillo (coord.), *Estudios de Derecho mercantil europeo*, Madrid, 2005, pp. 83–103, p. 88.

mandatory rules that are internationally enforced. The latter are mandatory in international transactions, and hence their force cannot be obviated by agreement of the parties as to the applicable law.[27]

The applicability of national non-mandatory rules (or to be exact, rules that are not internationally mandatory) is freely determined by the parties, who choose what law is to be applicable (or do not agree to choose a law other than that applicable absent choice or to include clauses in the contract to obviate the application of these rules). The prevailing consensus is that the applicability of non-mandatory rules of Member States does not normally imply a restriction that is incompatible with Community freedoms.[28] These freedoms should not be invoked in order to constrain the free will of the parties except in situations where this may be warranted by shortcomings of the market. Only internationally mandatory rules impose constraints that the parties cannot remove.

The identification of market failures justifying the application of internationally mandatory rules basically arises in three types of case: where a market is not competitive, where there are asymmetries of information or where there are external factors – that is, when situations arise where the costs are not borne by those making and benefiting from the decisions –. The rules intended to remedy these shortcomings in the market must be applied internationally. The Community rules on contracts are intended to operate basically within the spheres where such failures arise, which is entirely consistent with the principles underpinning Community intervention.[29]

2. Non-mandatory rules and general provisions on contractual obligations

The content of non-binding instruments aimed at making European private law more uniform, and in particular the *Principles of European Contract Law* drawn up by the Commission on European Contract Law, is basically confined to non-mandatory rules as is the norm for rules on contractual obligations in civil codes. The tendency to focus on informal harmonization of non-mandatory rules reflects the idea that those sectors with mandatory rules are more concerned with political decision-making, and the fact that the rules relating to consumer protection have by now been substantially harmonized in the EU by means of directives.

In the current European context, however, the unification of non-mandatory rules on contractual obligations can be considered of minor importance in the

---

[27] *See* S. Grundmann, "The Structure of European Contract Law", *ERPL*, vol. 4, 2001, pp. 505–528, pp. 513–516.

[28] *See* ECJ judgment of 24 January 1991, case C-339/89, *Alsthom Atlantique.* This judgment declares – *obiter dictum* – that rules which the parties are free not to apply by choosing a different applicable law can not be considered restrictions on Community freedoms prohibited by the ECJ.

[29] *See* S. Grundmann, "The Structure . . .", *loc. cit.*, pp. 517–521.

framework of the internal market. That is firstly because globally-oriented compilations of this kind with a comparable level of development already exist, for instance the UNIDROIT *Principles of International Commercial Contracts*. But most importantly, in the context of Community integration, unification aimed at removing obstacles posed to intra-community transactions by legal diversity can only be effective to the extent that mandatory rules are unified, since it is these that constitute (largely at least) such obstacles.[30]

Arguments aimed at restricting the europeanization of private law on the ground that it would weaken the cultural identity of the States can sometimes be used to try and protect the position of national jurists. However, the idea that since private law serves private ends there can be no cause to regret the disappearance of inefficient national legal institutions, for whose protection the existence of cultural differences in Europe is no argument,[31] will not stand up for a number of reasons.

Firstly, because despite notable coincidences, there is undeniably a significant degree of diversity between the private law of the EU member states, deriving from the cultural and linguistic diversity of the Union.[32] Secondly, because the different regulatory options, even in matters of contract law, typically obey to separate ideological criteria[33] and it is not clear that this ideological diversity (for example among solutions to the same question founded on a liberal or a redistributive approach) ought to be eliminated for the sake of efficiency. Moreover, the social, cultural, economic and other differences between the various Member States of the present EU may determine different – and in principle perfectly legitimate – normative preferences according to the country.

Given these facts, the justification for any unification of the general system of contractual obligations, and particularly of its non-mandatory rules, requires a differentiated analysis. Such broad unification is hard to justify in the current Community framework, especially if unification is approached comprehensively, given the way in which regulatory harmonization has traditionally been linked to the proper functioning of the internal market. As noted earlier, the functioning of the internal market can hardly be said to be negatively affected by the persistence of diversity among the laws of the Member States inasmuch as the rules of private international law are appropriately unified, since the regulation is non-mandatory and the parties can choose what law they wish to be applicable.

---

[30] *See* M.W. Hesselink, *The New European Private Law*, The Hague, Kluwer, 2002, pp. 238–239.

[31] *Cf.* J.A. Alfaro Águila-Real, "La unificación. . . .", *loc. cit.*, p. 110.

[32] For all these, highlighting certain manifestations of that diversity, see S. Sánchez Lorenzo, *Derecho . . ., op. cit.*, pp. 225–271; and *id.*, "What Do We Mean when We Say Folklore? Cultural and Axiological Diversities as a Limit for a European Private Law", *ERPL*, 2006, pp. 197–219, pp. 213–216.

[33] *See* D. Kennedy, "The Political Stakes in 'Merely Technical' Issues of Contract Law", *ERPL*, vol. 10, 2002, pp. 7–28, pp. 26–27.

Nonetheless, to foster the unification of national laws on the subject is obviously quite legitimate and may even prove desirable insofar as it makes it possible to draw up more appropriate rules than the ones contained in the Member States' own laws. But intervention on this point by Community institutions, concerned with contractual law as they have been lately, ought not to be pursued without reference to national legislators, who are basically the ones with the powers to legislate on the subject. Respect for the different views of the Member States on the subject must be an essential part of any initiative aiming at the unification of general contract law.

The introduction of new mechanisms for coordination among Member States in the drafting and adoption of rules which are more stringent but are also more flexible and take better account of the peculiarities of the different States is an extremely important factor for modernisation. That development may facilitate the europeanization of contract law through reforms of national codes informed by common criteria set out in non-binding documents such as the *Principles of European Contract Law*.[34] Such a recommendation clearly flows from an analysis of the mechanisms for coordination of state laws operating in the USA, particularly the adoption of uniform rules by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). In any event, in the US system uniformity is favoured by a set of decisive factors which are absent in the EU case, such as a legal culture common to all states, a considerable institutional fabric independent of federal power which facilitates the drafting of uniform laws that are not binding but are open to adoption by states, plus a feeling of belonging to the same legal community which prevails even in sectors of the law that are regulated at a state level.

It should be borne in mind in this connection that even comprehensive formal unification of private law by the EU Member States would not prevent the persistence of significant differences in its application and interpretation, since national traditions vary considerably, for instance as regards the definition of open or flexibly-worded rules and the significance attributed to jurisprudence.[35] Moreover, from the standpoint of the functioning of an integrated market, harmonization of laws through the kind of regulatory techniques typical of private law, such as the use of standards founded on indeterminate legal concepts like good faith, could lead to differing interpretations depending on the country and hence in practice not effectively help to reduce the obstacles to intra-Community trade.[36]

---

[34] *See* L. Díez Picazo y Ponce de León, "Reforma de los Códigos y Derecho europeo", *Anuario de Derecho Civil*, vol. 56, 2003, pp. 1565–1574, pointing out that reform of national codes is a necessary premise for the achievement of uniform contract law among the Member States.

[35] *See* E. Hondius, "Finding the Law in a New Millennium: Prospects for the Development of Civil Law in the European Union", M. Bussani and U. Mattei (eds.), *The Common Core of European Private Law*, The Hague, 2003, pp. 79–103, pp. 89–95.

[36] *See* H. Collins, "The Freedom to Circulate Documents: Regulating Contracts in Europe", *European Law Journal*, Vol. 10, 2004, pp. 787–803, pp. 795–796.

3. Other sectors of private law

While the scope of civil codes makes them a key element in the legal and cultural identity of a country, they essentially contain rules, very often of a non-mandatory nature, dealing with relations between private individuals. Rules of private law aimed at imposing controls, as in the field of consumer protection, normally fall outside their scope. The kinds of rules that typically pose obstacles to Community freedoms or measures having a like effect are therefore only present in civil codes to a very limited extent.

Other areas of private law which have been subject to approximation through directives – such as company law, intellectual property or unfair competition – or regulations – for example on companies or industrial property – have a clear connection with the functioning of the internal market while regulating areas traditionally lying outside the scope of civil codification.

The harmonization of rules on issues normally addressed in codes poses special problems as regards adaptation of national legal systems, as the measures to be introduced can be especially difficult to place and systematise. Moreover, in common-law countries these are normally areas where judge-made law has greater relative weight, which also makes it hard to apply harmonization rules.[37]

At the same time, an eventual unification of the rules of broad areas of private law at a Community level is surely not the best solution if we consider the need to adapt the legal system to changing technological and social environments. This idea needs to be balanced against the difficulty of achieving acceptable Community-wide consensuses, which tend to be costlier and slower the more detailed and comprehensive is the proposed unification of the substantive law.[38]

The claim that European identity demands a unified legal system is gainsaid by the fact that a basic element of European identity is precisely the acceptance of a plurality of (legal) languages and cultures.[39] From this point of view, a wide-ranging codification of private law could be detrimental to European identity. According to Article 6(3) of the EU Treaty, the Union must respect the national identities of its Member States, a concept that may be assumed to embrace essential aspects of social and economic organisation associated with political concepts, traditions and (social and natural) circumstances, which are largely peculiar to each Member State.[40] Respect for the cultural identities of peoples is not a bar to evolution of national legal systems since the political and social concepts prevailing in a geo-

---

[37] *Cf.* G.A., Bermann, "A Commentary . . .", *loc. cit.*, p. 54.

[38] *Cf.* W. Fikentscher, "Harmonizing national and Federal European Private Laws, and a Plea for a Conflicts-of-law Approach", M. Bussani and U. Mattei (eds.), *The Common . . ., loc. cit*, pp. 43–48, p. 47.

[39] *Cf.* T. Wilhelmsson, "Private Law in the EU: Harmonised or Fragmented Europeanisation", *EIPR*, 2002, pp. 77–94, p. 90.

[40] *See* E. Steindorff, "Mehr staatliche Identität, Bürgernähe und Subsidiarität in Europa?", *ZHR*, vol. 163, 1999, pp. 395–440, pp. 412–413.

graphical area change with the passage of time, as illustrated particularly by developments in the sphere of family law,[41] for instance regarding the treatment of same-sex marriages.

The will to unify private law at a European level implies an aspiration towards a common European identity and is an important component in the make-up of that identity. However, a project of this kind further requires the taking of major decisions on basic values relating to the organisation of social and economic relations and needs to achieve its own balance between contractual freedom and other freedoms linked to major social goals, particularly solidarity. This affects all areas of the legal system, albeit in some areas with a strong technical element cultural or ideological considerations are less important, but that is unusual in civil codes, except for rules on the validity and enforcement of contracts.[42]

In fact initiatives for wide-ranging europeanization of private law necessarily go hand-in-hand with the intent to transcend the limits inherent in the use of the internal market as a frame of reference for possible actions. For that reason such initiatives must be accompanied by progressive superseding of the operation of the internal market as a key element and affirmation of the EU as a political entity endowed with a constitution of its own.[43] However that has not been the case so far, and experience shows that formally, initiatives for the adoption of such measures have had to be presented as a requirement of the internal market and for the removal of barriers to trade.[44]

The private law systems of the various Member States are an essential component of the peculiar cultures and traditions of these countries, and of the personal identity of individuals inasmuch as this is tied to the cultural context in which that person lives. This is particularly evident in certain spheres of family and succession law in which the divergences among the laws of the EU Member States are moreover generally wider.

But the link between private law and cultural identity exists even in the contractual sphere, for the substance of this area of the legal system reflects the standards of distributive justice prevailing in a community and at the same time is a consequence of accepted social practices in a community, particularly in the functioning of its market. This cultural and social dimension of private law must be

---

[41] *See* C. González Beilfuss, "Relaciones e interacciones entre Derecho comunitario, Derecho internacional privado y derecho de familia europeo en la construcción de un espacio judicial común", *Anuario español de Derecho internacional privador*, t. IV, 2004, pp. 117–186, pp. 179–180.

[42] *Cf.* K.D. Kerameus, "Problems of Drafting a European Civil Code", *ERPL*, 1997, pp. 475–481, pp. 478–479.

[43] *See* "Social . . .", *loc. cit.*, pp. 656–657.

[44] This was illustrated by the content of the Communication from the Commission "A more coherent European Contract Law. An Action Plan" of 2003, which offers practically no justification of the ambitious proposal for unification of private law that it contemplates.

taken into account when judging whether a given unification proposal entails excessive centralisation incompatible with the principle of subsidiarity, a risk which clearly arises to the extent that the uniformisation pursued is intended to encompass contract law in its entirety.[45]

III. THE SPATIAL SCOPE OF UNIFICATION

1. A private law for intra-Community relations?

To avert the loss that could result from European codification or binding unification of broad areas of private law, the possibility has been mooted that this process coexist, at least during the early stages, with the current national codes.[46] The idea of devising a system of specific private law for intra-Community situations is not readily justifiable other than for situations where what is at stake is the ambit of mandatory applicability of certain rules, which indeed would affect a very significant part of contractual regulation as illustrated by the directives on consumer contracts,[47] and even the ECJ jurisprudence on the directive regarding agency contracts.[48]

In the case of general contract law, which is typically non-mandatory, this option is not justified at all. The adoption of such an approach would introduce major elements of complexity, associated in particular with the need to demarcate and coordinate with other legal systems in this sphere and an increase in the costs associated with knowledge and application of the legal system.[49] Such drawbacks seem to outweigh by far the advantages that it would bring, a view borne out by the fact that in the making of uniform state laws on this subject in the USA, the option of creating a specific set of rules for inter-state situations has systematically been rejected, as illustrated by the *Uniform Commercial Code* (UCC).

However, it is quite another matter to introduce an optional instrument which does not supersede national laws except when chosen by the parties as applicable

---

[45] *See* H. Collins, "European Private Law and the Cultural Identity of States", *ERPL*, vol. 3, 1995, pp. 353–365, pp. 359–363.

[46] *See* T.K. Graziano, "Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen? – Überlegungen anlässlich des 200. Jahrestags des französischen Code civil", *ZeuP*, vol. 13, 2005, pp. 523–540, pp. 532–537.

[47] *See* F. Esteban de la Rosa, "La aplicación de las directivas comunitarias en materia de Derecho privado a las situaciones transfronterizas", S. Sánchez Lorenzo and M. Moya Escudero (eds.), *La cooperación judicial en materia civil y la unificación del Derecho privado en Europa*, Madrid, 2003, pp. 179–204; and B. Añoveros Terradas, *Los contratos de consumo intracomunitarios*, Madrid, 2003, pp. 199–220.

[48] *See* ECJ judgment of 9 November 2000, case C-381/98, *Ingmar*.

[49] *Cf.* W. Van Gerven, "Harmonization of Private Law: Do We Need it?", *CMLRev*, vol. 41, 2004, pp. 505–532, p. 531.

to an international transaction. This approach is in line with the traditional procedure for application of a compilation such as the UNIDROIT *Principles of International Commercial Contracts*,[50] and as such it is not strictly speaking novel beyond the fact that it contemplates the drafting of a body of Community rules that can perform a similar function.[51]

In any event, it is not really satisfactory for the initiative of drawing up an optional set of rules on this subject to be taken by an organisation like the EU. The EU may promote other alternatives that do more to achieve better and more uniform coordination in this area, and to that end a comparison with the US experience in coordinating state laws may in this case provide pointers of particular interest to the EU, as it will be seen later on.

2. European law and international standards

In opposition to the inflexibility traditionally associated with the notion of a European civil code which was originally intended to compulsorily replace the statutes and rules in force in the various Member States – even though many of its rules were non-mandatory – it has been accepted for years now that any globally-applicable mercantile regulations would have to be endowed with a very general substantive scope and be highly flexible.[52] There is an international tendency, clearly reflecting the evolution of UNCITRAL and UNIDROIT, to abandon inflexible instruments like international conventions and to create more flexible instruments like directives, model laws or simple recommendations.[53]

---

[50] *See* J.C. Fernández Rozas, "*Lex mercatoria* y autonomía conflictual en la contratación transnacional", *Anuario español de Derecho internacional privado*, t. IV, 2004, pp. 35–78, pp. 62–73; and N. Bouza Vidal, "La elección conflictual de una normativa no estatal sobre contratos internacionales desde una perspectiva europea", *Pacis Artes. Obra homenaje al prof. J.D. González Campos*, Madrid, 2005, pp. 1308–1334, pp. 1326–1334.

[51] This is apparent in the revision of Article 3 of the Rome Convention of 1980, in the terms of the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, which expressly contemplates the possibility that the parties may choose a set of non-State rules as applicable to the contract, devised specifically to allow the parties to refer to a document like the UNIDROIT Principles, the European Principles of Contract Law or some optional instrument drawn up in the EU, *cf.* COM (2005) 650 final, p. 5. This proposal of amendment does not substantially alter what is already possible with a proper interpretation of Article 3 of the Rome Convention, as there is nothing in the existing legal framework to prevent reference for example to the UNIDROIT Principles, which in practice should mean that the law applicable in absence of choice is relevant only in respect of issues not addressed in the Principles when the parties have chosen to apply the Principles; see P.A. De Miguel Asensio, "Armonización normativa y régimen jurídico de los contratos mercantiles internacionales", *Diritto del commercio internazionale*, vol. 12, 1998, pp. 859–883, 872–878.

[52] See J.C. Fernández Rozas, *Ius mercatorum (Autorregulación y unificación del Derecho de los negocios transnacionales)*, Madrid, 2003, pp. 113–282.

[53] See for example P. Behrens, "Voraussetzungen und Grenzen der Rechtsfortbildung durch

In this connection, although there has been little progress in implementing the proposals put forward in the context of UNCITRAL for a wide-ranging codification of the law on international trade, these are mainly based on flexible procedures, partially inspired by the American UCC model.[54] This model followed by UNCITRAL is based on the acceptance of a compendium of rules concerning the main kinds of commercial transactions, the result of coordination of rules most of which are already contained in various international instruments. The objective is to draw up a set of model regulations which can be amended, eliminated or added to by the individual States adopting them. It is believed that this last condition will make it easier to achieve acceptance (albeit with variations) of a uniform set of rules by a large number of countries and is better adapted to the major divergences existing in legal traditions world-wide.

While the choice of a flexible procedure rather than an inflexible option like an international convention improves the chances of approval, there are numerous obstacles standing in the way of a broad-based world-wide compendium of this kind due to the degree of disparity between the different systems and the absence of a well-developed institutional fabric that would facilitate drafting and coordination with the interests of the different States. These obstacles, which would nonetheless be much less severe or would be susceptible of correction to some extent in the case of a Community-wide project, would surely hinder rapid acceptance by numerous States of the essential substance of such a set of rules drafted on a world-wide scale (unlike the situation of the UCC in the USA).[55]

To the extent that it contains a balanced set of rules concerning international commercial transactions, a purportedly world-wide commercial code of broad substantive scope could prove effective essentially in the same situations as are contemplated for application of the UNIDROIT Principles. It would therefore be useful, particularly in cases where the parties to international contracts refer to these rules, and also insofar as decision-making bodies view it as an expression of rules and principles broadly-accepted in international commerce, not to mention its influence as a model for State legislators – albeit this will likely be limited, with nothing comparable to the unifying impact of the UCC in the USA.

This may be a good point when it comes to questioning the utility of drawing up a uniform European-wide optional instrument concerning contractual obliga-

---

cont.

Rechtsvereinheitlichung", *RabelsZ*, vol. 50, 1986, 19–34, pp. 31–32; and H. Kronke, "Ziele – Methoden, Kosten – Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT", *JZ*, vol. 56, 2001, pp. 1149–1157, pp. 1152–1154.

[54] See M.J. Bonell, "Do We Need a Global Commercial Code?", *Dickinson Law Review*, vol. 106, 2001, pp. 87–100, pp. 89–95, although it should be stressed that world-wide regulations ought to be limited to regulating international transactions.

[55] See W.J. Woodward, Jr, "Private Legislation in the United States – How the Uniform Commercial Code Becomes Law", *Temple Law Review*, vol. 72, 1999, pp. 451–466.

tions. European codification should particularly be rejected in sectors where an acceptable degree of harmonization has been attained world-wide (within which context the achievements of the UNIDROIT Principles and the *Vienna Convention on Contracts for International Sale of Goods of 1980* must be highlighted). The existence of similar regulatory instruments having differing geographical scopes of application (for instance depending on whether the business is intra- or extra-Community) would introduce a factor of uncertainty for operators, and for the same reason any codification that was not applicable to internal or national transactions would be inadvisable since it would create even greater regulatory complexity and uncertainty.

For purposes of greater approximation of commercial laws on a universal scale, it is important to note that there is now a tendency to revise the criterion whereby the WTO is defined as a body devoted to abolishing economic barriers to trade between States (by means of measures dealing with tariffs, quantitative restrictions, antidumping measures, etc.) but is not responsible for harmonizing the national laws regulating business activity, a task traditionally undertaken by other intergovernmental organisations such as UNCITRAL or UNIDROIT and non-governmental organisations like the ICC. Despite major criticisms of the WTO model from broad sectors, the position of the WTO is worth considering as it relates to possible harmonization of relevant areas of the Member States' laws.

In order to create harmonizing rules, the institutional fabric of the WTO offers a number of advantages and disadvantages vis-à-vis those other organisations. Besides the obstacles inherent in the fact that it was designed for other purposes, one difficulty that harmonization within the WTO poses is that it would aim to establish a legal framework that guarantees fair trading in the market and eliminates imbalances and obstacles to trade, and hence in the normal run of things harmonization may negatively affect certain States for which it entails an economic cost (particularly if they are forced to raise their standards of protection).

But the WTO also offers advantages as an organisation for harmonization of national laws; in particular it provides a framework within which benefits (e.g. on tariffs) can be offered to countries on which harmonized standards will impose a cost (consider for example the TRIPS Agreement on intellectual property).[56] An institutional framework like that of the WTO is therefore important if international harmonization of rules is to be achieved in sectors where levels of protection vary from country to country. In these cases, harmonization imposes costs on those countries that have to raise their standards, so that they will normally only be prepared to accept it if they receive something in return, which an institutional framework like that of the WTO is able to provide.[57] For that reason the WTO could be

---

[56] See A. Reich, "The WTO as a Law-Harmonizing Institution", *University of Pennsylvania Journal of International Economic Law*, vol. 25, 2004, pp. 321–382, pp. 359–368.

[57] *Cf.* A.T. Guzman, "Choice of Law: New Foundations", *Georgetown Law Journal*, vol. 90, 2002, pp. 883–940, pp. 936–937.

an especially appropriate forum for harmonization, not so much of general laws on contracts as of those aspects – normally the ones that constitute the greatest barriers to international trade – in which countries apply different standards of protection, as in the case of consumer protection laws.

Although harmonization of national laws is not among the instruments contemplated by the WTO unlike the EC Treaty, it is worth remembering that GATT expanded with the passage of time to take in the harmonization of certain national policies and rules. That has been the case for instance in the spheres of customs, rules of origin, sanitary and phytosanitary measures, or in connection with antidumping measures – this last a subject on which GATT progressed from prohibiting certain abuses to significantly harmonizing national rules – and in the sphere of intellectual property on the basis of minimum substantive and procedural standards laid down in the TRIPS Agreement.

One of the items currently on the WTO's agenda according to the Doha ministerial declaration of 2001 is cooperation *inter alia* in the areas of competition policy and of environmental rules. In addition, the areas where there is special potential for harmonization under the auspices of the WTO include certain basic labour standards with major implications for world trade and the protection of human rights, the rules on product liability, taxation of international trade, and most particularly levels of consumer protection in international commerce. In all these areas the existence of different standards may amount to an obstacle to cross-border commercial activity.[58]

IV. EVOLUTION OF THE INSTITUTIONAL FRAMEWORK AND DEVELOPMENT OF NEW REGULATORY TECHNIQUES

1. Mechanisms of europeanization

Initiatives addressing the unification of large areas of private law in Europe envisage the drafting of rules as an essentially academic process, as illustrated by the work groups set up for purposes of Europe-wide civil codification and the premises of the Commission on European contract law.[59] The rule-making processes contemplated by these initiatives present major differences with respect to the traditional political process. The political process is typically less homogeneous in terms of the groups of representatives involved and the interests that they represent, and more pluralistic than the academic milieu in which work has been so far conducted on the europeanization of private law.

---

[58] *Cf.* A. Reich, "The WTO . . .", *loc. cit.*, pp. 357–358.

[59] See J.C. Fernández Rozas, "El derecho de los contratos en el marco de la unificación jurídica del derecho privado de la Unión Europea", *Liber Amicorum en homenaje al prof. D. Opertti Badán*, Montevideo, 2005, nos. 20–23.

Whereas hitherto proposals for Europe-wide regulatory instruments in the sphere of private law have been drawn up by academic groups, the social importance and political significance of a civil code or a code of obligations is such that it has been suggested that a special procedure will be needed for its adoption in order to guarantee its legitimacy and an adequate level of acceptance. In this connection, it has been proposed that a specific procedure will be necessary, modelled on the one followed for adoption of the *Charter of Fundamental Rights of the European Union* (and subsequently for the *Treaty establishing a Constitution for Europe* of 2004), whereby the text of the code would be drawn up by a group of experts appointed by the Member States, which would be linked up to parliamentary commissions from both national parliaments and the European Parliament.[60] In any event the importance of this approach is currently very limited inasmuch as the very idea of codifying broad areas of private law at a Community level is very much open to question and those not seem a reasonable objective in the short time.

The Commission put forward a number of proposals through its Action Plan on Contract Law of 2003,[61] aimed at creating a more coherent European contract law. The Commission has adopted a largely technocratic approach in which the issue of a European civil code – as compared to the significance of great national codifications – is simply a matter of transaction costs in intra-Community supply of goods and services.[62] Moreover, there is no provision to reinforce the participation of political organs imbued with particular democratic legitimacy such as national parliaments and the European Parliament. One essential point for development of the future code in the Action Plan is the creation of a common frame of reference, which should lay down the meaning of principles and concepts used in European contract law. It is expected that this will be drawn up fundamentally in the academic sphere. An approach of this kind basically reinforces the position of the Commission itself and of certain academic circles.

It seems that this orientation does not give due consideration to the fact that a code or instrument like the one envisaged necessitates the taking of significant decisions of political or ideological import, which means that it would be best to follow a procedure that from the outset guarantees the possibility of intervention by the various sectors concerned, and also some kind of connection with bodies enjoying democratic legitimacy. Even in to a relatively technical area of private law such as the rules on contractual obligations, regulation implies the taking of political and ideological decisions.[63] In a market economy wealth circulates and is

---

[60] See W. Van Gerven, "Codifying European Private Law", 2002, at <http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments>.

[61] COM (2003) 68 final of 12 February 2003 (*DO* 2003 C 63/1).

[62] *Cf.* G. Canivet and H. Muir Watt, "Européanisation du droit privé et justice sociale", *ZEuP*, vol. 13, 2005, pp. 517–522, p. 517.

[63] See D. Kennedy, "The Political . . .", *loc. cit.*, pp. 7–28.

distributed chiefly by means of contracts, and hence the rules on the subject indubitably impinge on the distribution of wealth in society.[64]

In October 2004 the Commission published a new Communication on European contract law.[65] This Communication stressed the Commission's resolve to revise the entire Community *acquis* as it relates to consumer contracts, bearing in mind that the common frame ought to serve to lay down a set of terms, concepts and definitions that may be of particular use in rendering the Community acquis more coherent in the course of the revision process.[66] Certainly, as regards the orientation of that common frame of reference, one of its chief and immediate objectives ought to be to enable coordination of the various relevant directives issued by the EU on contracts.[67] This task may prove to be particularly important and difficult given that directives do not define basic concepts, the choice of some of the terms used is too loose in the light of national legal terminology, and they do not take due account of the fact that some of these concepts vary substantially from State to State. All this decisively affects the legal rules governing contracts and is detrimental to uniformity in the application of directives.[68]

The Commission further stressed that the common frame of reference may be adopted as a model for national legislators in order to foster gradual approximation of the Member States' laws, as a basis for the drafting of model contracts, and possibly for the creation of an optional instrument, the need for and scope of which still require further discussion. Particularly noteworthy as regards the drafting of the common frame of reference is the Commission's view that it should be based upon the Community *acquis* and the best solutions contained in the laws of the Member States.[69] However, the decision as to which of these solutions are the best is no mere technical matter but is essentially a political issue, especially considering that the differences among laws are predicated upon the particular social, cultural and economic circumstances of each one.

One very important point given the plurinational nature of the EU is that in practice the academic groups are so organised that some legal cultures or traditions

---

[64] *Cf.* M.W. Hesselink, "The Politics of a European Civil Code", *European Law Journal*, vol. 10, 2004, pp. 675–697, p. 677.

[65] "Communication from the Commission – European Contract Law and the revision of the acquis: the way forward", *COM (2004) 651 final.*

[66] The 2005 Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union of 2005 (Official Journal C 198 of 12/08/2005) envisages the completion of a final research report in 2007 including a draft common frame of reference in the sphere of European contract law and the adoption of the common frame of reference, envisaged for 2009.

[67] *Cf.* B. Zypries, "Der Aktionsplan für ein kohärentes europäisches Vertragsrecht der Kommission – oder: Was ist zu tun im Europäischen Vertragsrecht", *ZEuP*, vol. 12, 2004, pp. 225–233, p. 228.

[68] See B. Pozzo, "Harmonisation of European Contract Law and the Need of Creating a Common Terminology", *ERPL*, 2003, pp. 754–767, pp. 763–766.

[69] COM (2004) 651 final, p. 3.

(essentially German, English and French) are over-represented, whereas others are almost entirely sidelined with virtually no influence (particularly the southern Europeans).[70]

Moreover, it seems clear from the Spanish point of view that the doctrine written in Spanish would carry little weight in the interpretation of the rules of European private law given that it is not normally consulted in the sphere of the dominant legal traditions, even when issues of European private law are concerned. This situation would be particularly irksome in the event that such rules were to become applicable in Spain and had to be interpreted in a uniform manner throughout the Community. It is not then an approach that can readily be accepted from a Spanish position. In that connection it is particularly important to note at this juncture that there is also an extraordinary imbalance in the geographical origin of the members of the expert network set up by the Commission to draw up the common frame of reference, despite the fact that one of its organisational objectives is to achieve comprehensive coverage of all European legal traditions.[71]

2. Comparison with the USA

The experience in the USA, where *soft law* – in the form of uniform laws, model laws or restatements – has been developed as a means of reaching greater uniformity, illustrates the importance of non-binding elements for harmonization. In the realm of private law are common in the US normative compilations of this kind, such as Restatements, which do not imply compulsory harmonization.[72] The American experience shows that if introduced in the context of a suitable institutional fabric, instruments of this kind can be formulated in a manner less dependent on state legal systems and facilitate progressive unification of state laws through the influence of uniform non-binding rules on review processes. Moreover, especially in the commercial sector those instruments open the door to gradual

---

[70] See U. Mattei, *The European Codification Process (Cut and Paste)*, The Hague, 2003, p. 69; and M.W. Hesselink, "The Politics . . .", *loc. cit.*, p. 688.

[71] See Report from the Commission – First Annual Progress Report on European Contract Law and the Acquis Review, 23 September 2005, *COM (2005) 456 final*, where there are obvious imbalances in the origin of the members of the Network: there are 35 German representatives; the next largest contingent comes from the United Kingdom with 25 followed by Italy with 10, while France has 8 and Spain 7 – a situation that reflects the traditionally scant participation of southern European countries in these activities. It is also striking that Poland should only have two representatives (as compared to 35 from Germany).

[72] See M.A. Eisenberg, "Why is American Contract Law so Uniform? – National Law in the United States", H.L. Weyers (Hrsg.), *Europäisches Vertragsrecht*, Baden-Baden, 1997, pp. 23–43, pp. 30–42.

acceptance by operators, who are able to incorporate them into their transactions on a voluntary basis.[73]

An important factor in the harmonization of state laws in the USA has been the adoption of uniform laws within the NCCUSL and ALI frameworks, the prime example of which is the *Uniform Commercial Code* (UCC). These instruments are also optional, but unlike the ones currently being proposed in the EU for the creation of an optional instrument, they are essentially aimed at state legislators, which is entirely logical given that the chief objective is to attain uniform state laws. Moreover, the members of the NCCUSL are also appointed by the states. The drafting of uniform instruments in the sphere of private law in the USA has helped in the creation of a regulatory framework which provides legal security, reducing the need for private individuals to negotiate agreements – and the costs and risks inherent therein – facilitating the modernisation of laws that have been rendered obsolete by social and technological developments, and limiting the circumstances in which conflicts of laws can occur.

There are circumstances which militate in favour of the development of instruments of this kind in the Community sphere, such as the similarity of the principles of private law in the generality of Community systems, as highlighted by the ECJ.[74] In addition, a legal literature that is European as opposed to national[75] – with a consequent focus on comparative method – is developing. These studies are centred on the principles and rules common to the (major) European legal systems in the various sectors of the law of obligations and consider national differences as local variations of a substantially unified system.[76] However, at the present time this approach can be deemed as far removed from reality inasmuch as there are no unified European rules in a large proportion of subject matters. The European context in this respect is at present entirely different from that of the USA, where the weight and prestige of the judiciary, which is much greater there, further helps to assure that judicial decisions, reinforced by a policy of *stare decisis*, are not perceived as *soft*.[77]

The method develop to create uniform laws in the US is one which has not for the moment been tried in the europeanization of private law, nor has it had any

---

[73] See B.S. Markesinis, "Why a Code is not the Best Way to Advance the Cause of European Legal Unity", *ERPL*, 1997, pp. 519–524, pp. 522–523.

[74] See R. Schulze, "Le droit privé commun européen", *Revue internationale de droit comparé*, vol. 47, 1995, pp. 7–32, pp. 18–28.

[75] See C. Schmid, "Anfänge einer transnationalen Privatrechtswissenschaft in Europa", *ZfRV*, 1999, pp. 213–222, pp. 215–220.

[76] One of the pioneering works in this area is R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civil Tradition*, The Hague, 1990; and pioneering reference works in this line, in the sphere of contracts and contractual obligations respectively, are H. Kötz, *Europäisches Vertragsrecht*, vol. I, Tübingen, 1996; and C. Von Bar, *Gemeineuropäisches Deliktsrecht*, vol. I, Munich, 1996.

[77] See U. Mattei, *The European . . ., op. cit.*, pp. 118–119.

significant influence in the EU. From a private-law perspective, the influence of the USA has been evident in the intent to draw up instruments inspired by the ALI restatements, or even by the UCC; however, endeavours of this kind have been pursued only by groups of academics acting mainly on their own initiative. But, unlike the situation in the US, these groups in Europe typically work entirely independently of States rather than within a framework that would facilitate the composition of instruments – such as the uniform laws of the NUCCSL – that might be adopted by the different States and therefore help to achieve significant harmonization or unification between national laws.

Aside from the influence of the restatement model on the Principles of European Contract Law, the apparatus that has grown up in the USA to foster uniformisation of state laws has impinged little in the EU. Within the EU, there has been no progress towards the construction of an institutional fabric that fosters uniformity among national law codes and statutes by means of suitable national review processes modelled on European-scale instruments comparable in flexibility to the model and uniform laws of the NCCUSL. The instruments used up to now in the Community for harmonization of laws – in particular regulations and directives (and to a much lesser extent international conventions between Member States) – would be of no use in drawing up this kind of instrument, and therefore it has been proposed that it take the form of a recommendation.[78] In particular Article 211 of the EC Treaty envisages adoption by the Commission of recommendations which according to Article 149 of the Treaty will not be binding. In any case the Community framework for the drafting of measures of this kind is quite unlike the fabric existing in the USA for the creation of uniform laws by the NCCUSL and the ALI, underpinned – especially in the case of the NCCUSL – by a mechanism for inter-state cooperation.

The comparison with the USA uniform and model laws and restatements, the institutional framework in which they are created and how they become state law deserve special attention to find better mechanisms for the europeanization of private law. Anyway, it should also be considered that the impact of these instruments as means of unification in the USA is limited when compared to the significance of having a common legal culture making it possible to develop common principles which reflect shared values. The make-up of that shared culture is directly influenced by the existence of a national market and a national feeling, a high degree of population mobility and other cohesive factors, which are far more important for harmonization of business practice than are doctrinal constructs.[79]

---

[78] Bearing in mind that this could be an initial solution pending the eventual adoption of a regulatory instrument in the form of an international convention, see A.M. López Rodríguez, *Lex Mercatoria and Harmonization of Contract Law in the EU*, Copenhagen, 2003, pp. 263–264.

[79] *Cf.* A. Rosett, "Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law", *AJCL*, vol. 40, 1992, pp. 683–697, pp. 694–695.

3. Prospects of evolution in the EU

As the years go by, certain trends are becoming apparent in the prospects in the EU, reflecting what must be among the chief concerns in this sphere and departing not only from what was for long the core of the doctrinal debate, but also from some of the stated objectives of the Commission – including very recent ones.

It is highly significant in this regard that the idea of codifying large areas of European private law does not now seem to be an objective of the Community's institutions in spite of previous – and still recent – statements to that effect. With its 2003 Action Plan on this subject, it is also clear that contrary to the opinion traditionally sustained by the proponents of a civil code (or law of obligations), the EC Commission proposes to create a common frame of reference based not on a comparative-law approach (entailing a search for common denominators or convincing rules – which in the final analysis would imply making political decisions) but first and foremost on the Community *acquis*. According to the Commission, the Community *acquis* should provide the basis on which to develop the common principles, definitions and rules that will make it possible draw up a common frame of reference, and eventually perhaps a European civil code. Following in the same direction, there is now a tendency to review the priority awarded to some of the Commission's most recent and important objectives, for instance to draw up an optional instrument on contract law.

Following that Action Plan, it seems clear that for the future the EU Commission prefers to draw up an optional instrument (the so-called 26th regime) – that is, one that does not bindingly replace those existing in the Member States – but it does not explain in detail how such an optional instrument will work.[80] The idea of an optional instrument applicable only to international transactions – and hence coexisting in the countries that adopt it with national laws which will continue to be applicable to internal relations – is surely quite unsuitable, despite the fact that the Commission mentions it in its 2003 Action Plan in connection with contract law. For the Commission at this time the optional nature of the instrument relates to the free will of the contracting parties and the possibility that they may opt to declare it applicable to their relationship, in line with the major tendency in the Principles of European Contract Law.[81]

---

[80] In particular, whether the parties will have to opt in (the default is non-application) or opt out (the default is application of the instrument); while the first alternative seems the more reasonable (since the second adds little to the non-mandatory nature of the rules) and is similar in structure to other Community legal institutions that coexist with national provisions, in the sphere of contracts its practical utility is doubtful since parties are hardly likely to take up this option given fear of the unknown (and for example the absence of any body of case law), *cf.* J. Basedow, "Ein optionales Europäisches Vertragsgesetz – opt-in, opt-out, wozu überhaupt?", *ZEuP*, vol. 12, 2004, pp. 1–4, p. 2.

[81] *Cf.* S. Sánchez Lorenzo, "La unificación del Derecho comercial internacional", *Globalización y comercio internacional (Actas de las XX Jornadas de la AEPDIRI)*, Madrid, 2005, pp. 239–265, pp. 248–249.

In any event, some thought needs to be given to the potential significance of the proposal to configure the common frame of reference as an optional instrument. It is important to note first of all that the impact of the so-called common frame of reference as an instrument that is optional for the parties may well be limited. In the sphere of international commerce, it is unlikely to achieve sufficient stature to oust the UNIDROIT Principles, besides which, in view of the latter's success there is surely some doubt as to the need of a common frame of reference and whether it constitutes progress. Moreover, within the Community there is already an instrument which is optional, because it is non-legislative and essentially dependent for its efficacy on the favourable opinion of the parties concerned. That instrument is the *Principles of European Contract Law*,[82] which are conceived not only as a basis for the adoption of rules at a Community level and as a coherent set of rules that parties may declare applicable to a contract (a modern formulation of *lex mercatoria*), but also as an alternative or a first step towards the eventual drafting of a European code of obligations. For the future, there is also the possibility – not yet developed in the EU- of creating instruments that are optional basically because whether they are applicable or not depends on whether the national legislators – and not the parties to specific contracts – choose to adopt or incorporate it into the State system, as is the case of uniform laws drafted under the NCCUSL in the USA.

The common frame of reference rests basically on non-mandatory rules; it is expressly envisaged that should a rule be mandatory, this must be clarified and justified,[83] which means that given the demands of the internal market and the need to remove obstacles to it, the utility of the frame of reference will be severely limited unless that orientation is altered.[84] But more importantly given this context, particular attention must be paid to the review currently in progress on the *acquis* in consumer matters, in respect of which there is undoubtedly a need to clarify certain definitions and utilise terms more consistently.

The criterion adopted by the Competition Council at its meeting on 28 and 29 November 2005 is entirely consistent with what was earlier said about the criteria that should guide determination of the substantive scope of unification of private law in the EU at this time. The Council's conclusions at that meeting regarding the proposal on European contract law and its review of the *acquis* in matters of

---

[82] While the harmonising force of the European Principles may be enhanced by their limited geographical scope and by the fact of having been conceived for both international and internal transactions, for the moment they have had less impact on contract practice than the UNIDROIT Principles, largely because the international and non-binding nature of the latter is especially well suited to the needs of international business.

[83] This is expressly mentioned in connection with the procedure for drafting the common frame of reference in the First Annual Progress Report on European Contract Law of the Commission, *COM (2005) 456 final*, p. 5.

[84] See H. Heiss and N. Downes, "Non-Optional Elements in an Optional European Contract Law: Reflections from a Private International Law Perspective", *ERPL*, 2005, pp. 693–712, pp. 697–699.

consumer protection, which is an outcome of the EU Commission's First Annual Progress Report on European Contract Law, clearly stress the need for an early review of the *acquis* in matters of consumer protection (especially conclusions 13 to 17).

Clearly that review should be conducted separately from the drafting of the common frame of reference, with priority status; that is certainly the best option given the advantages to be derived from a review and an improvement of the rules in that area, for which there is definitely room in terms of predictability and legal security.

We would note by the way that in the review of rules on consumer protection, consideration must be given to the serious problems existing as regards the applicability of private-law directives to cross-border situations, meaning that these rules ought to be revised and a unified system of law established for that subject matter.[85] Indeed, in view of the lacunae arising from the introduction of isolated rules in Community provisions on sundry matters, as illustrated in particular by the chaotic situation resulting from the inclusion of imprecise rules on mandatory applicability of the rules on consumer protection, there is a need for greater unification of private international law at a Community level.[86]

The chief legal barrier facing companies which seek to operate at a Community level is that the differences in national laws prevent them from being able to pursue a uniform contractual/commercial strategy for the European Union as a whole, for instance because the different national restrictions make it difficult for them to use the same commercial offers or offer the same general contract conditions in all Member States.

One fundamental obstacle is the fact that at a Community level there are generally hindrances in the way of companies unifying the rules applicable to their transactions with consumers located in different countries of the Union. The reason for this is that the applicable rules of protection must be those of the consumer's country – as provided in Article 5 of the Rome Convention – thus limiting the possibility of companies choosing the applicable law. That situation is further aggravated by the fact that in matters of advertising and fair trading in the market, the legal rules normally applicable are those of the country at which the advertising is directed or where the effects of the given business conduct materialise. That country is normally the country of residence of the consumer with whom a distance contract is concluded.

In reforming consumer protection in the internal market with a view to establishing a coherent regulatory framework and improving the level of protection currently available at a Community level, the objective should be to ensure that the

---

[85] See F. Esteban de la Rosa, "La aplicación . . .", *loc. cit.*, pp. 178–204.

[86] *Cf.* S. Sánchez Lorenzo, "La función de las técnicas conflictuales en los procesos de unificación del Derecho privado material", *Pacis Artes. Obra homenaje al prof. J.D. González Campos*, Madrid, 2005, pp. 1765–1786, p. 1785.

laws of any Member State guarantee adequate and appropriate protection. The eventual outcome of this situation should be to make it possible generally for choice of law clauses in consumer contracts to be effective without restriction as long as the chosen law is that of a Member State. Such a development would be decisive in enabling companies of the Member States to unify the terms of cross-border contracts throughout the Community, with due guarantees to all consumers secured by harmonized Community rules and hence irrespective of the Member State whose laws are applicable to that consumer transaction.

In support of the desirability of a broad-reaching unification of substantive private law in Europe, its proponents generally point to the drawbacks of the unification of private international law rules as an instrument of integration.[87] But the fact is that for the short term the integrative potential of more unification of the rules of private international law will clearly continue to be greater than that of an ill-defined proposal for uniformisation of substantive rules in areas of private law where substantive unification is not essential to proper working of the internal market.[88]

In some areas major differences persist among the laws of the States, reflecting legitimate divergences of interests and traditions, and unlike what happens within the framework of creation of uniform rules in the context of inter-state cooperation in the USA, attempts to carry out a broad-reaching uniformisation have so far been pursued practically in isolation from national legislators, who remain the competent authorities for purposes of legislation in these matters.

---

[87] See J.D. González Campos, "Diritto . . .", *loc. cit.*, pp. 56–61, referring to these drawbacks and the inadequate basis of the analyses of those who emphasise them.

[88] See P.A. De Miguel Asensio, "Conflictos de leyes e integración jurídica: Estados Unidos y la Unión Europea", *Anuario español de Derecho internacional privado*, vol. V, 2005, pp. 43–102, pp. 98–102.