GUEST EDITORIAL: EUROPEAN CONTRACT LAW AFTER THE YEAR 2000

1. Should contract law be europeanized?[1]

The term to europeanize the law, as used in this editorial, means to unify or harmonize European law. Europe covers those countries which are or will become members of the European Union.

The Union of today is mainly an economic community. Its purpose is the free flow of goods, persons, services and capital. The idea is that the more freely and abundantly these can move across the frontiers, the wealthier and happier we will be. They move by way of contracts. It should therefore be made easier to conclude contracts and to calculate contract risks. However, those doing business abroad know that some of their contracts with foreign partners will be governed by a foreign law. The unknown laws of the foreign countries is one of their risks. The foreign laws are often difficult for the businessman and his local lawyer to understand. They make him feel insecure, and may keep him away from foreign markets in Europe. Thus, the existing variety of contract laws in Europe may be regarded as a non-tariff barrier to the trade. It is the aim of the Union to do away with restrictions of trade within the Communities, and therefore the differences of law which restrict this trade should be abolished.

1. See Basedow, "A Common Contract Law for the Common Market", 33 CML Rev. (1996), 1169–1195.

2. Can we content ourselves with the existing europeanization?

In the last decades there have been important developments of what may be called the Union contract law. Most important is perhaps the Directive on Unfair Terms in Consumer Contracts,[2] but the EC has issued several other directives providing protection of the consumer as a contracting party[3] and of the employee. Futhermore, the Union has established a law of competition, which purports to prevent restrictive trade practices. Some rules of this law provide restrictions of the parties' contractual freedom by laying down which contract terms are permissible and which are not. A Directive of l8 December l986 on the Self-employed Agent[4] contains mandatory rules, most of which protect the agent in his relationship with the principal.

The Union legislation mentioned above has provided some europeanization of contract law. However, it is only a fragmentary harmonization. It is not well-coordinated, and, since the national laws of contract are different, it causes problems when it has to be adjusted to the various national laws. There is no European law of contract to support these specific measures.

The uniform choice of law rules of the Rome Convention on the Law Applicable to Contractual Obligations of l9 June 1980[5] lays down rules on which legal system governs contracts with foreigners. It provides that the parties may agree on which legal system to apply. A Greek seller and a Dutch buyer may, for instance, agree that English law shall govern their contract. If they have not made such an agreement the courts must apply the legal system with which the contract has its closest connection. This is presumed to be the legal system of the party who provides the goods or services which the other party buys, in the example mentioned above it will be Greek law because

2. 93/l3 of 5 April 1993, O.J. L 95/29.
3. See directives on Doorstep Sales (20 Dec. l985, No. 85/577), Consumer Credit (22 Dec. l986, No. 87/102), Package Tours (l3 June l990, No. 90/3l4), Time Share Agreements (26 Oct. l994, No. 94/47) and Distance Contracts (20 May 1997, No. 47/7).
4. 86/653 EEC, 18 Dec. 1986, O.J. 1986, L 382/17.
5. 80/934/EEC, O.J. 1980, L 266/1.

the seller is a Greek. The purpose of the Convention is to give the businessman the means of knowing when his contract will be governed by the contract rules of his own law and when it will be subject to the rules of a foreign law. However, if the parties to the contract have not chosen the law applicable, the rules of the Convention leave some uncertainty as to which law a court will apply.[6] In addition, the contracts which are to be governed by an unknown foreign law will cause the businessman problems. A Dutch party will not know what Greek contract law provides. And the Greek party will have no assurance that his law will be applied in an English or Dutch court, even if the rules of the Convention provide that Greek law should be applied. In the courts of most countries a foreign law will have to be pleaded and proved, and to prove its content is often expensive for a party, as well as difficult. Futhermore, as most lawyers and judges do not like foreign laws and therefore try to avoid them, he will often find that his own law will not be applied.[7]

It is therefore submitted that the choice of law rules of the Rome Convention are a poor tool of legal integration. They have not established the legal uniformity necessary for an integrated market. There is still some truth in what, in his colourful language, the Heidelberg professor *Anton Friedrich Justus Thibaut* said about the situation in Germany in l814 when the country was divided in a multitude of states each having their own legal institutions. "If their is no unity of laws then the terrible and odious practice of the conflict of laws will arise . . . so that in their intercourse the poor subjects will be stuck and suffocated in such a constant maze of uncertainty and schock that their worst enemies could not advise them worse. Unity of law would, however, make smooth and safe the road of the citizen from one state to the other, and wicked lawyers would no longer have the opportunity

6. See on the issue Lando in (1996–97) *King's College Law Journal*, 55, 67 et seq.

7. See Cappeletti, Seccombe and Weiler (Eds.), *European University Institute, Integration Through Law*, Volume 1, Book 2, Part II, pp. 161 et seq., "Conflict of Laws as a Technique for Legal Integration", by Hay, Lando and Rotunda, at pp. 168 et seq.

to sell their legal secrets and thereby to extort and maltreat the poor foreigners".[8]

3. The Commission on European Contract Law

It was this unsatisfactory state of affairs which led to the *Principles of European Contract Law*. Since l982 the *Commission of European Contract Law* has been working to establish *Principles of European Contract Law*. The principles are drafted as articles and supplied with comments which explain the operation of the articles. In these comments there are illustrations, ultra short cases which show how the rules are to operate in practice. Futhermore, there are notes which tell of the sources of the rules. Part 1 of the Principles, dealing with performance, non-performance and remedies was published in 1995.[9] In l992 the Second Commission on European Contract Law began to work on the formation, validity, interpretation and contents of contracts and on the authority of an agent to bind his principal. The Second Commission held its last meeting in May l996, and Part 2 of the Principles is scheduled to be published in l998. In 1997, the Third Commission began to draft rules which are common to contracts, torts and unjust enrichment, such as set-off, assignment of debts and claims, subrogation, and prescription.

With a few exceptions the members of the Commission of European Contract Law have been academics, but many of the academics are also practising lawyers. The Members have not been representatives of specific political or governmental interests, and they have all pursued the same objective, to draft the most appropriate contract rules for Europe.

8. See Thibaut, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland*, (Heidelberg, 1814), reprinted in Hattenhauer, Thibaut und Savigny, *Ihre programmatischen Schriften,* (München, l973), p. 61 at pp. 33 et seq.

9. Lando and Beale (Eds.), *Principles of European Contract Law, Part 1. Performance, Non-performance and Remedies,* (Dordrecht, 1995).

4. Is the europeanization of contract law feasible?

Can the 15 or more States agree on a unified contract law? Europe is still divided by different legal languages, methods and rules. The Civil law countries on the Continent and the Common law countries on the British Isles have a different approach to the law and speak a different legal language, but also on the Continent there are significant differences of approach.

However, in the *Commission on European Contract Law* the participants often found that they shared their concepts with respect to how they thought the law should be. There were, of course, differences of opinion. Most of these, however, did not reflect national attitudes, but rather the attitude of the individual members, for instance on how much freedom of contract the parties should have, and, perhaps more often, on the legislative technique to adopt. It was rarely basic national cultural attitudes which divided the members.

There was also a certain degree of unanimity when it came to the question of how a case would be solved under the existing national laws. In the discussions and when preparing the meetings the participants would consider how the courts of their own country have or would have reacted to the problems discussed. When they tried to visualize how a concrete case would be solved they sometimes found that although the rules were different the courts would reach the same results. The consensus was greater than one would think when one compared the legal rules and techniques of the various countries. The Court of Justice of the European Communities has judges from all the Member Countries, and some of these judges have told me of similar experiences: there is often agreement about the outcome of a case although the reasons for the decision vary considerably.

There may be several explanations for these similarities in attitudes. The similar economic and political structure of the Member States is one. Another is their common cultural heritage. A third is the millieu in which both judges and law professors are raised and live; most of the guardians and preachers of our law and justice grew up in well to do bourgeois homes with moral traditions. In Europe the middle class has in fact been the guardian of ethics and so have, in general,

the parents of the judges and professors. Their fathers were there, and behaved themselves. In school and at the universities the lawyers in spe were good, relatively virtuous students with strong ties to their homes. Many of them were right-wingers.[10] Their professional life has maintained their bourgeois attitudes, and has confirmed their conservative response to life. Elderly people tend to be even more conservative than young people and the judges in the higher courts are middle-aged or elderly gentlemen or gentlewomen. So are most law professors, since a professor generally gets tenure when he is about 40.

Thus, the legal values of the European brotherhood of lawyers are very similar. And so are, it is submitted, the legal values of the European peoples who live in societies of a similiar economic, and political structure and share the same ethics. This should enable us to make a European Code of Obligations.

However, one must realize that today the majority of law professors, judges and practicing lawyers in Europe would oppose the idea of unification. And they have their reasons. Some consider national law to be part of the nation's cultural heritage; it reflects the spirit of the people.[11] What is good law for one nation may be bad law for another. The truth about contract law, they argue, is not the same for a Swede and an Italian, for an Englishman and a German.

However, contract law is not folklore. It is a question of ethics, economics and technique. The common economic, cultural and political background has made it possible to draft common principles favourable for the economy and technically expedient. It has even been possible to reach agreement on a world-wide basis. In 1980, delegates from all over the world succeeded in adopting the Convention on Contracts for the International Sale of Goods of 1980 (CISG), which is

10. See for what was then West Germany W. Kaupen, *Die Hüter von Recht und Ordnung. Die soziale Herkunft, Erziehung und Ausbildung der deutschen Juristen*, (2nd ed., 1971) and Dahrendorf, *The education of an Elite. Law Faculties and German Upper Class, Transactions of the 5th World Congress of Sociology*, (Louvain, l964), 259–274.

11. See von Savigny, *Von Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, (Heidelberg, 1814), reprinted in Hattenhauer, Thibaut und Savigny, *Ihre programmatischen Schriften*, (München, l973) 95 et seq.

now in force in over 50 States covering almost every legal culture in the world.

Opponents to the idea of unification also argue that to introduce a new contract law in Europe will cost sweat, tears, and money – which of course is true. And many lawyers will hate to see everything which they themselves learned and practised disappear, and to have to learn a new contract law. They will all have to become law students again, and elderly men and women do not like that. In addition, the practising lawyers will no longer be able to "sell ther legal secrets" as *Thibaut* said.

The claim for uniformity should come from the people, notably the businessmen, who ultimately will find it bothersome, costly and risky to change law each time they cross a border which is no longer a real border.

5. The two schools

In spite of their conservatism, more and more lawyers have realized that European contract law should be harmonized or unified. However, there are two schools, who may be called *the codifiers* and *the cultivators*. What divides them is the question whether the law should be europeanized by way of codification (legislation) or by patient cultivation of the people.[12] A European Contract Law, the cultivators say, should grow organically and slowly in the people, led by the academics, and by the business community when it feels the need. In their international organizations the business people should establish common customs and practices. This new European law should then be taught to the law students, who when they become judges will apply it in their decisions. The cultivators refer to the proud tradition of Roman Law, which spread in Europe from the time of the glossators of the 12th century,

12. See e.g. Zimmermann, "Savigny's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science", 112 *Law Quarterly Review* (1996), 576, and Kötz, *Gemeineuropäisches Zivilrecht, Festschrift für Konrad Zweigert*, (Tübingen, l981), 481. In several meetings Kötz has advocated this view and has been supported by many European, notably German, lawyers.

and which reigned in Continental Europe till it was replaced by the codifications of the 19th century. The cultivators see the universities as the main platform for the debates on the future civil law of Europe. They imagine that the writings of learned scholars and socratic seminars under the palm trees of the *academia* will distil the *ultima ratio* and establish a European Contract Law. In fact the EC and the European Union have promoted a European *régime* of – mostly academic – lawyers whose platform is no longer their own country but Europe and whose writings and debates are concerned with the future European law. This *régime* has established and promoted an interchange of law students, European law reviews and books, such as *Kötz & Flessner's European Contract Law*.[13]

A regime of the kind mentioned is necessary also for those who wish a European Contract Code. They too need European text books and articles to be discussed among academics, and European Contract Law to be taught in the classroom before and after it has been codified.

However, it is very questionable whether the practices of the businessmen and the writings of the academics and their discussions can bring about a europeanization of contract law.

First, it will be very difficult to establish a system of simple and clear rules. It may be difficult to base a uniform law on business practices and academic debates. It is likely that confusion will come to reign if the European doctors are given the task of establishing a European contract law. Although a régime is emerging, European lawyers are still divided by different legal languages and methods. To the differences in the academic background of the European professors one must add that most academics are persons of a marked individuality. Already *Thibaut* warned against a law which like the Roman law was based on the doctrine of the learned society: "There is nothing which we good jurists like more than to hold the opinions of others to be inadvisable for the very reason that they are the opinions of others".[14]

13. The first of the two volumes of this book, Kötz, *Europäisches Vertragsrecht, I*, deals with formation, validity, content of contract, and contract and third parties. It was published in l996. An English translation *European Contract Law* by Weir appeared in 1997.

14. Thibaut, *supra* note 8, p. 21 et seq.

When the Roman Law reigned in Europe, its many and contradictory sources created a great amount of insecurity. "It cannot be denied" said *Thibaut*, "that Roman law has been conducive for our learned endeavours, notably for the study of philosophy and history and that this great enigmatic mass has sharpened the laywers' faculty of combination and has given them ample opportunity to practise, and to glorify themselves. The citizen, however, may rightly claim that he was not born for the lawyers . . . All their learning, all their variations and guessings, all that has manifold upset the safety of the citizen and has only filled the pockets of the laywers. The citizen's happiness does not ask for the learned counsel, and we would sincerely thank the heavens if simple laws would bring about that the lawyers were dissuaded from their learning . . . . I assert . . . that for the the citizen their learning has never helped the true genuine sense of law but only destroyed it."[15]

The mess described by *Thibaut* was to some extent cleared up when the French Civil Code was introduced in a number of European countries. In comparison with the former law, the Code was clear and succinct, forceful in its language and free from detailed digressions. Like the French civil code a European Code must strive at simplicity. When drafting the Principles, the Commission of European Contract Law has tried to follow the device of the authors of the French Civil Code. As was said by *Portalis* in his *Discours préliminaire*: "The task of the legislation is to determine the general maxims of law, taking a large view of the matter. It must establish principles rich in implications (*féconde en conséquences)* rather than descend into the details of every question which might possibly arise."

The main objection to the idea of the cultivators is that even if the professors were to agree on the principles of a European contract law one cannot expect that this law would be adopted by the courts in the way the cultivators imagine. Today, neither on the Continent nor in the British Isles can or will the courts free themselves of the fetters of the law laid down in the national codes, statutes or precedents. A unified law can only be applied fully by the courts of Europe if the legislator tells the court that they *must*. A European Civil Code has to be

15. Thibaut, *supra* note 8, p. 23.

prepared, passed and promulgated. One will have to tolerate a certain polycentrism, but there should be certainty about the main principles. Together with the practising lawyers and the judges, the doctors should work them out, but they have to be passed, either by the legislatures of the Union Countries or by the Council and the Parliament of the European Union which, by the way, both in 1989 and 1994 requested the Commission and the Council to prepare a European Civil Code.[16]

A slow cultivation may have its advantages. However, it will probably take a long time to achieve a europeanization in this way, as is shown by the experience of the United Kingdom. In almost 300 years the English and the Scots have lived together in a Union. They have basically the same culture and speak the same language. A major part of their law has been unwritten. Most of the uniform law they have has been brought about by legislation, but since this legislation has not touched upon the basic principles of private law, these two members of the United Kingdom still have two systems of law. The Union of today has at least 16 legal systems and ll languages. If no legislative measure is taken, the peoples of the Union will probably continue to have different contract rules. Those who will establish a European Contract Law by way of a natural outgrowth must arm themselves with great patience.[17]

6. The future avenues

The future European law of contract may take several avenues.

One is a continuation of the fragmented Union legislation and continued debates between members of a growing European *academia* on the principles of contract law, supported by the efforts of the business world to make uniform customs, standard form contracts and contract terms. In this way an unwritten European *jus commune* may emerge. It will be somewhat diffuse and polycentric, but it may eventually

16. See Resolution of 26 May 1989, O.J. 1989, C 158/400 and of 6 May 1994, O.J. 1994, C 205/518.

17. Basedow seems to expect a long ripening period before Europe is ready for a code, see Basedow, *supra* note 1.

straighten out some of the differences of the national laws. This is what the cultivators wish.

Another avenue is a European Civil Code covering the law of contracts. This is what the codifiers want, and I am, as you can guess, one of them. One must expect that an intensive trade will create a need for the greater amount of legal certainty which a Code will provide. World trade has grown very fast and this brought CISG into existance. In the countries of the European Union, where intra-union trade has increased still more since the Common Market was established in 1958, unification of the law of contract will become more urgent the more trade and communication grow.

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