Special Issue Section

European Contract Law and the Commission's Action Plan

Introduction

ULF BERNITZ*

Introduction

The European contract law project and its many aspects are attracting wide interest and different options and proposals are rapidly taking shape. This special issue section of the European Business Law Review is devoted to these problems, particularly in light of the Action Plan, recently published by the European Commission.

The articles in this section are continuing the discussion on the European contract law problems which was presented in a previous special issue, published by this Review about a year ago under the heading *Towards a Unified European Private and Consumer Law: What Course to be Taken?*[1] The primary base for the articles in that issue was the Green Paper, published by the Commission in July 2001, called *Communication on European Contract Law*,[2] and the four different options presented in that paper. Several of the articles in that issue were primarily focusing on the relation between European contract law in general and the bulk of European consumer law of a private law nature that has emerged already. The issue includes articles by Professors Stephen Weatherill, Laurence Gormley, Guido Alpa, Thomas Wilhelmsson, Josef Drexl and Hans-W Micklitz. In addition, this Review has published recently a comprehensive article by Professor Guido Alpa, *European Private Law: Results, Projects and Hopes*[3] which presents this emerging field with special emphasis on its sources and treatment in legal doctrine.

The Commission's Action Plan, already mentioned, was published in February 2003 and is called *A More Coherent European Contract Law*.[4] It presents the different views expressed in relation to the Green Paper and expresses the Commission's reactions to these views and its proposals for further action. The Action Plan represents a certain retreat from the Commission's most far-reaching option in the Green Paper, that of a mandatory, comprehensive European Civil Code. The Action Plan proposes a number of non-regulatory and regulatory measures as possible solutions

* Professor of European Law, Stockholm University, Director Oxford/Stockholm Wallenberg Venture in European Law, Senior Research Fellow, Balliol College, Oxford.

[1] [2002] EBLR p 491 ff.

[2] COM (2001) 398 final, see also D Staudenmayer, The Commission Communication on European Contract Law and the Future Prospects, [2002] 51 ICLQ 673.

[3] [2003] EBLR p 379 ff.

[4] COM (2003) 68 of 12 Feb. 2003, [2003] OJ C63/1 of 15 Mar 2003.

to the problems created by divergences between national contract laws in the EU. One alternative would be the creation of a general code of a voluntary or non-mandatory character, based on the principles of opt-in or opt-out. This is cautiously presented as an optional instrument and a non-sector specific measure. Other, less far-reaching measures or alternatives are also presented and discussed in the Action Plan, such as improving the presently existing *acquis* (eg, in the area of consumer law), the establishment of a common frame of reference (eg, publicly accessible documents that contain definitions of key concepts and contract rules) and the promotion of the elaboration of EU-wide standard contract terms.

In my opinion, the Action Plan is a constructive document, rich in ideas and proposals. It recognizes that different types of measures will be needed as well as a blend of short and long time perspectives. Still, the Action Plan largely leaves open, for the time being, how far we should go in Europe in harmonisation of contract law and neighbouring areas of the law of obligations (claims). This is probably intentional. It is now time for an open legal debate and analysis, discussing the pros and cons of different alternatives and solutions.[5]

Two of the articles in this issue are based on papers presented at a conference in London in May 2003 on the European Contract Law and the Commission´s Action Plan, organised jointly by the British Institute of International and Comparative Law, the Institute of European and Comparative Law at the University of Oxford and the Oxford/Stockholm Wallenberg Venture in European Law (the articles by Weatherill and Sinai).

The first article in this issue, *A Single European Law of Contract?* is written by William Blair QC and Richard Brent of Gray´s Inn, London. It is based on a talk and the discussion at a conference held jointly by the COMBAR and the Bar European Law Group in Stockholm in May 2003. The article presents and discusses the initiatives taken by the Commission, primarily the Action Plan. A number of important problems are treated in this rich article, including the importance and relevance of existing legal diversities within the Union, the competence to legislate on EU level, the values of a pluralist approach, the relation to codes drafted by private institutions and choice of law problems in connection to possible application of the Rome Convention.

The constitutional basis for the Commission's legislative projects, or lack of basis, is discussed by Professor Stephen Weatherill in his article *European Contract Law: Taking the Heat Out of Questions of Competence*. After having stated the constitutional background he finds the Commission is avoiding discussing the constitutional issues in depth also in the Action Plan. He discusses, inter alia, the problems of "creeping competence" in relation to the use of non-binding instruments and soft law. However, he finds the Commission's reticence understandable at this stage of the explorations. In the final part, it is discussed whether the forthcoming European Constitution would change the constitutional prerequisites.

---

[5] See, eg, S Grundmann and J Stuyck (eds), An Academic Green Paper on European Contract Law, Kluwer Int 2002.

In his contribution in this issue, Professor Guido Alpa discusses *Harmonisation of Contract Law and the Plan for a European Civil Code*. His article focuses primarily on the reactions to the proposals of the Commission and of the 2001 Resolution of the European Parliament on the approximation of the civil and commercial law of the Member States. In particular he presents and discusses the comments and initiatives taken in Italy, partially within the ambit of the Italian National Forensic Council and within the CCBE (the Council of the Bars and the Law Societies of the EU). Clearly, as Professor Alpa illustrates, there is a diversity of attitude as to the importance of existing legal differences and the need for harmonisation measures to be taken between lawyers in England and Wales and in the Continent.

Ali R Sinai discusses in his comprehensive article a particular, but important legal aspect of one of the Commission's proposals in the Action Plan, the creation of an optional instrument (in reality an optional European civil code), namely the position of mandatory rules. The title of his article is *The Inclusion of Mandatory Rules in an Optional EC Contract Law Instrument*. Mandatory rules are particularly important in European competition and consumer law but mandatory aspects are also found elsewhere, eg, the Commercial Agents Directive. The *Ingmar* judgment of the ECJ in 2000[6] in relation to mandatory limitations to contractual choice of law is discussed in particular in Sinai´s article. The article provides a rich analysis of the problems involved. In the conclusion, the author points especially to the difficulties related to the inclusion of European rules which are internationally mandatory, also when the parties have chosen the law of a non-Member State.

[6] C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc*, [2000] ECR I-9305.