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Herausgegeben von Marina Wellenhofer

Gintautas Šulija

Standard Contract Terms in Cross-Border Business Transactions

A Comparative Study from the Perspective of European Union Law

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INTRODUCTION

'Reasons for choosing the law of contract lie not only in its importance in any modern system. It is, moreover, a field in which lawyers are increasingly having to look beyond the confines of their own systems, particularly within the European Economic Community, and in which the movement for harmonisation and unification is likely to gain momentum. But before there can be harmonisation or unification there must be mutual understanding'.
Barry Nicholas, December 1981,
The French Law of Contract (Clarendon Press Oxford 1992) vii

RELEVANCE

In recent decades European economic integration has developed in tandem with the internal market[2]. In theory, the creation of the internal market requires enabling a supplier to sell his goods or provide services unrestricted in the internal market. However, owing to various trade barriers created by Member States, it is still difficult to fully enjoy the benefits created by the Union market freedoms. Thus harmonised rules seem to encompass more and more areas; and since the Union has now acquired competence over these areas through secondary legislation, national regulators no longer have the exclusive right to act autonomously. The expanding - sometimes also negatively referred to as 'encroaching' - competences of the Union raise doubts as to what common rules are really indispensable for the proper functioning of the internal market, and where the Union has overstepped its competences[3].

It seems that there is no unambiguous answer to the question of where European integration should halt and what further areas of private law will be harmonised. Will the creation of the internal market mean a gradual and full merger of national legal systems within the borders of the Union, and if so, what would this new European contract law look like in future? Even if there were no obstacles to the Union attaining competence over the adoption of a unified private law, it is not easy to identify clearly what actual inter-state repercussions

[2] The development of the common market is sometimes defined as the third stage of economic integration. *See e.g.* Barnard C. *The Substantive Law of the EU. The Four Freedoms* (Oxford: Oxford University Press 2004) 9; Mortelmans K. 'The Common Market, the Internal Market and the Single Market, What's in a Market?' 35 *C.M.L. Rev.* (1998) 107 *et seq*

[3] In this regard, see also: 'Lugano' Opinion 1/03 of 7 February 2006; cf. 'Tobacco Advertising' C-376/98

the enactment of harmonised rules would eliminate[4]. Indeed, how can we set aside trade obstacles in inter-state trade if we don't know what exactly these trade obstacles are? The unification of European private law creates many dilemmas that are difficult to resolve: first, is it really necessary to enact a unified civil code or special trade code in Europe?; second, should this hypothetical civil or trade code or European guidelines be mandatory or merely optional?; third, do the institutions and bodies of the Union have sufficient competence to do this. The numerous reactions to these issues would suggest that one can hardly expect the Member States to develop a sound and unanimous approach in the foreseeable future[5].

In the meantime, both academic writers and practitioners offer different scenarios on the elimination of trade barriers in the area of private law. Some academics support the creation of a common European law of contract[6]; some of them, however, back only initiatives directed towards the creation of common rules of contract law that are confined to cross-border European transactions[7]; some of them advocate enacting more directives aimed towards achieving a

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4 In this context, probably the most striking example was the Draft Directive on Services in the Internal Market. *See*: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, L376/36 27.12.2006)

5 For example, Davies persuasively argues: '*What kind of rules might be necessary in operating an internal common market? Shared criminal law, at least concerning fraud? Common tax rule? A Common Contract Code? Harmonised Education System to Ease Migration of Persons? A single language? All are arguable'. See*: Davies G. 'Subsidiarity: the Wrong Idea in Wrong Place, at the Wrong Time' 43 *C.M.L. Rev.* (2006) 65

6 For instance, one of the most prominent advocates for the unification of private law in Europe Prof. Lando contends that the Principles of European Contract Law could be a first step towards a European Code of Contracts. *See*: Lando O. 'Principles of European Contract Law: An Alternative to or a Precursor of European Legislation*?*' 40(3) *Am. J. Com. L* (1992) 577; Lando O. 'Optional or Mandatory Europeanisation of Contract Law' 1 *ERPL* (2000) 59 *et seq*; Basedow J. 'Codification of Private Law in the European Union: the making of a Hybrid' 1 *ERPL* (2001) 35 *et seq*; Mattei U. 'A Transaction Costs Approach to the European Code' 5 *ERPL* (1997) 537 *et seq;* Meyer J. 'BB - Europareport: Auf dem Weg zu einem Europäischen Zivilgesetzbuch' *BB* (2004) 1285 *et seq*

7 *For different approaches on enhancing harmonisation of European contract law compare:* Grundmann S., Stuyck J. 'An Academic Green Paper on European Contract Law – Scope, Common Ground and Debated Issues', in: *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2002) 21 *et seq;* von Bar Ch., Lando O., Swan S. 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code' 2 *ERPL* (2002) 235-236; van den Bergh V. L. 'The Principles of European Tort Law: The Right Path to Harmonisation?' 4 *ERPL* (2006) 514 *et seq*; Franzen M. *Privatrechtsangleichung durch die Europäische Gemeinschaft* (Berlin New York 1999)

higher degree of common private law elements[8], preparing an optional code for the contracting parties[9], or simply generally support further developments of European contract law[10]. Generally speaking, the initiatives to approximate European civil laws are assessed positively by most stakeholders; however, there is no unanimous position on the best methods and approaches on implementing ideas for the approximation civil laws in Europe.

At the same time, sceptical views are popular among academic writers as well. Beyond the content of the proposed Union legislation, it may be doubted whether mechanism of making laws 'from above' via the supra-national institutions of the Union suits the needs of Europe's peoples best. Perhaps paternalistic interventions aimed at safeguarding public interests diminishes the very credibility of the Union and contributes to 'the lack of democracy', which is so criticised in the Union. Nevertheless, realistically speaking, one can hardly expect that the current agreement between twenty-seven Member States would be possible without supranational interference[11]. An intensive discussion regarding the so–called 'europeanisation' of national private law systems at the Union level commenced after 2001, though some extensive research projects on this issue had begun several decades ago[12]. In 2001, the Commission launched a debate on whether the absence of common rules on European contract law directly or indirectly obstructs the internal market and, if so, to what extent[13]. Interestingly, after presenting 'On European Contract Law', a Communication from the Commission to the Council and the Parliament, the Commission has become less ambitious in adopting uniform private law in the whole of the

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8 *See*: Müller–Graf P.-Ch. 'EC Directives as a Means of Private Law Unification', in: Towards a European Civil Code. (ed.) Hartkamp A. Hesselink M. *et. al*. (Ars Aequi Libri – Nijmegen Kluwer Law International 2004) 77 *et seq*

9 Gerven W. van 'Harmonisation of Private Law: do we need it?' 41(1) *C.M.L. Rev.* (2004) 531

10 See, *e.g.,* Möllers T. 'European Directives on Civil Law. The German Approach: Towards the Re-codification and New Foundation of Civil Law Principles' 6 *ERPL* (2002) 795 *et seq*

11 It should be noted that there are some suggestions that only interested countries could participate in the preparation of the European Civil Code (by drawing parallels with the Economic and Monetary Union of the European Union). Later every interested Member State would be able to opt-in. *See*: Koopmans T. 'Towards a European Civil Code?' 5 *ERPL* (1997) 542

12 *See*: Ciacchi A. C. 'An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies', in: *The Politics of the Draft Common Frame of Reference*, Somma A. ed. (Wolters Kluwer Law and Business, The Netherlands 2009) 3 *et seq*

13 Communication from the Commission to the Council and the European Parliament 'On European Contract Law', Brussels 11.07.2001 Com (2001) 398 Final, para 23

Union[14]. In 2007, for example, the Commission stated that there are currently no plans to propose a European Civil Code[15].

It can be contended that a unified European law of contract is neither necessary nor possible at least at this stage[16]. Moreover, perhaps a realistic solution would be simply to accept that trade distortions arising from divergent legal systems is a lesser evil while the 'European machine is accelerating, producing an ever more confusing amount of supranational rules and thereby extensively affecting the deeper structures of our legal systems'[17]. It is true that there are many arguments in favour of the view that private law should now grow organically without radical interventions from the Union. Even if one agrees that significant obstacles to trade – *e.g.* trade externalities, reduction of transactional, informational asymmetries - created by the rules of private law *de facto* exist, the costs of such approximations seem to be enormous in comparison to the gains of eliminating trade distortions (which are often merely hypothetical) in the Union. Moreover, apart from the issue of legal efficiency, many national governments treat national private law and its terminology as a part of their cultural heritage, which should be saved unchanged no matter what economic or legal gains are achieved by approximating laws[18].

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[14] It would probably be right to assert that any plans to elaborate the mandatory European Civil Code are no longer on the Commission's agenda since publishing the Action Plan 'On a more Coherent European Contract Law' of 12 February 2003. This idea has mostly been endorsed by legal academics, but not by practitioners or businesses.

[15] *See*: Report from the Commission. Second Progress Report on the Common Frame of Reference, Brussels 25.7.2007 COM (2007) 447 final. *Cf.* Council of the European Union. Press release 2863rd Counsel meeting Justice and Home Affairs, Luxembourg, 18 April 2008; European Parliament Resolution of 3 September 2008 on the CFR for European contract law, reference B6-0374/2008.

[16] *See*: Remien O. *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (Tübingen: Mohr Siebeck 2003) 84-7; Wagner G. 'The Economics of Harmonisation: the Case of Contract Law' 39 *C.M.L. Rev.* (2002); Weatherill S. 'Why object to the Harmonisation of Private Law by the EC?' 12 *ERPL* (2004) 633; Legrand P. 'Against a European Civil Code' 60 *M.L.R.* (1997) 44 (for a commentary and criticism of Legrand's arguments see: Zeno-Zencovich V. 'The European Civil Code', European Legal traditions and neo-positivism' 4 *ERPL* (1998) 351 *et seq*); Weir T. 'All or Nothing' 78 *Tul. L. Rev.* (2004) 511; Van Den Bergh V. L. 'The Principles of European Tort Law: The Right Path to Harmonisation?' 4 *ERPL* (2006) 514 *et seq*; Markesinis B. 'Why a Code is not the Best Way to advance the Cause of European Legal Unity' 5 *ERPL* (1997) 519 *et seq*

[17] Rield K. 'The Work of the Lando Commission from an Alternative Viewpoint' 1 *ERPL* (2000) 75

[18] For example, the French Civil Code (Napoleonic Code) is often regarded as the cultural heritage of the French Revolution. This argument is relevant for England as well. *Cf.* Lando O. 'On Legislative Style and Structure' 4 *ERPL* (2006) 476; Basedow J. 'Das BGB im künftigen europäischen Privatrecht, der hybride Kodex – Systemsuche zwischen nationaler Kodifikation und Rechtsvergleichung', 200 *AcP* (2000) 445 *et seq*