

# Opinio Juris in Comparatione

*Op. J. Vol. 2/2009, Paper n. 5*

*Studies in Comparative and National Law*  
*Études de droit comparé et national*  
*Estudios de derecho comparado y nacional*



## FIFTEEN YEARS OF EUROPEAN PRIVATE LAW

AT THE OCCASION OF THE 15TH BIRTHDAY OF THE  
TRENTO/TORINO COMMON CORE OF EUROPEAN  
PRIVATE LAW PROJECT

by

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**Suggested citation:** E. Hondius, *Fifteen Years of European Private Law, At the occasion of the 15th birthday of the Trento/Torino Common Core of European Private Law project*, *Op. J.*, Vol. 2/2009, Paper n. 5, pp. 1-20, <http://lider-lab.sssup.it/opinio>, online publication October 2009.

**FIFTEEN YEARS  
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AT THE OCCASION OF THE 15<sup>TH</sup> BIRTHDAY OF THE  
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Ewoud Hondius<sup>♦</sup>

**Abstract**

Fifteen years ago, the Common Core of private law project was founded in Trento. Three years ago the project moved to Torino. This paper seeks to compare the outcome of the project, as compared with other projects and ventures in the realm of European Private Law. Rather than on the substantive issues, it focusses on the contributions of the various projects to the infrastructure of European private law.

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<sup>1</sup> This paper was presented at the fifteenth annual meeting of the Common Core of European Private Law project in Torino on 26 June 2009. The author is grateful to the two anonymous peer reviewers of *Opinio Iuris* for their critical remarks as to the original manuscript. This paper does partially build on previous publications, such as the author's chapter 'The Genesis of the Principles of European Contract Law and of Modern Dutch Private Law', in: Danny Busch *et al.*, *The Principles of European Contract Law and Dutch Law*, The Hague: Kluwer/Nijmegen: Ars Aequi, 2002, p. 13-27.

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## 1. Introduction

This year marks the fifteenth birthday of the Common Core of European Private Law project. It is an excellent occasion to assess what this project and other projects in the area of European Private Law have achieved over this period. In this paper I want to explore the results of sixteen projects or ventures. I will start with the European Commission, which in the view of many should have been the natural starting point of harmonisation projects in Europe - but has only recently, in 2001, taken up this challenge (Nr. 2). I will then turn to two courts which have largely contributed to laying the groundwork for a European Private Law: the European Court of Justice (Nr. 3) and the European Court of Human Rights (Nr. 4). Treaties are the traditional means of harmonisation or even unification of the law. There are several treaties in the area of private law which would merit consideration, but there is one which plays a pivotal role - and by chance is globally oriented rather than restricted to Europe - : the Convention on the International Sale of Goods (CISG) (Nr. 5).

We then arrive at a number of academic projects rather than public ventures. The best known of these are Ole Lando's Principles of European Contract Law (PECL) (Nr. 6) and Joachim Bonell's Principles for International Commercial Contracts (Unidroit Principles) (Nr. 7). Other persons or institutions involved in such projects to be dealt with in this paper are Giuseppe Gandolfi's *Académie des privatistes* (Nr. 8) and Christian von Bar's Study Group for a European Civil Code (Nr. 9). More specific aims are pursued by Reiner Schulze's and Hans Schulte-Nölke's Acquis group (Nr. 10), Helmut Koziol's and Jaap Spier's Tilburg group and later the European Centre for Tort and Insurance Law (ECTIL) (Nr. 11), Katharina Boele-Woelki's Commission on European Family Law (CEFL) (Nr. 12) and the combined efforts of the *Société de législation comparée* and the *Association Henri Capitant* (Nr. 13).

I will further discuss four more purely academic projects, which do not purport to directly prepare the way for European legislation: Stefan Grundmann's Society of European Contract Law (SECOLA) (Nr. 14), Walter Van Gerven's *Ius commune* casebooks project (Nr. 15), the book Towards a European Civil Code (Nr. 16) and Mauro Bussani's and Ugo Mattei's Common Core project (Nr. 17). Finally, before arriving at some conclusions (Nr. 19) I will analyse a project which does *not* (yet) exist but has captivated the minds of several of our colleagues: a European Law Institute (Nr. 18).

I am fully aware of the fact that the number of projects to be assessed could easily be doubled or trebled. On the institutional level, there are more official agencies which deal with harmonisation, such as Strasbourg's *Commission Internationale de l'Etat Civil* for instance. Treaties galore: the area of transport law is rich with examples. The same is true for the various sets of Principles. Lando and Bonell have started a real fashion. Various *Principles of ...* have by now been published and the series has not yet ended. In 2003 for instance a group of academics published *Principles of European Insolvency Law*<sup>2</sup>. According to one of the editors the principles (!) used in drafting such principles should be the following: 'draft in the singular, use the present tense, use gender-neutral language, be simple, avoid Latin and don't use cross-references'<sup>3</sup>. Other examples of the results of such academic projects are the *European*

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<sup>2</sup> W.W. McBryde, A. Flessner, S.C.J.J. Kortmann (eds), *Principles of European Insolvency Law*, 2003. See Bob Wessels, Principles of European insolvency law - <[www.iiiglobal.org](http://www.iiiglobal.org)>.

<sup>3</sup> W.W. McBryde, *The Principles of European Insolvency Law: an exercise in drafting*, (2004) 8 *Edinburgh Law Review* 111-114.

*Insurance Contract Law* group<sup>4</sup> and Bas Kortmann's *European Trust Law* group<sup>5</sup>. Of special interest are the *ALI/Unidroit Principles of Transnational Procedure* which span the Atlantic Ocean<sup>6</sup>. Outside Europe, of the various regional efforts at harmonisation, those of the *Organisation pour l'harmonisation du droit des affaires en Afrique (OHADA)* seem particularly interesting.

A survey of various European projects can be found in the PhD thesis of Kristina Riedl<sup>7</sup>. This author, having first analysed the shortcomings of the European legislative process then discusses 'Das Harmonisierungspotential der Rechtswissenschaft' (the harmonisation potential of legal science). She looks into the *ius commune*, the conflict between Thibaut and Savigny, the *lex mercatoria*, the American harmonisation of private law, the Hague Conference for Private International Law and CISG<sup>8</sup>. But the core of her book is the analysis of the 'Bestandteile einer sich entwickelnden "Wissenschaft vom Europäisierungsprozess", die zu einer ausübenden Mitspielerin im europäischen Mehr-Ebenen-Regime herangewachsen ist' (the components of a developing science of a Europeanisation process, which has grown into a participating player in the European multi-layer regime): the Lando Commission, the Unidroit Commission, the Gandolfi group, the *casebook* project, the Spier/Koziol group, ECTIL, the Trento project, the European Tort Law project, the Study Group on a European Civil Code, SECOLA, the Commission for European Family Law, the *acquis* group, the *social justice* group and the literature on *ius commune*<sup>9</sup>.

My comparison will lead to an assessment, which will not be based on the intrinsic value of the various projects, but rather on their contribution to the infrastructure of the harmonisation process. Even with this restriction, a further limitation is that I will limit myself to two basic questions: what are the single most positive and the single most negative contribution of the project concerned to the harmonisation process. It is hoped that adding the positive and negative elements will give us some idea of the ideal European harmonisation project.

An analysis such as this one is by no means original. By way of example I refer to a paper published by Mark Van Hoecke in a little known *Festschrift* for Maastricht University's Nico Roos<sup>10</sup>. On the basis of what they mention on their websites, the author analyses the purposes of some of the more important academic projects: Lando, *ius commune*, Trento, Von Bar, *acquis*, Family Law, Pavia, Spier<sup>11</sup>. Nor is it the only possible way of comparing the projects. Another way would have been to count the number of quotations, or to assess the

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<sup>4</sup> See Helmut Heiss, The Common Frame of Reference (CFR) of European Insurance Contract Law, *European Journal of Commercial Contract Law* 2009, p. 2-11.

<sup>5</sup> D.J. Hayton, S.C.J.J. Kortmann, H.L.E. Verhagen (eds), *Principles of European Trust Law*, The Hague: Kluwer Law International - W.E.J. Tjeenk Willink, 1999, 215 p.

<sup>6</sup> Frédérique Ferrand, in: Loïc Cadiet, Guy Canivet (eds), *1806 - 1976 - 2006. De la commémoration d'un code à l'autre: 200 ans de procédure civile en France*, Paris: Litec, 2006, p. 277-299; Michele Taruffo, 'Harmonizing civil litigation in Europe?', in: Fabrizio Cafaggi, Horatia Muir-Watt (eds), *Making European private law/ Governance design*, Cheltenham: Elgar, 2008, 355 p. 46-63.

<sup>7</sup> Kristina Riedl, *Vereinheitlichung des Privatrechts in Europa/Wissenschaftliche Initiativen im Prozess der Privatrechtseuropäisierung*, PhD European University Institute 2003, Baden-Baden: Nomos, 2004, 285 p.

<sup>8</sup> Riedl, *o.c.*, p. 128-161.

<sup>9</sup> Riedl, *o.c.*, p. 247.

<sup>10</sup> Mark Van Hoecke, De ideologie van een Europees burgerlijk wetboek, in: F. Van Dun e.a. (eds), *Over leven en recht/Opstellen aangeboden aan Prof. mr. N.H.M. Roos*, Maastricht: Shaker, 2004, p. 36-65.

<sup>11</sup> Van Hoecke criticises the projects for focussing almost exclusively on motives which may legitimise legislative intervention: 'Men concentreert zich bijna uitsluitend op motieven die een interventie van de Europese instellingen kunnen legitimeren - wat in feite een positivistische, geen verklarende benadering is'.

personalities of the leading figures, both of which methods have been used by Sir Basil Markesinis and Jörg Fedtke in their engaging book on Comparative Law<sup>12</sup>.

This is not a wholly impartial analysis. I am or have been involved in the projects referred to in Nrs. 6, 9, 14, 15, 16 and 17.

## *2. European Commission*

### *(a) Brief sketch*

A first and very important actor in the harmonisation process of European Private Law is the European Commission. In July 2001, the Commission published a Communication on Contract Law, which has been the subject of much academic discussion<sup>13</sup>. The project has gradually been watered down, until it now may - or may not, that is the question - result in a Common Frame of Reference. The Commission is at the moment considering how to proceed on the basis of a *Draft common frame of reference*, which was submitted to the Commission by a joint network of academics by the end of 2008<sup>14</sup>.

Before this, the Commission has of course issued, with the European Council, a large number of directives and regulations covering various areas of private law, such as anti-discrimination law, company law, consumer law, environmental law, etc.<sup>15</sup> The positive element of this exercise is that of the various EU instruments, the directive is a very effective one, which at the same time leaves Member States some discretionary power to model the legislative end result in the traditions of their own legal system. The directives are increasingly of a full harmonisation nature - something which many academics deplore, but which some - including this writer - applaud (provided of course that the contents of the directive are in good order). There are two features which merit an explanation: why is a directive to be preferred over the regulation. And why is full harmonisation better than minimum harmonisation?

### *(b) The instrument of the directive*

Some academics consider a regulation to be a better instrument for the harmonisation of private law than a directive. The discussion has recently arisen again over the proposed directive on consumer rights<sup>16</sup>. A regulation undoubtedly has some advantages over a directive, such as the total uniformity in the European community and the fact that transposition is not necessary. The latter argument however is also a major advantage of the directive, which leaves Member States a measure of discretion to use the terminology and tradition of their own law when implementing rules imposed by Brussels. An example is the

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<sup>12</sup> Sir Basil Markesinis, Jörg Fedtke, *Engaging with foreign law*, Oxford: Hart, 2009, 452 p.

<sup>13</sup> Stefan Grundmann, Jules Stuyck (eds), *An academic green paper on European contract law*, The Hague: Kluwer Law International, 2002, 432 p.

<sup>14</sup> Christian von Bar, Eric Clive, Hans Schulte-Nölke (eds.), *Principles, definitions and model rules of European private law/Draft common frame of reference (DCFR) outline edition*, München: Sellier, 2009, 642 p. (publication of a six-volume text with comments is expected in October 2009).

<sup>15</sup> See Peter-Christian Müller-Graff, EC Directives as a Means of Private Law Unification, in: Arthur Hartkamp et al. (eds), *Towards a European Civil Code*, 3d ed., Alphen aan den Rijn: Kluwer/Nijmegen: Ars Aequi Libri, 2004, p. 77-100.

<sup>16</sup> See Willem van Boom, De ontwerprichtlijn Consumentenrechten: gemaakte keuzes en gekozen onderbouwing, in: M.W. Hesselink, M.B.M. Loos (eds), *Het voorstel voor een Europese richtlijn consumentenrechten/Een Nederlands perspectief*, The Hague: Boom, 2009, p. 15, 19.

case of Sweden which because of the Nordic tradition was allowed to keep the black list of clauses considered unfair outside the legislative text: mention in the explanatory memorandum was considered sufficient<sup>17</sup>. A less convincing example is that of the remedy for the unfairness of contract terms. In the Netherlands, the remedy chosen for reasons of integrating the directive on this subject into the Dutch Civil Code was that of avoidability, although the text of the directive - including the Dutch version - clearly speaks of 'not binding'. As a result of the judgment in the *Océano* case<sup>18</sup>, the Dutch had a hard time to find a means to bring their legislation in line with the directive<sup>19</sup>.

*(c) A plea for full harmonisation*

Should a directive leave Member states the freedom to introduce further reaching measures than the directive imposes? So far, almost all consumer protection directives have provided this possibility. The directives on product liability<sup>20</sup> - which in Brussels is not considered consumer protection, witness its exclusion from the injunctions directive<sup>21</sup> - and on trade practices<sup>22</sup> are among the few which prescribe total harmonisation.

Some time ago, the European Commission announced the intention to focus on full harmonisation<sup>23</sup>. This announcement has met with divided reactions. Consumers and their organisations as well as most academics reacted with hostility. Trade & industry, and in particular small and medium enterprises were in favour, which is quite obvious because full harmonisation would make it easier to make use of the European common market. At present, such enterprises will have to find out about the law of each jurisdiction where they intend to export to. One never knows whether Finland and Malta have perhaps enacted statutes which are far more consumer-friendly than what they are used to at home. Under a full harmonisation regime such enquiries will not be needed any longer.

It is usually alleged that consumers are better off with minimum harmonisation. I would challenge this point. Let us for the sake of argument accept that Finland and Malta offer a higher level of consumer protection than Germany. Even if a German consumer would go shopping in Finland or Malta and presumably would profit from the higher level of consumer protection there, how would he be knowledgeable about these rights? From the point of view of the Finnish or Maltese consumer: how would they know that German law provides protection at a lower level? In other words: full harmonisation may also benefit consumers. Provided indeed that the level of protection required by Article 153 EC Treaty has not been reduced to nothing.

*(d) A drawback of EU legislation: how to look behind the curtain*

A major drawback of the involvement of the EU is the lack of transparency of European legislation. For interpretation of directives and regulations we only have the recitals at our disposal and even these do not always help. What on the national level are the *travaux préparatoires* which may be very helpful, simply does not exist on the European level. At

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<sup>17</sup> European Court of Justice 7 May 2002, C-478/99.

<sup>18</sup> European Court of Justice 27 June 2000, C-240/98.

<sup>19</sup> See also ECJ 4 June 2009, *Pannon GSM Zrt. v Erzsébet Sustikné Györfi*, C-243/08.

<sup>20</sup> Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985, L 210.

<sup>21</sup> Directive 98/27/EC on injunctions for the protection of consumers' interests, OJ 1998 L 207.

<sup>22</sup> Directive 2005/29/EC on unfair commercial practices, OJ 2005, L 149.

<sup>23</sup> The creeping way in which the Commission has done so is set out in detail by Hans Micklitz, in: Geraint Howells, Reiner Schulze (eds), *Modernising and harmonising consumer contract law*, München: Sellier, 2009, p. 47-83.

present it has been up to academics such as Hans Micklitz<sup>24</sup> and Leone Niglia<sup>25</sup> to provide us with some insight in the history: 'to look behind the curtain'.

### *3. The European Court of Justice's Quest for Principles*

The EC Treaty entails very few provisions which empower the European agencies to come up with private law rules. And yet the European Court of Justice has been able to develop various general principles<sup>26</sup>, which are also relevant to private law. An example is the case of *Masdar (UK) Ltd v Commission of the European Communities*<sup>27</sup> on unjustified enrichment. This development has long remained unnoticed by students of private law. But in recent times, this has changed. Two authors in particular stand out: Arthur Hartkamp and Axel Metzger.

In his '*Vermogensrecht algemeen/Europees recht en Nederlands vermogensrecht*' (Patrimonial law in general/European law and Dutch Patrimonial Law), Hartkamp reminds us of the large number of general principles of community law which the European Court of Justice has developed in its case-law<sup>28</sup>. '*Doorgaans zijn deze van constitutionele, institutionele of administratiefrechtelijke aard*' (Usually these are of a constitutional, institutional or administrative nature), he writes in Nr. 6, but in Chapter III he distinguishes several communitarian principles of private law, such as the principle, which opposes keeping an unjustified enrichment<sup>29</sup>, abuse of law<sup>30</sup>, good faith<sup>31</sup> and estoppel<sup>32</sup>.

In his *Habilitatsschrift* on the importance of legal principles for European private law<sup>33</sup>, Axel Metzger analyses the notion of legal principles, as well as the system of European private law, the functioning of legal principles in the United States of America, the importance of comparative law and legal history, the case-law of the European Court of Justice, the legal principles of Public International Law and the *lex mercatoria*.

Metzger starts his analysis with a search for the concept of legal principles. Dworkin and Alexy oppose 'principles' and 'rules': '*Die Regel habe im Gegensatz zum Prinzip eine Alles-oder-Nichts-Wirkung (...). Prinzipien seien dagegen Gründe für eine Entscheidung, ohne dass sie eine bestimmte Entscheidung erzwingen würden*'<sup>34</sup>. We find these ideas already in Paulus' *Non ex regula ius summat, sed ex iure quod est regula fiat*<sup>35</sup>. The *Principles of European Contract Law (PECL)* conform well with the theory of authors such as Boulanger and Coing, who argue that principles should have a high level of abstraction<sup>36</sup>. A third school according to Metzger is that of Canaris and MacCormick, who see the formation of legal principles as

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<sup>24</sup> Hans Micklitz, 'The targeted full harmonisation approach: looking behind the curtain', in: Geraint Howells, Reiner Schulze (eds), *Modernising and harmonising consumer contract law*, München: Sellier, 2009, p. 47-83.

<sup>25</sup> Leone Niglia, *The Transformation of Contract in Europe*, PhD European University Institute, The Hague: Kluwer, 2003, 235 p.

<sup>26</sup> Takis Tridimas, *The General Principles of EU Law*, 2d ed., Oxford: University Press, 2006, 720 p.

<sup>27</sup> ECJ 16 December 2008, C-47/07.

<sup>28</sup> A.S. Hartkamp, *Mr C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Vermogensrecht algemeen/Europees recht en Nederlands vermogensrecht*, Deventer: Kluwer, 2008, 196 p.

<sup>29</sup> Hartkamp, *o.c.*, Nr. 105.

<sup>30</sup> Hartkamp, *o.c.*, Nr. 106.

<sup>31</sup> Hartkamp, *o.c.*, Nr. 107.

<sup>32</sup> Hartkamp, *o.c.*, Nrs. 108-110.

<sup>33</sup> Axel Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, Habilitationsschrift* Hannover 2008, Tübingen: Mohr, 2008, 622 p.

<sup>34</sup> Metzger, *o.c.*, p. 14.

<sup>35</sup> Metzger, *o.c.*, p. 16.

<sup>36</sup> Metzger, *o.c.*, p. 17.

'aus mehreren gesetzlichen Vorschriften ein gemeinsamer Grundgedanke gewonnen, und diesem wird dann der Charakter eines allgemeinen Rechtsprinzips zugesprochen'<sup>37</sup>. Bydlinski focusses yet on something different by viewing legal principles as 'Bindeglied zwischen Recht und Moral'<sup>38</sup>. Metzger concludes that a principle is a notion where not the contents but the procedure are the determining element: 'Ein allgemeiner Rechtsgrundsatz ist eine Rechtsnorm, welche nicht oder nicht vollständig von den Rechtsregeln der betreffenden Rechtsordnung anerkannt ist und welche von internen, "externen" (insbesondere ausländischen) und/oder historischen Rechtsregeln im Wege der Induktion abgeleitet wird'<sup>39</sup>. How may the bindingness of legal principles be explained: by way of legislation, case-law, tradition? As none of these, suggests the author: 'Allgemeine Rechtsgrundsätze lassen sich nur schwer in die herkömmliche Rechtsquellenlehre integrieren'<sup>40</sup>.

Metzger then mentions 'rechtsordnungsübergreifende Grundsätze', such as the principles developed by the *Commission on European Contract Law* (Lando), the *Study group on a European Civil Code* (Von Bar), *UNIDROIT* (Bonell), the *Académie des privatistes européens* (Gandolfi), the *European group on tort law* (Spier/Koziol), the *Common core of European private law* (Trento), the *Commission on European family law* (Boele-Woelki), the *Project group restatement of European insurance contract law* (Reichert-Facilides) and the *International working group on European trust law* (Kortmann). In the third place there are 'überhistorische Rechtsgrundsätze', of which the author presents a succession case of the French *Cour de cassation* as an example<sup>41</sup>.

The development of principles of European private law by the European Court of Justice has been very important for laying the foundations of a European private law. There is but one drawback. The status of answers to prejudicial questions is problematic. It is unclear whether the Court embraces the French legal tradition, where the answers to prejudicial questions have a statute-like quality - with the disadvantage that whenever new cases arise the Court has to retract from its original position - or as in common law jurisdictions is limited to the case at hand.

#### 4. The other European court: for human rights

As has the ECJ, the European Court of Human Rights in Strasbourg has developed a whole range of principles to deal with human rights infringements. The extremely broad range is demonstrated by the case of Maurice and Draon, where Article 1 of the First Protocol to the European Convention of Human Rights was used in the realm of medical liability: by taking away retro-actively the rights of handicapped children under the Perruche case<sup>42</sup>, the French legislature had infringed the property rights of these children<sup>43</sup>. This teaches us that through a dynamic interpretation - let US Supreme Court Justice Scalia not read this - private law can be established from scratch. The obvious drawback of this is that it also makes for some uncertainty.

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<sup>37</sup> Metzger, *o.c.*, p. 19.

<sup>38</sup> Metzger, *o.c.*, p. 23.

<sup>39</sup> Metzger, *o.c.*, p. 26.

<sup>40</sup> Metzger, *o.c.*, p. 107.

<sup>41</sup> D. 1978, Jur. 505 note Lindon.

<sup>42</sup> *Cour de cassation (Assemblée plénière)* 17 November 2000, *Dalloz* 2001, Jur. 332, *JCP* 2001, II, 10 438 (note François Chabas).

<sup>43</sup> *Draon v France* (Nr. 1513/03) and *Maurice v France* (Nr. 11810/03) of the Grand Chamber of the European Court of Human Rights, 6 October 2005.



### *5. CISG: success or failure*

The CISG has been successful on a number of counts. First, it has now been ratified by some seventy states, representing more than two thirds of world trade. Second, it has led to a considerable body of case law which is easily accessible. Third, CISG has been emulated on the regional level (the non-conformity notion was taken over in the European directive on consumer sales) and in various national states (such as Germany and the Netherlands). This, by the way, means that commercial sales are now harmonised in 23 out of 27 member states of the European Union. Fourth, CISG shows that it is possible to bridge cultural, economic and legal differences which exist between civil law and common law, capitalist and socialist states, and developing and industrial nations. Fifth, a substantive solution seems to provide more certainty than an approach by private international law (Rome I). Sixth, the CISG has six official languages (some would rather consider this a failure). Seventh, there is an excellent data-base of CISG decisions and arbitral awards.

The CISG also has a number of failures. The main failure is that business interests often opt-out. Many CISG cases only reach the court, because the parties concerned were simply unaware of the existence of CISG at the moment when they could have opted out. Second, one major trading power, the United Kingdom, is still missing (Japan is joining shortly). Third, the text of CISG is becoming slightly obsolete already. It has no provisions for standard contract terms (battle of the forms) or for contracts concluded by fax or e-mail. And the procedure to change CISG is extremely cumbersome. Fourth, there is no court of final instance (but there is a good data-base). Fifth, CISG leaves open some important questions, such as whether attorney's costs are included (Zapata case). Sixth, the CISG has six official languages (some would rather consider this an advantage). Seventh, many states have made reservations.

In keeping with my promise I shall select one positive and one negative element. The positive element is that CISG demonstrates that a global regulation of a major part of private law, notwithstanding conflicts between North and South, East and West, Common and Civil Law, is possible.

The negative contribution of CISG surely is the lack of interest of trade and industry in the whole endeavour, a lack of interest which I find hard to explain. Take a sales contract between a Chinese and an American firm. When Chinese law is to be applied, the American company will mistrust the implications of the contract, whereas the Chinese on their turn will mistrust American law with its huge compensations for damages. What is easier than to revert to a neutral system such as CISG? I am aware of the fact that such rational arguments have failed so far to convince business persons, who rather remain committed to old and obsolete traditions<sup>44</sup>.

### *6. Lando's pride: the PECL*

The story is well known. After a symposium on harmonisation of private international law in the European Union, held in 1974 in Copenhagen, a dinner party was given in Copenhagen's amusement park Tivoli. There, Ole Lando, Professor of private international law at the Copenhagen Business School, had a brainwave: in order to integrate the common market

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<sup>44</sup> André Janssen, Olaf Meyer (eds), *CISG methodology*, München: Sellier, 2009, 395 p.

instead of harmonising private international law in Europe, why not harmonise substantive law. At the time there was considerable strife between those who advocated harmonisation of private law and the partisans of private international law<sup>45</sup>. No longer is this the case. Even the greatest advocates of substantive harmonisation admit that in non-harmonised questions private international law will have to provide the clue. Private international law adherents on the other hand have come to recognise that, wherever possible, harmonisation of substantive law is the better way. Ole Lando discussed his idea with Dr Hauschild, a senior civil servant with the European Commission to whom he gallantly attributed the idea<sup>46</sup>, and set out to work.

He found academic support for the idea of harmonisation of substantive law at a symposium organised by the European University Institute in Florence in 1976<sup>47</sup>. Once the preparatory work was done, a Commission was formed, consisting of academics, preferably with some experience in practice, one or two each from the Member States of the European Union. In the early 1980's, the Commission started work. Two or three times annually, the twenty-odd members would meet in various university towns all over Europe. In order to speed up the process, the subjects were split in two. Performance, Non-Performance and Remedies were to be handled first; Formation, Validity, Interpretation, and Content and Effects would come later. In a later stage, Authority of Agents was added.

Jurisdictions covered are those represented in the European Union, which means that in the case of the United Kingdom both England and Scotland were represented in the Commission. The enlargement of the Union over the past twenty years is reflected in the addition of new members from the new Member States. Earlier, observers were invited from some of the candidates for membership in Central and East Europe. Over time, because of personal circumstances there have been some changes in membership. Of the original twenty members only five were still active in the Commission at its final meeting.

The major contribution which Lando has brought to the harmonisation process is that he demonstrates that it is possible for a private group of academics to make a useful contribution. The negative element is that a group which is tied to one person is bound to be temporal.

#### *7. Bonell's threat: competition from Rome.*

By a strange coincidence, the Commission on European Contract Law was not the only group to embark on a project of harmonisation. In Rome, the Institute for the Unification of Law (UNIDROIT) started a very similar project, which in 1994 resulted in the publication of Principles for International Commercial Contracts<sup>48</sup>. There has always been some competition between the two projects, probably for the better. But the most striking conclusion from

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<sup>45</sup> To such an extent, that when in the late 1960's the Dutch government had to make a choice between ratifying either the 1964 Hague Conventions on - substantive - International Sale of Goods (the predecessors of the Vienna Sales Convention - CISG) and the 1955 Hague Convention on the Conflict of Law relating to Sales of Goods, this gave rise to a very sharp debate between the two schools within the Netherlands (the partisans of substantive harmonisation won).

<sup>46</sup> Preface to the Principles (p. xi).

<sup>47</sup> Ole Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, in: Mauro Cappelltti (Ed.), *New Perspectives for a Common Law of Europe*, Leyden: Sijthoff, 1978, p. 267-288.

<sup>48</sup> *Principles of International Commercial Contracts*, Rome: UNIDROIT, 1994, also available in many other languages, including Arabic, Dutch, French, German, Italian and Spanish. See M.J. Bonell, *A New Approach to International Commercial Contracts/The UNIDROIT Principles of International Commercial Contracts*, The Hague: Kluwer, 1999, and the book edited by Vogenauer and Kleinheisterkamp, referred to below.

a comparison is their similarity. Not only are the solutions adopted often the same or similar, the very choice of subjects dealt with, the style of drafting and the order of the chapters are all very much alike. This is in itself not so strange, if only because of the personal unions - at least five members served on both Commissions - and because the needs of commerce in Europe (PECL) and the world at large (PICC) are almost identical. Two formal points on which the two sets of Principles differ relate to their scope of application. The UNIDROIT Principles cover only commercial contracts, whereas the PECL deal with all contracts, including consumer transactions and private contracts. An obvious difference is that the Lando Principles only cover (Western) Europe, whereas UNIDROIT has a global scope of application. This geographical feature does perhaps explain while the PECL's highly acclaimed system of national Notes could not work in the case of UNIDROIT.

On one point, the UNIDROIT Principles have at least initially met with more success than PECL: UNIDROIT and the President of its Working Group, Michael Joachim Bonell, have always succeeded in having the better publicity. This, and the fact that in the end the UNIDROIT Principles were published first, may explain the apparent edge which they still have with regard to their practical application. Indeed, there is a growing number of arbitral awards based on the Principles for International Commercial Contracts, which have also influenced new legislation in Central and Eastern Europe<sup>49</sup>.

But fortunes may change. It was the Study group for a European Civil Code (the Von Bar commission) which used the PECL as the basis for its Draft Common Frame of Reference. The PECL suddenly found itself on a path of everlasting glory, serving as the possible foundation for a European Contract Code. In this project there was no room for the globally oriented PICC. PECL had equalised the score, even if the prospects of imminent adoption of a European Code seem gloomy.

Recently, however, the PICC have regained the lead. This time, the combined efforts of Stefan Vogenauer, Jan Kleinheisterkamp and Oxford University Press have provided the UNIDROIT Principles with a Commentary which will boost its importance. The *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*<sup>50</sup> is comparable to Bianca and Bonell's Commentary of the CISG in the late 1980s<sup>51</sup>. Like the CISG Commentary, it is an article by article comment, written by an international team of researchers, coming from England, France, Germany, the Netherlands, South Africa, Switzerland, Turkey and the United States. But this does not tell the full story. The authors do not hesitate to inform the reader about the background of the principal actors<sup>52</sup>.

But basically it is the Commentary itself which will be most useful. And, occasionally, controversial. What to say for instance about Stefan Vogenauer's suggestion that in case of linguistic discrepancies between the five official version, it is appropriate to accord more

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<sup>49</sup> See for Lithuania: Valentinas Mikelenas, Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience, *Revue de droit uniforme* 2000, p. 243-260.

<sup>50</sup> Stefan Vogenauer, Jan Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)*, Oxford: University Press, 2009, 1319 p.

<sup>51</sup> C.M. Bianca, M.J. Bonell (eds), *Commentary on the International Sales Law/The 1980 Vienna Sales Convention*, Milan: Giuffrè, 1987, 886 p.

<sup>52</sup> This for instance is the information given as to Joachim Bonell: 'The Chairman of the Working Group was Professor Michael Joachim Bonell, an expert in commercial and comparative law. Bonell, a native of South Tyrolia, had been a consultant with UNIDROIT since 1978 and a member of the Italian delegation to the Diplomatic Conference for the adoption of the CISG in 1980. He went on to hold chairs at the University of Camerino (1980-1982), the Catholic University of Milan (1983-198), and the University of Rome I (La Sapienza)(since 1986). His appointment as Chairman gave a tremendous boost to the project, and it is fair to say that the PICC are very much the product of his tireless efforts', *o.c.*, p. 8.

weight to the English and, to a lesser extent, to the French version. According to Vogenauer this 'follows from an analogy to Art. 4.7, according to which in the interpretation of multilingual contracts preference is to be given to "a version in which the contract was originally drawn up"<sup>53</sup>.

In general, the Commentary is descriptive, as is the case where Ewan McKendrick discusses the question whether the PICC's provisions on hardship may be used for the purpose of supplementing the CISG (which makes no provision for hardship). Having first observed that there is a gap in the CISG which may justify resort to the PICC, the author then mentions that the predominant view among commentators is that there is no gap on this point in the CISG<sup>54</sup>. In other places, the authors do not, where necessary, refrain from criticism. Thus, having observed that one of the remedies in case of hardship according to the Official Comment to Art. 6.2.3 is renegotiation, McKendrick concludes that it 'is surprising that no express mention is made of these possibilities in the text of Art. 6.2.3 itself'<sup>55</sup>.

It will be difficult for the PECL group to catch up with this work. Difficult, but not wholly impossible.

What can we learn from the PICC? That public relations are of the essence. The drawback is that the Unidroit region is so large that a firm backing of e.g. the EU is missing and that because of the sheer number of jurisdictions covered, PECL's system of Notes is not possible.

#### 8. *The Gandolfi Code: competition from Pavia?*

The 2001 Action Plan of the European Commission must have caused some happy feelings in Pavia. Not only did the European Commission in its Communication mention Lando and Unidroit, it specifically also referred to Gandolfi's Academy of *Privatistes*. Under the supervision of Giuseppe Gandolfi, an *Académie de Privatistes Européens* was founded with the aim of drafting a European Contract Code. Parts I and II of the draft has been published<sup>56</sup>. The drafts are based mainly on Italian Contract Law and on the so-called McGregor Code, a draft bill of the English and Scottish Law Commissions for a common Anglo-Scottish Contract Law<sup>57</sup> (which failed to be successful). The disadvantage of this work is that it being written in French, it is not accessible to a number of European citizens. The advantage is that it being written in French, it demonstrates that English is not the only *lingua franca* in Europe.

Another advantage is the style of the Gandolfi texts, which freely mention what were the options for the group and which possibility was chosen for what reasons.

#### 9. *Lando's legacy: the Study Group for a European Civil Code*

One of the weaknesses of the Lando project is that it is very much a one-man effort. At one time it was hoped that Hugh Beale would be the successor once Ole Lando - born in 1922 - would step down, but an appointment as Law Commissioner prevented him from taking over. The Commission on European Contract Law having had its final meeting in

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<sup>53</sup> *O.c.*, p. 149.

<sup>54</sup> *O.c.*, p. 712.

<sup>55</sup> *O.c.*, p. 724.

<sup>56</sup> Giuseppe Gandolfi (ed), *Code européen des contrats/Avant-projet, Livre premier*, Milano: Giuffrè, 2001.

<sup>57</sup> H. McGregor, *Contract code drawn up on behalf of the English Law Commission*, Milano/London, 1993.

Copenhagen in February 2001, the question may be raised how to handle practical issues such as copyright. For this purpose, a four-member commission was appointed, consisting of Eric Clive (Scotland), Ole Lando (Denmark), André Prüm (Luxembourg) and Clause Witz (France)<sup>58</sup>. More important, another group presented itself - and been accepted - as a spiritual heir to the Lando Commission.

In 1997, under the then Dutch presidency of the European Union, a conference on a European Civil Code was held in Scheveningen, the seaside resort of The Hague. The conference was not in favour of drafting a European Code which would be made binding upon all Member States, but it was precisely that which Christian von Bar now set out to look into. The Study Group which Von Bar set up included several members of the former Lando Commission. Von Bar succeeded to secure sufficient funds to set up a number of teams of young researchers in Germany and the Netherlands<sup>59</sup>.

A major element in the success of the Von Bar group has been the working method, which Christian von Bar had already developed for earlier projects. This consists in hiring a group of some 15 young graduates from various law schools in Europe, representing as many EU member states as possible. These graduates then write on a specific part of the project, but in the meantime also serve as national expert on their own legal system for all other researchers. A group of senior academics controls the outcome. The weakness of the system is that it is in need of much money - the graduates will have to be paid. It also raises the need for much coordination.

The *Study group* has succeeded in publishing Principles for all areas of a Civil Code, excluding Family Law, Company law and Succession<sup>60</sup>. Together, these Principles have served as the basis for the *Draft Common Frame of Reference*.

#### 10. *The acquis of the Acquis group*

The *acquis group*, which is based in Münster and in Torino, is trying to establish a *Restatement of the existing acquis communautaire*<sup>61</sup>. It hopes thereby to provide a countervailing power against the more radical proposals of the *Commission on European Contract Law* (Lando) and the *Study group for a European Civil Code* (Von Bar). This countervailing power may have been needed when the *Draft common frame of reference* was being established.

The very first publication by the group on precontractual links and formation of contract is remarkable for its content and its form. The surprise as for the content is the section on non-discrimination right. The surprise as for procedure, is that the Acquis principles in their comments do discuss internal dissensus within the commission. The first Acquis volume was quite severely criticised for going far beyond its self-proclaimed limited role of stating only existing law<sup>62</sup>.

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<sup>58</sup> The group also served as the Editing Group.

<sup>59</sup> See Christian von Bar, *Die Study Group on a European Civil Code*, in: Festschrift Dieter Henrich, Giesecking, 2000, p. 1-12.

<sup>60</sup> The last volume to be published has been Christian von Bar (ed), *Non-contractual liability arising out of damage caused to another*, München: Sellier, 2009, 1384 p.

<sup>61</sup> Research group on the existing EC private law (Acquis group), *Principles of the existing EC contract law (Acquis Principles)/ Contract I: pre-contractual obligations, conclusion of contract, unfair terms*, München: Sellier, 2007, 311 p.

<sup>62</sup> Nils Janssen, Reinhard Zimmermann, *Restating the Acquis Communautaire? A critical examination of the 'Principles of the Existing contract law'*, 71 *Modern Law Review* 505-534 (2008).

### 11. ECTIL: always on the road

A positive point about ECTIL and the related Spier and Koziol groups is that these groups have not awaited the coming about of the Principles they were striving for, but have published their intermediary achievements - the outcome of questionnaires - straight away. Negative is that the resulting Principles are not always drafted in the King's English. Unfriendly observers have concluded that the Spier/Koziol/ECTIL texts suffer from the fact that they try to express German *Professorenrecht* in English.

### 12. CEFL: all in the family

What may we learn from the European Family Law debate? Perhaps two points, which are difficult to classify as positive or negative. First, it is unquestionable that Family Law in a broad sense - including Law of Persons and Matrimonial Property, and according to some even Inheritance Law - has some highly political overtones. Divorce and marriage between persons of the same gender are but two pieces of contention. This has led to the question whether or not harmonisation of family law is feasible at all: while the answer of the CEFL is in the affirmative, that of a comparative lawyer such as Esin Örücü is not: 'Reality has it however, that the legal systems we looked at in this study are not in line with the CEFL Principles, and certainly not with the "final points"'<sup>63</sup>. It has also led to the question of legitimacy: why are the present members of the Commission commissioned to lay down the future law of Europe.

A second related point is that this Commission has sometimes considered laying down not just one solution, but offering a number of options. The idea is that even if there are three or four options to select, this will reduce the number of systems from 27- to these three or four.

### 13. *Société de législation comparée* and *Henri Capitant*

Two - for some - unexpected participants in the harmonisation debate are the *Association Henri Capitant* and the *Société de législation comparée*. The first mentioned association once had as its aim the 'propagation de la culture juridique française', but has gradually transformed itself into a comparative law organisation. The two organisations have published two volumes as the outcome of their involvement in the project<sup>64</sup>.

In the first place a team, coördinated by Aline Tenenbaum (Université Paris XII), has elaborated ideas on a common terminology<sup>65</sup>. The authors have restricted themselves to an analysis of nine important notions: *contrat, obligation - devoir, acte juridique - fait juridique, règles impératives et ordre public, bonne foi, la faute - le manquement, préjudice, dommages et intérêts - indemnité* and *anéantissement (du contrat ou d'une clause contractuelle)*. That is it. Their book does not deal with legislative styles, nor with notions such as agency, anticipatory breach, mixed contracts, or standard form contracts terms. Which of course does not mean that the elected notions are

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<sup>63</sup> Esin Örücü, in: Esin Örücü and Jane Mair (eds), *Juxtaposing legal systems and the Principles of European Family Law on divorce and maintenance*, Antwerpen: Intersentia, 2007, 269 p.

<sup>64</sup> The two have been combined into a single English language volume: Bénédicte Fauvarque-Cosson, Denis Mazeaud (eds), *European contract law/Materials for a Common frame of reference: terminology, guiding principles, model rules*, München: Sellier, 2008, 614 p.

<sup>65</sup> Guillaume Wicker, Jean-Baptiste Racine (eds), *Terminologie contractuelle commune, Projet de cadre commun de référence*, Paris: Société de législation comparée, 2008, 532 p.

not of major importance. An illustration is the discussion following the *Océano* case as to the distinction between 'non binding', 'void' and 'avoidable'.

The authors give a general picture of their method. First they have analysed the *acquis*: not just the *acquis communautaire* but also what they call the *acquis international* (such as the Principles of European Contract Law and the Vienna Sales Treaty). Then they deal with a number of national jurisdictions, including some from outside the EU (Louisiana). And yet, some readers may have wished a more elaborate exposition of the method followed by the team. What strikes the reader, is that the team is quite fascinated by the equivalence of English and French legal terminology, and to a lesser extent of German and Italian notions, but not in other linguistic versions. The sources quoted are almost all from these four jurisdictions. Other terminological problems, such as the distinction which Austria ('Rechtshandlung') and Germany ('Rechtsgeschäft') make with regard to legal acts, are not analysed.

A second project which the French have undertaken, is nothing less than a revision of the Principles of European Contract Law (PECL)<sup>66</sup>. In undertaking this exercise, they have not worked on the whole set of Principles but only on what they consider the hard core. This means that they have not worked on chapters 1 (General provisions), 10 (Plurality of parties), 11 (Assignment of claims), 13 (Set-off), 14 (Prescription) and 17 (Capitalisation of interest). The aim of the exercise has been a reflection as to the best law possible 'de manière notamment à concilier la liberté et la justice contractuelles et à répondre aux besoins pratiques sans sacrifier la cohérence théorique'<sup>67</sup>. To do so, the PECL were compared with the UNIDROIT Principles, the Vienna Sales Convention, the Gandolfi *avant-projet* and the Catala *avant-projet*. The work was supervised by Guillaume Wicker (Bordeaux) and Jean-Baptiste Racine (Nice).

Although the authors do not state as an explicit goal giving French law a bigger influence in the European debate, this they do achieve in various ways. By way of example the proposal to replace Article 1:102 PECL may be quoted. The proposed new article reads:

**'Article 0:101: Liberté des parties de conclure le contrat**

Chacun est libre de contracter et de choisir son cocontractant.

Les parties sont libres de déterminer le contenu du contrat et les règles de forme qui lui sont applicables.

La liberté contractuelle s'exerce dans le respect des règles impératives'.

When one compares this with the original text of the PECL, one will see that the latter not only establishes mandatory law but also good faith as a term of reference for freedom of contract. This was a compromise between on the one hand the idea that freedom of contract is a foundational principle of contract law, on the other hand the idea of some members of the Commission on European Contract Law that protection of the weak party has also developed as a paradigm of contract law. By taking out good faith, the French have also removed PECL's 'Tröpfen Öl'. From a French point of view, this may be attributed to the traumatic experience with the judicial discretion exercised by French judges in the XVIIIth century, but from a Dutch-German-Scandinavian point of view this is a step backwards. Another example of the impact of the French vision is the re-introduction of the distinction

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<sup>66</sup> Laura Sauton-Laguionie and Frédéric Bujoli (eds), *Principes contractuels communs, Projet de cadre commun de référence*, Paris: Société de législation comparée, Paris 2008, 853 p.

<sup>67</sup> *O.c.*, p. 16.

between 'obligations de moyen' and 'obligations de résultat' which Article 6:103 PECL had removed for being not of major assistance.

On the other hand it must be admitted that the authors have not always defended the position of existing French law. They have for instance agreed with the PECL provisions on hardship and frustration, although these deviate from French case law (*Canal de Craponne*). Not only the contents, also the order of the chapters has been reshuffled by the authors.

#### *14. SECOLA: in saecula saeculorum*

Some years ago, a conference took place in Rome. It was the founding meeting of the Society of European Contract Law (SECOLA). After the end of the Saturday morning reunion, the newly elected President, Stefan Grundmann, who read Art history before becoming a lawyer, organized an on the spot excursion to<sup>68</sup> Rome's Capidoglio. He was so enthusiastic, that at around 4 p.m. some members had to remind him that the participants were getting hungry for their lunch. SECOLA, after its President, has always remained a youthful organisation. Annually, it meets to discuss one specific theme. The papers are usually published in the SECOLA law review: the *European Review of Contract Law*.

A drawback is perhaps the fact that not always are the themes chosen that innovative.

#### *15. Van Gerven's dream: a European thesaurus of cases*

Many human beings have dreams, but not always do dreams become true. One academic whose dreams have – to some extent - become true is Walter Van Gerven. His dream is that once European law students should possess a single thesaurus of landmark cases. At present, every English student knows *Donoghue v Stevenson*, every French student the *Blicke* case, every German student *Caroline von Monaco*. But do they know the landmark cases from other jurisdictions? It is doubtful. Van Gerven has set up a series of casebooks which aim to remedy this situation. Each casebook selects a number of landmark cases, which are then annotated from a perspective of other jurisdictions<sup>69</sup>.

I have personally had the privilege of teaching classes on European Contract Law and European Tort Law on the basis of the respective volumes of the casebooks series, both in Europe (Belgium, Germany and the Netherlands) and the United States (Louisiana). In general this was highly satisfactory. I am not so satisfied with some of the later casebooks however. They seem to have lost the original aim out of sight, and rather appear to wish to become treatises in their own right. This is what we may learn from this project: that the original aims should always be kept in mind and that a rigorous curatorium is necessary.

#### *16. Towards a European Civil Code*

In the early nineteen nineties two law students from the University of Amsterdam traveled thirty five kilometers to the University of Utrecht to submit to two law professors of that university - Arthur Hartkamp and myself - an idea which they had conceived and for which they found little support in their own University. It was the idea to bring about in one volume various essays pertaining to the harmonisation of private law on a European level. Together, the four of us, joined at the time by Tilburg University's Jan Vranken, published a

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<sup>68</sup> *Cour de cassation (civ)* 6 March 1876, *Dalloz* 1876, I, 193.

<sup>69</sup> The earliest one was Walter van Gerven, Jeremy Lever and Pierre Larouche, *Tort Law*, Oxford: Hart, 2000, 969 p.



first edition of 'Towards a European Civil Code' in 1994. In 1998, a second edition was published, in 2004 a third<sup>70</sup> and the fourth edition is expected to come out in 2010. The venture has been a commercial success, partly because of the cooperation between two wholly different publishers. One is the student publishing house *Ars Aequi Libri*, which sells a low-budget edition of the book on the local market. The other is *Kluwer Law International*, a large publisher which markets its expensive edition with the help of its worldwide distribution chain. The advantage of the project is obvious: it makes it easy to organise lectures on European Private Law for university students.

The strong point of this project is that its result, the *Towards* book, makes it possible to bring the discussion of the harmonisation of private law into the classroom. The weak point, I am afraid, is that the content of the book is growing so much, that it may soon have to be turned into a multi-volume encyclopaedia.

### 17. *The Common Core project*

The story of the Common core of European private law project has been told by the two convenors<sup>71</sup>. The very fact that they usually invite outsiders to review critically the results of the project at the beginning of the annual meeting in first Trento and now Torino is a valuable tool to keep the issue of methodology on the agenda<sup>72</sup>. Another positive element of the project is its openness to young scholars, not only intellectually but in the beginning also financially.

A drawback of Trento is that the official output is somewhat limited, when one takes into consideration all the work and finances which go into its research.

### 18. *Towards a European Law Institute?*

We finally arrive at a brief analysis of an institute which time and again has been proposed by colleagues in various European jurisdictions: the European Law Institute. By way of example - there are many more who have written on the subject - I mention Austria's Kristina Riedl<sup>73</sup>, Belgium's Walter Van Gerven<sup>74</sup>, England's Stathis Banakas<sup>75</sup>, France's Anthony Chamboredon<sup>76</sup>, Germany's Christian von Bar<sup>77</sup>, Eva-Maria Kieninger<sup>78</sup>, Stefan Leible<sup>79</sup> and Christoph Schmid<sup>80</sup>, Jim Janssen van Raay from The Netherlands<sup>81</sup> and Switzerland's Franz Werro<sup>82</sup>.

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<sup>70</sup> Arthur Hartkamp *et al.* (eds.), *Towards a European Civil Code*, The Hague: Kluwer/Nijmegen: Ars Aequi Libri, 2004, 847 p.

<sup>71</sup> See Mauro Bussani, Ugo Mattei, The Common Core Approach to European Private Law, 3 *Columbia Journal of European Law* 339-356 (1997/98). See for a tribute to the two founding fathers Rudolf Schlesinger (1909-1996) and Rodolfo Sacco (1923- ) Ugo Mattei in: Annelise Riles (ed), *Rethinking the Masters of Comparative Law*, Oxford: Hart, 2001, p. 238-246.

<sup>72</sup> See for a collection of such essays Mauro Bussani and Ugo Mattei (eds), *The Common Core of European Private Law*, The Hague: Kluwer Law International, 2003, 231 p.

<sup>73</sup> Riedl, *o.c.*, p. 257.

<sup>74</sup> Walter Van Gerven, in: Dirk Heirbaut en Georges Martyn (eds), *Napoleons nalatenschap/Tweehonderd jaar Burgerlijke Wetboek in België - Un héritage Napoléonien/Bicentenaire du Code civil en Belgique*, Mechelen: Kluwer, 2005, p. 423-437.

<sup>75</sup> Stathis Banakas, European Tort Law: is it Possible?, *European Review of Private Law* 2002, p. 363-375.

<sup>76</sup> Anthony Chamboredon, Christoph Schmid, Pour la création d'un "Institut européen du droit"/Entre une unification législative ou non législative, l'émergence d'une science juridique transnationale en Europe, *Revue internationale de droit comparé* 2001, p. 685-708.

<sup>77</sup> Christian von Bar, Ein gemeinsamer Referenzrahmen für das marktrelevante Privatrecht in der Europäischen Union, in: *Festschrift für Erik Jayme*, München: Sellier, 2004, II, p. 1231: 'Die Ideallösung wäre aus meiner Sicht die Schaffung zweier neuer Einrichtungen auf europäischer Ebene: ein European Law Institute und eine European Law Academy. Das European Law Institute müsste als Arbeitspferd agieren, das die

Although I share the ideal that it will be good to bring together the various networks, both public and private, which at present are dealing with European Private Law, there may also be something to be said against the idea. The simple question where a European Law Institute should be located is perhaps sufficient to demonstrate the struggle which may be expected over its establishment. Amsterdam, Berlin, Florence, Leuven, Osnabrück, Paris, Riga, Rome, Saarbrücken and Vienna are but some of the more obvious candidates. It may be more useful to keep the competition sharp by allotting a certain amount of money for legal research, to be solicited by those research groups which have an interest.

### *19. Conclusions*

Fifteen years of working on European private law have taught us a number of lessons, both positive and negative. What are the positive elements? First of all: that a worldwide - and *a fortiori* a Europe-wide - regulation of a major part of private law, notwithstanding conflicts between North and South, East and West, Common and Civil Law, is possible (CISG, Nr. 5). When an instrument is looked for, both the directive (EU, Nr. 2), principles (ECJ, Nr. 3, and ECHR, Nr. 4) and the model law/Restatement (Lando, Nr. 6 and Bonell, Nr. 7) are useful means to provide on the one hand stability and on the other hand discretion to adapt the text to domestic circumstances. These texts need not necessarily be uniform: a Europe of two or even four speeds has been envisaged by CEFL (Nr. 12).

As for the procedure to arrive at a text, the approach of engaging young academics who are both experts for one single part of the project and for the whole of their own legal system, coupled with an assembly of elder academics who overview the work of the young, has proven its worth (Study Group, Nr. 9). Also useful are sharing one's intermediate and preliminary data, as has been the practice of ECTIL and its forerunners (ECTIL, Nr. 11), and allowing participation by every interested scholar (Secola, Nr. 14, Common core, Nr. 17).

The common core project also illustrates the usefulness of remaining committed to the original methodology, while at the same time opening oneself to criticism from outside the own group (Common core, Nr. 17). The Acquis group demonstrates that it is useful to give the reader a full account of the method by which the text was arrived at (Acquis, Nr. 10). Having a multilingual powerbase is also worth the expense (Société de législation comparée and Henri Capitant, Nr. 13). As for the presentation of the manuscript, publication in book form – even in this digital era – is still useful in the classroom (Towards, Nr. 16). The addition of Notes appears useful (Lando, Nr. 6) as does the explanation of the reasons for

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Entwürfe formuliert und die rechtsvergleichende Grundlagenforschung organisiert. (...). Die European Law Academy dagegen wäre als ein permanentes Gesprächsforum der Verantwortlichen zu organisieren' (the ideal solution from my point of view would be the establishment of two new institutes on a European level: a European Law Institute and a European Law Academy. The European Law Institute should be the work horse which drafts texts and organises the necessary comparative law research. (...). The European Law Academy however should be organised as a permanent discussion forum of those responsible).

<sup>78</sup> Eva-Maria Kieninger, Stefan Leible, Plädoyer für einen "Europäischen wissenschaftlichen Ausschuss für Privatrecht, *EuZW* 1999, p. 37-42.

<sup>79</sup> Stefan Leible, Marktintegration und Privatrechtsvereinheitlichung, in: Andreas Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs*, Bern: Stämpfli, 2006, p. 5, 75.

<sup>80</sup> Anthony Chamboredon, Christoph Schmid, Pour la création d'un "Institut européen du droit"/Entre une unification législative ou non législative, l'émergence d'une science juridique transnationale en Europe, *Revue internationale de droit comparé* 2001, p. 685-708.

<sup>81</sup> Press conference European Parliament 27 August 1991.

<sup>82</sup> Franz Werro, Unification of European Private Law: A Question of Cultural Legitimacy, in: Andreas Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs*, Bern: Stämpfli, 2006, p. 109, 112.

selecting one particular solution (Gandolfi, Nr. 8). As for the use in practice, maintaining an active database can be fruitful (CISG, Nr. 5). Finally, Unidroit shows us that public relations are important (Unidroit, Nr. 7).

There are also some negative lessons which these experiences may teach us. Sometimes the original idea of the founder is floundering because subsequent participants in the project have different ideas: thus, the idea of a thesaurus of common cases in European legal education is slowly ebbing away under the pressure of new editing teams, which rather wish to present all materials from every jurisdiction, rather than limiting the work to the landmark cases from a limited number of jurisdictions (Casebooks, Nr. 15).

The debates on Family Law witness the fact that law may be so intertwined with politics, that the legitimacy of the project is questioned (CEFL, Nr. 12). The disinterest of trade and industry in CISG demonstrates that business interests are sometimes simply not willing to commit themselves to novel ideas (CISG, Nr. 5). As for the presentation, some projects don't set out the *travaux préparatoires* (EU, Nr. 2). As for the institute behind the project, some continuity may be useful (Lando, Nr. 6). And finally, the question whether the foundation of a European Law Institute (Nr. 18) will contribute to the *discours juridique* remains to be seen.

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