Towards a European Law – The Contribution of Law Faculties to Reform and Unification of Private Law

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A. Preliminary Remarks

It is an honour, and a great responsibility as well, to be invited to contribute to the first issue of the new *European Journal of Law Reform*. The mounting flood of articles, books, lectures etc. on the subject of unification of law in Europe makes any attempt to add something of interest or value to this subject seem equally audacious and superfluous. Nevertheless, I was encouraged to do so by two observations. First, Switzerland and Germany both achieved unification of their private law around the turn of this century. Their new codes brought about not only unification but also far-reaching reforms. It is interesting to ask whether historical events of this kind might repeat themselves on a European scale, and what means and tools might be used to this end. Secondly, the monumental work of Eugen Huber provokes, and at the same time justifies, the question of what it is that scholars, law professors and law schools could and should contribute towards the international unification of private law in general, and of the law of obligations in particular, which could take place in Europe in the next century – an event which would certainly amount to a fundamental law reform in most countries – and it seems particularly apposite to deal with this

* Professor Dr. Dr.h.c., Director, Institut für Ausländisches und Internationales Privatrecht, Abt. I, Albert-Ludwigs-Universität Freiburg i. Br. The title of this article is, of course, a homage to all those colleagues who have, on various occasions, expressed their favourable views about the movement towards a European Civil Code, *see*, for example, Professor Ewoud Hondius and his many strong arguments and contributions in 'European Contract Law: The Contribution of the Dutch' in *Europäisches Vertragsrecht* (Hans-Leo Weyers (ed.)) (Baden-Baden, 1997), p. 45 et seq., with many references to his various articles and contributions; see also Peter-Christian Müller-Graff and his valuable 'Private Law Unification by Means other than of Codification' in *Towards a European Civil Code* (Arthur S. Hartkamp (ed.)) (Nijmegen, 1994), p. 19 et seq.

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question in a law journal co-edited in Basel, the place where Eugen Huber held a chair and prepared what was to become the uniform law for Switzerland.[1]

I. Pros and cons

The topic of unification or at least harmonization of private law, or – less ambitiously – the law of obligations of the European nations, seems to have divided the community of European jurists into two, increasingly hostile, camps. Apart from the highly controversial question of whether the European Union or the European Parliament do already possess the power to prepare and enact a European Civil Code,[2] the main focus of the controversy is the question whether there should be any unification of private law in Europe at all. As Professor Ole Lando has pointed out at a symposium organized by the law faculty of the University of Florence,[3] this debate is reminiscent of an argument which took place in Germany during the first half of the 19th century between the well-known Heidelberg Professor Anton Friedrich Justus Thibaut and his even more famous Berlin colleague, Friedrich Carl von Savigny. As early as 1814, Thibaut advocated the enactment of a uniform civil

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1 For want of space, it would be preposterous to report here the details of the constitutional development in Switzerland which led to the creation, in 1874, of a federal legislative power for the unification of commercial law and the law of obligations, and later, in 1898, of a similar power for private law in general. The same applies to the author of the Civil Code and the foundation he laid for this impressive code in his *System und Geschichte des schweizerischen Privatrechts* (1896/93). I would like to acknowledge, however, that in the preparation of this article I have derived much valuable information from Hans Merz, 'Fünfzig Jahre Schweizerisches Zivilgesetzbuch' in (1962) *JZ*, at p. 585 et seq.; Peter Liver, *Das Schweizerische Zivilgesetzbuch. Kodifikation und Rechtswissenschaft, Centenarium 1861–1961* (Basel, 1961), pp. 193, 202–210 (as to the discussion whether codification should be attempted at all, and the final rejection of von Savigny's position), pp. 212–213 (as to the influence of legal science, and, in particular, comparative law research on the codification of the ZGB and its significance for a European unification of law), and also his introduction to the *Berner Kommentar*, Vol. I/1 (1962), p. 28. In regard to the Obligationenrecht, *see* Ernst A. Kramer, 'Die Lebenskraft des schweizerischen Obligationenrechts' in (1983) 102 *ZSR*, at p. 241; Hans Merz, *Die Quellen des schweizerischen Obligationenrechts von 1881. Ein Beispiel interner Rechtsvereinheitlichung, Festschrift Konrad Zweigert* (1981), p. 667; Hans Merz, 'Das Schweizerische Obligationenrecht von 1881. Übernommenes und Eigenständiges', *Hundert Jahre schweizerisches Obligationenrecht* (Hans Peter *et al.* (eds.)) (Freiburg, 1982), p. 3.

2 *See* Hondius *supra* at p. 53, referring to the claim that a resolution of the European Parliament of 1989 has already created a legislative power to that effect.

3 Ole Lando, 'Creeping or Codified Unification of European Civil Law with Special Reference to the Law of Contract', paper read at *I principi de diritto Europeo de contratti, tavola rotonda*, 10 May 1997 (as yet unpublished), pp. 1, 8. As to the project of the so-called 'Lando group', backed by the European Parliament, which was meant to pave the way to a European Uniform Civil Code (or a Code of the Law of Obligations) and which has produced as a first result the 'Principles of European Contract Law', *see* Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law: Part I – Performance, Non-performance, Remedies* (Deventer, 1995).

code for Germany which was then divided into about 40 different jurisdictions, while von Savigny in the same year published a manifesto against the very idea, instead favouring a continuous growth and development of the law under the direction of scholars using the principles and structures of Roman law as a foundation for their shared conceptions.[4] Professor Lando, after pointing out the ways in which the situation in Germany in the 19th century, namely its variety of jurisdictions in a loose federation of states, resembles the differences of legal systems which can be found in the European Union of today, quoted from Thibaut's manifesto.

> If there 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 shock that their worst enemies could not advise them worse. Unity 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 to sell their legal secrets and thereby to extort and maltreat the poor foreigners.[5]

The need described so eloquently by Thibaut for the Germany of the 19th century, namely to facilitate the traffic of persons and goods across borders by means of a unified law, obviously applies to the Europe of the outgoing 20th century, too,[6] but resistance and criticism are equally strong or even harsher than that of Thibaut's adversaries: 'to promote the adoption of a European civil code is arrogant,' writes one author,[7] who goes on to state that 'the desire to institute unity ... is totalitarianism, ... a project seeking to reduce the diversity of legal discourses within Europe.' This resistance to unification with its emphasis on the preservation of codes and law-making powers of states which are rather tiny entities when viewed on a global scale echoes, of course, the Swiss debate about a federal legislative power for

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4 *See* Hans Hattenhauer, *Thibaut und Savigny: Ihre programmatischen Schriften* (Munich, 1973), at p. 47: 'Grund zur Kodifikation bestand (für von Savigny) um so weniger, als man etwas besseres zu bieten hatte: aus dem Römischen Recht geborene Rechtswissenschaft. Das Römische Recht in seiner klaren Begrifflichkeit und Systematik, diese scheinbare Mathematik des Rechts, war ihm die ideale Hilfe zur Verbesserung der Verhältnisse im Zivilrecht.' This, of course, refers to von Savigny's work *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814), reprinted in Hattenhauer, p. 95.

5 Thibaut, reprinted in Hattenhauer, *supra* note 4, at p. 33. The elimination of conflict of law questions was a strong motive for the unification of private law in Switzerland, too, *see* A. Egger, *Zürcher Kommentar zum Schweizerischen Zivilgesetzbuch I* (Zurich, 1930, 2nd ed.), Allgemeine Einleitung, No. 19, referring to the damage which may be inflicted upon the reputation of a legal system 'if preliminary issues concerning the applicability of norms block the way to the substantive legal issues'.

6 *See* Ernst A. Kramer, *Europäische Privatrechtsvereinheitlichung* (JBI, 1988), at p. 477 with many references.

7 Pierre Legrand, 'Against a European Civil Code' in (1997) 60 *Modern Law Review*, pp. 53 and 56.

private law in the second half of the 19th century, which in itself was an echo of the debate between Thibaut and von Savigny.[8]

I have to abstain from taking up this fundamental debate for several reasons.[9] First of all, it would be impossible to do justice to all the arguments and convictions (often more or less irrational) which are fielded in this context, such as the fear that sacrificing some of the peculiarities of one's legal system will lead to a loss of cultural identity. Gutteridge, in his comparative law treatise published in 1949, explains this fear as the feeling that by the necessity to give up concepts and structures of domestic law in favour of uniform rules the 'national *amour propre* suffers accordingly'.[10] Since I do not share this fear and am hardly able to understand it, but harbour the opposite conviction that unification or at least harmonization of law is a *must* in Europe, at any rate as far as the law of obligations is concerned, I cannot claim to be neutral in this controversy. However, it is not only this admittedly biased conviction which requires me to abstain from the debate, but also the observation that harmonization and unification of the law of obligations in Europe have already progressed much further than their adversaries admit or take into account. Another reason why I think it is futile for a scholar like myself to intervene in this debate is that in the end it comes down to political and economic questions, the answer to which is dependent primarily on political developments and only marginally on the arguments of law professors: in the end, it was not Thibaut who brought about the unification of law in Germany, but the abolition of customs duties by the so-called *Zollverein* established in 1833, the building of railways, which led to an unprecedented traffic of goods and persons throughout Europe, and also the political and historical developments in Germany in the late 19th century that resulted in the formation of the second Empire and its acquisition of the legislative power required in order to enact a civil code for Germany. In Switzerland, in the debates leading up to the constitutional reform of 1874 as well as in the decisive initiative of the *Schweizerischer Juristenverein* in 1884 which paved the way for the ZGB, it was again the strong arguments and contribution of practitioners who pointed out the need for a unification of Swiss law. It is the public in general and merchants in particular who expect to get rid of the legal fences and hurdles in their personal or commercial communications, and it is politicians who have to respond to these needs by becoming architects and builders of the house of a uniform European law. We, as academics, can help only in so far as we provide the bricks and mortar and, perhaps, some calculations necessary for the statistics, so that, should the

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[8] *See* Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (Tübingen, 1996), at p. 167: 'Föderalismus . . ., der von jeder Erweiterung der Bundeszuständigkeit eine öde Einebnung der lebendigen kantonalen Rechtsvielfalt befürchtete.'

[9] For a fair and balanced report of this debate in the 1980s *see* Kramer, *supra* note 6, at p. 485.

[10] H. C. Gutteridge, *Comparative Law* (Cambridge, 1949, 2nd ed.) at p. 157, quoted from Roy Goode, 'International Restatements of Contract and English Contract Law' in (1997) *Uniform Law Review*, at p. 233, note 7.

necessary political will and power prove to exist, building such a house of European uniform law could be accomplished in as quick, but also as solid a manner as possible.

II. How law faculties can contribute

If one considers the contribution of universities and their law faculties to the process of unification and harmonization of private law in Europe and its possible effectiveness, there are two areas to be mentioned at the very beginning: research and teaching. The intimate relationship between research and teaching is one of the trademarks of universities compared with other institutions of higher education on the one hand and pure research institutes on the other. It is well known that there is interaction between research and teaching, because research is often stimulated by teaching and the necessary dialogue with those who are taught, while only continuous research by teachers themselves will guarantee that the students will be offered the most up-to-date information in the fields they study. With respect to the topic of this article, however, the necessary interaction between teachers and students acquires an additional dimension: in working, as it were, on the bricks and mortar necessary for the construction of a uniform private law in Europe, we are educating the generation of young lawyers who are to participate actively in this construction tomorrow and during the next decades.

But before exemplifying this assertion in detail, some other preliminary remarks have to be added. Even if one does not pretend to be able to offer convincing arguments for preferring this or that path to unification, such as the enactment of a European civil code by a competent legislator, to mention but one of the far-reaching projects mooted by some authors, or a more modest framework in which the contribution of law faculties and scholars could take place, one should in any case remember to reflect what options are at hand for harmonizing and unifying private law in Europe, and what institutions there are to promote possible projects in this context. In doing so, it goes without saying that the EU and its institutions cannot be examined on an exclusive base, but account must be taken of those international institutions beyond the European plane which share the same aims, i.e. whose *raison d'être* is the unification or harmonization of law. Those institutions which have made an impact on law in Europe ought to be mentioned briefly, even though they may, in fact, be playing a wider or even global role.[11]

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[11] *See also* Kramer *supra* note 6, at p. 480.

B. Institutions and Tools

I. Institutions

The most influential organization in this context is probably the United Nation Commission on International Trade Law (UNCITRAL), which was established by the General Assembly of the United Nations by Resolution of 17 December 1966.[12] Without any doubt, UNCITRAL's most significant work so far has been the United Nations Convention on the International Sale of Goods (CISG), which has become not only a kind of universal set of rules for commerce in goods thanks to its ratification, accession, approval or acceptance by about 50 states (including all the Member States of the EU except the UK and Portugal, which means that to this, albeit limited, extent there already exists a European Uniform Sales Law for cross-border transactions in goods), but has also served as a model for national codifications,[13] apart from strongly influencing such projects as the European Principles of Contract Law[14] and the UNIDROIT Principles for International Commercial Contracts.[15] Even the Draft Directive on Consumer Sales presented by the Commission in 1996 refers to the CISG and its basic features.[16] But apart from the preparation and final elaboration of the CISG, UNCITRAL has been involved in numerous other projects which may have far-reaching consequences, such as the

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[12] For the details of the founding of UNCITRAL and of other universal international organizations in this context, *see* the still indispensable work of reference by Jan Kropholler, *Internationales Einheitsrecht* (Tübingen, 1975), at p. 44.

[13] As to the influence on the Scandinavian Sales Laws, *see* Jan Hellner, 'Die Bedeutung des UN-Kaufrechts in Skandinavien', in *Festschrift Karl Neumayer* (Basel, 1997), at p. 151; as to the influence on the Commercial Code of the Czech Republic *see* Jarmila Bednarikova, 'Les réformes législatives en Tchécoslovaquie: la réception est une chose, l'application une autre', in *Osmose zwischen Rechtsordnungen. Berichte des Kolloquiums anläßlich des zehnjährigen Bestehens des Schweizerischen Instituts für Rechtsvergleichung* (Schweizerisches Institut für Rechtsvergleichung (ed.)) (Zurich, 1992), at p. 61; Petr Hajn, 'Die Entwicklung des Zivilrechts in der Tschechischen Republik' in *Privatrecht und Wirtschaftsverfassung. Referate des Symposiums vom 29./30. Oktober 1993 in Dresden, veranstaltet von der Ernst von Caemmerer-Gedächtnisstiftung* (Peter Schlechtriem (ed.)) (Baden-Baden, 1994), at p. 30; as to the influence on the new Netherlands Wetboek *see* Arthur S. Hartkamp, 'Das neue niederländische Bürgerliche Gesetzbuch aus europäischer Sicht' (1993) 57 *RabelsZ*, at p. 674; on the reform draft of the German Law Reform Commission *see* Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (Cologne, 1992), at pp. 19 and 26.

[14] *See supra* note 3.

[15] International Institute for the Unification of Private Law (ed.), *Principles of International Commercial Contracts* (Rome, 1994), *see* Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Irvington NY, 1994), at p. 47 ('only exceptionally do the UNIDROIT-Principles depart from the solutions adopted in CISG').

[16] *See* Peter Schlechtriem, 'Verbraucherkaufverträge – ein neuer Richtlinien-Entwurf' (1997) *JZ*, at p. 441 et seq.; text of the Directive reprinted ibid., p. 446.

UN Convention on Independent Guarantees and Stand-By Letters of Credit of 11 December 1995,[17] the Draft Convention on the Assignment of Receivables Financing[18] and the recent Model Law on Electronic Commerce.[19]

Another important institution is the International Institute for the Unification of Private Law (UNIDROIT), founded by the League of Nations in 1926.[20] It was UNIDROIT which first promulgated the unification of the law of transnational sales of goods, paving the way to The Hague Conventions and The Hague Sales Laws ULIS and ULFIS in 1964, which in turn became the precursors of the CISG.[21] In recent years, UNIDROIT has been preparing a uniform law for international factoring, which led to the Ottawa Convention of 1988, and it has also published Principles for International Commercial Contracts (UNIDROIT Principles).

While The Hague Conference on Private International Law, which reaches back into the 19th century,[22] has produced numerous texts and drafts for conventions in its area, namely conflict of laws, the unification of private law is also one of the objects of the Council of Europe, established in 1949.[23] Its most successful endeavours so far are the Convention on the Liability of Hotel-Keepers concerning the Property of their Guests signed in 1962 and the European Convention on Compulsory Insurance against Civil Liability for Damage caused by Motor Vehicles of 1959; in addition, the Convention on Products Liability must be mentioned here because of its influence on the EC Directive on product liability adopted in 1985.[24]

Apart from these international organizations, various semi-public and non-governmental institutions have also tilled the field of law unification. Most prominent amongst these is the International Chamber of Commerce (ICC), known in particular for its standardized Incoterms and the rules for letters of credit prepared by it, but the European Bank for Reconstruction and Development and its

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17 *See* UN General Assembly Resolution 50/48 and the Explanatory Note by the UNCITRAL Secretariat p. 13; as to UNCITRAL's preparation *see* Report of UNCITRAL, UN Doc. A/50/17; *see* Norbert Horn, *The United Nations Convention on Independent Guarantees and the Lex Mercatoria*, Vol. 30 of the papers published by Centro di studi e ricerche di diritto comparato e straniero diritto da Michael Joachim Bonell (Rome, 1997).

18 UN Doc. A/CN.9/434.

19 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, New York 1997.

20 *See* Kropholler *supra* note 12, at pp. 57 and 58.

21 Ibid., note 12, at p. 57. The author points out that the main work was done outside the Institute by Ernst Rabel and his fellow researchers in the Kaiser-Wilhelm-Institut in Berlin; note 54, at p. 58.

22 As to the details *see* Kropholler *supra* note 12, at p. 59.

23 Ibid., p. 68.

24 Details as to the Convention prepared by the Council of Europe, which was laid open for signature in 1977, and the influence of the committee of experts of the Council of Europe and their results on the EC Directive *see* Hans Claudius Taschner and Edwin Frietsch, *Produkthaftungsgesetz und EG-Produkthaftungsrichtlinie. Kommentar* (Munich, 1990, 2nd ed.) at note 177.

Model Law on Secured Transactions are also noteworthy.[25] These texts might also be qualified as the core of the often-cited *Lex Mercatoria*, which, in so far as it can be reliably ascertained, deserves mentioning in this context too.

The most important source of harmonization of law is, of course, the EU, which need not be introduced here as an institution, but whose instruments to this end are the main topic of this article. The question to be asked now, even though still preliminary, is: by what instruments and techniques might unification and harmonization be reached, short of the enactment of a uniform code by a competent European legislator in the future?

II. Tools and roads

There are many ways to achieve unification or harmonization of law on an international level, and although it is not necessary to cover all of them in detail here,[26] the most frequent are mentioned below.

1. Model laws

The least ambitious attempt at unification or harmonization of law are model laws,[27] which are merely an invitation to national legislators to enact new laws, or reform the existing law, in order to bring their law in line with the laws of other countries. The technique of model laws is common in the United States, where the National Conference of Commissioners on Uniform State Laws and the American Bar Association have worked out and promulgated such model laws with varying success; but it also appears on the international scene. Recent examples which have already been mentioned include the Model Law on Electronic Commerce published by UNCITRAL, and the set of model rules for secured transactions from the European Bank for Reconstruction and Development. It remains to be seen whether the promulgation of model laws will really make a difference to the process of unification or harmonization of law in Europe. My impression is that model laws may be most useful in areas where new and unprecedented issues arise, such as in the case of electronic communication in commerce, or where a fundamental reform of existing laws is regarded as unavoidable for political or economic reasons, as was or is the case in some of the former socialist countries. It must be doubted, however, whether legislators in the Member States of the EU will voluntarily undertake a reform, e.g. of their law of secured transactions on the basis of, say, the European

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[25] *See* European Bank for Reconstruction and Development, Model Law on Secured Transactions (London 1994) and the contribution in the article by Röver, *infra* at pp. 119–135.

[26] Most valuable in this context Kramer *supra* note 6, at p. 483.

[27] As to model laws, their importance in the US and their usefulness in Europe *see* Heribert Hirte, *Wege zu einem europäischen Zivilrecht* (Stuttgart, 1996), at p. 32.

Bank for Reconstruction and Development Model in order to bring about more uniformity, desirable or even necessary as such unification might be.[28]

2. *Conventions*

The classic instruments are, of course, international conventions, concluded by nations in order to unify or harmonize certain sectors of the law. Numerous such conventions exist in Europe, be they conventions of European states in general or Member States of the Council of Europe and of the EU in particular; and they take many forms which differ in detail and need not be enumerated here.[29] Some conventions are not only binding on the signatories under the law of nations, but also contain uniform private law rules within the convention itself, which means that by ratification of the international instrument the uniform rules comprised therein are implemented directly and immediately, in other words, the international convention is 'self-executing'. However, the constitutions of many countries require specific legislation to implement such a document and to 'transform' its provisions into domestic law. Other international conventions are simple framework conventions to which the text of the uniform law is attached as an annex.[30] In such cases, the vagaries of national legislative programmes often lead to considerable delays between ratification of the convention and the implementation of the uniform law; in addition, because the rules stipulated by the convention are usually enacted as separate national legislation or incorporated into a pre-existing codification, it is easy to overlook their character as unified law when they are interpreted and put into practice. On the other hand, an annex law of this type may be implemented by nations not parties to the convention itself, so that it has the added benefit of functioning as a model law.

Another difference, to which great importance is given by some authors,[31] concerns the prerequisites for the application of rules unified or harmonized by a convention: while a 'true' uniform law stipulates its own conditions for application, e.g. that the parties have their places of business in different (contracting) states[32] or that dispatch and destination of transported goods take place in different states,[33] there are instances in which uniform or harmonized law applies only by way of conflict of law rules of the forum which call for the application of the domestic law

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[28] Hirte *supra* note 27 regards model laws as an attractive alternative which, to his regret, has so far been neglected in Europe, ibid. at pp. 34, 35.

[29] Still authoritative on this Ernst von Caemmerer, 'Rechtsvereinheitlichung und Internationales Privatrecht', in *Festschrift Walter Hallstein* (Frankfurt/Main, 1966), at pp. 63–95.

[30] *See*, e.g., The Hague Sales Law Conventions and the attached ULIS and ULFIS; also the Geneva Uniform Law on Bills of Exchange and Promissory Notes of 1930 and 1931, *see* Adolf Baumbach and Wolfgang Hefermehl, *Wechselgesetz und Scheckgesetz*: *Kommentar* (Munich, 1990, 17th ed.) at p. 47.

[31] *See* von Caemmerer *supra* note 29, at pp. 32, 37–54.

[32] *See* Art. 1(1)(a) and (b) of the CISG.

[33] *See* Art. 1 of the CMR (one of the two places must be in a contracting state).

of a jurisdiction where the relevant uniform rules are in force. While the former approach is supposed to make conflict of law rules and their 'terrible and odious practice' bemoaned by Thibaut obsolete,[34] the latter relies on their application as a *Vorschaltlösung*. Scholars used to argue, and to some extent still do, whether in cases involving more than one country the application of conflict of law rules can be dispensed with at all, or whether, even in the case of 'true' uniform law they will still be required, though concealed in its provisions on applicability; and the debate came to a head in the preparation of The Hague Uniform Sales Laws, ULIS and ULFIS, in which the (temporary) victory of the camp favouring 'true' uniform law over the school defending the turf of international private law was marked by the drafting of Article 2 of ULIS, which stated that 'rules of private international law shall be excluded for the purposes of the application of the present Law'.[35] Although the issue is still alive today, and not without effect on the interpretation of norms such as Article 1(1)(b) of CISG, it shall not be discussed here for two reasons. First of all, a monograph would be needed to do so; and secondly, I regard the controversy highly theoretical: although very interesting from a dogmatic point of view, the main and more important difference lies elsewhere. The point is that even 'true' uniform law, such as the CISG, inevitably becomes domestic law through its enactment by national legislators, and is thus exposed to the danger of domestic courts interpreting it in conformity with their familiar legal environment, slightly changing the meaning of rules and concepts in the process, so that in the end a diversity of different meanings will have developed behind the screen of uniform words. Such uniform laws therefore need to provide for uniform interpretation, but their provisions to that effect, such as Article 7(1) of CISG, cannot really be enforced in any meaningful way. On the other hand, there are harmonized texts which do not make any pretence of being a true uniform law and have to be applied through the channel of conflict of law rules, but where an international court is given the final say over their interpretation; and this means that a true uniform application of their rules is assured and divergent interpretations will be avoided. The question whether a law of this type is applied as part of, say, French or German law, ceases to be of any but theoretical interest, and the conflict of laws also becomes a merely theoretical, that is, a 'false' conflict. Therefore, where a court such as the European Court of Justice has the competence to keep watch over uniform or harmonized law, be it based on international conventions such as the European Convention on Recognition and Enforcement of Judgments or on EC Directives, it will in the end guarantee that the uniformity is not only one of words, but also of interpretation and application.

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[34] Conventions bringing about 'true' international uniform law which has to be applied if its own requirements are met and without any intervening conflict of law norms are particularly frequent in the area of transborder transactions, and it is only logical that some proposals for a European codification of private law have been restricted to transborder transactions.

[35] *See* in detail Ernst von Caemmerer, 'Internationales Kaufrecht', in *Festschrift Hans Carl Nipperdey* (Munich and Berlin, 1965), at p. 219.

Frequent and proven though the use of conventions may be, as a vehicle for unifying or harmonizing the law, it has one major disadvantage. Experience shows that conventions are often prepared meticulously and signed enthusiastically and the number of signatories gives rise to the highest hopes; but when it comes to their implementation by the national legislatures these seem to be 'likely to drag their feet for many years before ratifying',[36] so that often not even the number of ratifications required by the convention for its coming into force is attained. 'The result is that the treaty collections are littered with conventions which have never come into force.'[37]

3. EU/EC tools, in particular directives

In contrast to conventions, some legal measures of the EU may 'penetrate directly into the legal systems of its Member States'.[38] Directives in particular have brought about harmonization to an extent which is not yet fully appreciated by most lawyers in the teaching profession and in practice. It is true that on the long and winding path of steering a directive through the workings of the Commission, its committees and the European Parliament up to its implementation by the Member States,[39] there are many points where national and sometimes chauvinistic influences may throw it off course, either by distorting its concepts and provisions or by preventing it altogether. Indeed, the influence of lobbyists on national governments and ministries, which in turn try to influence the content of directives, may be felt more strongly in this area than in the preparation of conventions, where commissions of experts are often working at a healthy distance from domestic pressure groups.[40] Therefore, it is small wonder that not only the drafting but also the solution of issues in the various directives is of uneven quality.[41] But in the end, harmonization of private law by directives based on the rather broad heads of competence contained in the EC Treaty are bound to be more successful than attempts to reach the same end by means of conventions; for directives, once adopted by the Council, cannot be

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[36] *See* Goode *supra* note 10, at p. 233.
[37] See Goode *supra* note 10, at p. 232.
[38] Ibid., note 10, at p. 231. Goode therefore regards these legal measures as 'supra-national law'.
[39] As to the different procedures leading up to the final decision of the Council and the participation of various committees, the Commission and the European Parliament, a private law scholar like me must be allowed to refer to the specialists of European law; *see* Klaus-Dieter Borchardt, *Die rechtlichen Grundlagen der Europäischen Union* (Heidelberg, 1996), s. 6, at p. 154; as a short and informative introduction *see also* Sebastian Oehlert, *Harmonisierung durch EG-Richtlinien: Kompetenzen, Legitimation, Effektivität* (JuS, 1997), at p. 317.
[40] As to the details of the making of a directive and the culture of 'comitology', *see* Everson and Snyder, 'Regulating Europe?', Editorial in (1997) 3 *European LJ* at p. 207 and the contribution of Vos, 'The Rise of Committees' in (1997) 3 *European LJ* at p. 210.
[41] *See* Hondius *supra* at p. 49.

ignored, wilfully or negligently, by national legislators like so many conventions are, but have to be implemented, even if only a long time after the relevant deadline.[42]

4. Regulations

Even less leeway for obstruction by national interests is given by regulations based on Article 189(II) of the EC Treaty, which do not even require implementation but are binding with direct effect from the moment designated according to Article 191(I) of the EC Treaty. They rarely touch upon private law, although such regulations do exist; one example is the EC Regulation on Overbooking by Airlines.[43]

5. Judgments of the European Court of Justice

A further advantage of these EU/EC tools over most conventions in harmonizing or unifying certain sectors of the law is, as has been mentioned, the jurisdiction of the European Court of Justice to interpret European Community law (Article 164 of the EC Treaty), and, in addition, the obligation of Member States to interpret their domestic laws in conformity with directives, which is imposed by Article 5of the EC Treaty.[44] The Court's decisions in themselves, therefore, have become an important source of uniform European law.[45]

All these tools, however, can only achieve a patchwork unification or harmonization of private law, even if one is optimistic enough to believe that basic structures and concepts could be developed from this patchwork, which might thus become the common core of a European private law. One may ask once again whether we should not strive for a real European civil code in the vein envisaged by Thibaut for Germany in the 19th century, an idea which is advocated by Ole Lando and his group, but derided or fought against fiercely by its adversaries. This, of course, would require a corresponding legislative power for the European Parliament, and whether such a power will ever come to exist is shrouded in the folds of Europe's political future. It is exactly for this reason that speculation is futile as to the political course of Europe and whether it will lead to more powers for the European Parliament and even more common structures for the EU. For someone dealing with private law to speculate about the political future of Europe would be preposterous and presumptuous.

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[42] The implementation into domestic law creates additional problems, because the basic concepts and structures of domestic legal systems might 'reject' the transplant of the 'tissue' of harmonized rules; *see* Johannes Stabentheimer, 'Probleme bei der Umsetzung zivilrechtlicher EU-Richtlinien am Beispiel der Time-Sharing-Richtlinie' in (1997) *JBl.*, at p. 65. Creative and sensitive adaptation and amendment of domestic rules are required.

[43] EC Regulation 295/91 of 4 February 1991, OJ 1991 L 36.

[44] As to details *see* Hirte *supra* note 27, at p. 44.

[45] *See* van Gerven, 'The ECJ's Recent Case Law in the Field of Tort Liability; Towards a European IUS Commune?', in *European Ambitions of the National Judiciary* (Rosa H.M. Jansen *et al.* (eds.)) (The Hague, 1997), at p. 91 (as to state liability).

III. Levels of harmonization or unification[46]

The rather vague expression 'unification or harmonization of law' used so far throughout this article was chosen as a sufficiently wide frame for the variety of degrees of approaching or achieving uniformity which now must be briefly sketched out. Brevity demands that observations are restricted to the two most important tools, conventions and directives.

The most modest level is harmonization of a particular area of law, where the participating states are only bound to reach certain results, but are more or less free as to how to achieve them; they may enact new legislation or amend existing laws, and they are also free with respect to the legal concepts they use. This, of course, is the way EC directives work.[47] Not only are they implemented by national legislators as domestic law, which means that, in spite of the harmonization achieved by the directive, the normal rules on conflict of laws still need to be applied in cases of transnational transactions in order to determine which law is applicable; but each legislature is also more or less free to use legal concepts familiar from its own domestic legal system to achieve the goals set by the directive. This, of course, allows for a wide variety of legal approaches, and while the goals in themselves are often no more than the lowest common denominator, the subsidiarity of common provisions to domestic concepts and structures may well seem to prevent even a minimum unification. Although the European Court of Justice may, in the end, provide a uniform interpretation, it cannot act unless there is an appeal to it and even then only with respect to specific issues. Additional effort is required to fit its particular contributions into a more general picture, and it is in this context that research and scholarship could help to bridge the gap between hope and reality by uncovering the common core of convictions and legal concepts underneath the diversity of words and languages.

Conventions, on the other hand, usually provide a more rigid framework of structures and solutions, although national interests may be protected by reservation clauses allowing derogations from the uniform rules. As described above, there is a distinction between those conventions (whether self-executing or not) which produce harmonized rules of domestic law on the one hand, and those which create 'true' international uniform law. The harmonized law of the first type is domestic law, so that in transnational cases the conflict of law rules of the forum must be resorted to in order to determine the applicable national law. To this extent, the first type of conventions is somewhat similar to directives, both in terms of effect and in the fact that the harmonization of laws is not restricted to international transactions but does

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[46] *See* Kramer *supra* note 6, at p. 482.

[47] As to the problems of this scheme to achieve harmonization, *see* Stabentheimer, *supra* note 42.

also, and even primarily, apply to purely domestic situations.[48] Implementation as domestic law may, and often does, lead to a 'domestication' of conventions; in other words, they tend to be interpreted and understood in the light of the legal system onto which they have been grafted and to be modified thereby, with the effect that the same text may well be understood differently in two neighbouring states. The most famous example is the diverging interpretation by the French *Cour de Cassation* and the German Supreme Court of Article 3(4) of the 1930 Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes.[49] But such discrepancies can also occur in the application of 'true' international uniform law, as is shown by the different understandings of the concept of 'fundamental breach' in the case of non-conforming goods under Article 25 of CISG.[50] Where a competent court to preserve the uniform interpretation of uniform words is lacking, the only safeguard is information about decisions and comment by legal writers which makes it possible to take into account foreign judgments and their interpretation of the uniform rules in handling and understanding those rules. But such 'raw' information itself needs to be 'processed', i.e. analysed, digested, compared with other uniform law(s) as well as with domestic rules whose influence can often be traced therein. And the question of who is going to carry out this task inevitably leads back to the topic of this article: what can universities, their law schools and scholars contribute?

C. The Contribution of Universities, Academic Teachers and Scholars to the Process of Harmonization and Unification

I. Producing the bricks and mortar and training the masons

It is of course true that, in order to become acceptable and successful, unification or harmonization of law must be based on broad comparative research. As already recalled before, the Swiss Civil Code resulted from an exhaustive comparative

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[48] As examples *see* the Geneva Uniform Law on Bills of Exchange and Promissory Notes of 1930 and 1931, and the European Convention on the Liability of Hotel-Keepers concerning the Property of their Guests of 1962 promulgated by the Council of Europe.

[49] *See* von Caemmerer *supra* note 29, at pp. 87, 88, analyzing *Cass.* (Ch. Réunie) 8 March 1960, JCP 1960 III 11616 and *BGH*, 15 November 1956, *BGHZ* 22, 148, 152 and *BGH*, 12 January 1961, *BGHZ* 34, 179, 183. As to the status of the harmonized laws on bills of exchange and cheques brought about by the Geneva Conventions as domestic law, *see* Paul Lagarde, 'Les interprétations divergentes d'une loi uniforme donnent-elles lien à un conflit des lois' in (1964) 53 *Rev. crit. dr. int. pr.*, at p. 235.

[50] *See*, on the one hand, the rather narrow construction by the Bundesgerichtshof in the cobalt sulphate case, *BGHZ* 132, 290–305, and the generous understanding of the *Cour de cassation* in the case of sugared red wine, 23 January 1996, JCP 1996, II, 2234 (but of course, cultural convictions in regard to the sanctity of the quality of wine may explain these decisions).

analysis of the legal systems of the Swiss cantons undertaken by Eugen Huber;[51] likewise, on an international level, the success of the Convention on the International Sale of Goods goes back to the solid foundation laid by Ernst Rabel in his impressive collection and comparison of the sales laws of the world.[52] Another example of harmonization, successful because of its solid comparative basis, is the Products Liability Directive. Its basic structures were laid out by a group composed of law professors from Paris, Cambridge, Munich and Rome and of other experts who assisted the EC Commission not only in defining the policy goals but, perhaps even more importantly, in the fine tuning of the legal concepts to be used to achieve them.[53] The persuasiveness of the basic structures and policy solutions of the CISG on the one hand and the Products Liability Directive on the other, which seem to have had their main source in the careful and exhaustive preliminary comparative research on which these sets of legal rules were based, is manifest not only from the number of states that ratified the CISG or implemented the Products Liability Directive, but even more so from their character as models for other codifications. As mentioned before, the CISG and its basic concepts have influenced the UNIDROIT Principles and the Principles of European Contract Law, as well as national legislatures in countries of Western and Eastern Europe; but its influence can also be felt in the draft Directive on Consumer Sales.[54] The Products Liability Directive, on the other hand, was used as a model for product liability laws by countries which were not yet members of the EC such as Austria; by former socialist countries standing on the doorsteps of the EU, such as Hungary, Estonia and Lithuania; and even by Switzerland, Japan and Australia, countries which have enacted product liability laws which are quite similar to the structure and the basic concepts of the EC Directive.[55] By contrast, the failed Draft Directive on Defective

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[51] *See supra* Merz note 1; as to the foundation's 'reliable scientific report of the law on a historic, dogmatic and comparative basis', p. 586; as to the comparative cornerstone of the Swiss or *see* Kramer *supra* note 6, at p. 670; as to the details of the unification of private law in Switzerland, *see* Zweigert and Kötz *supra* note 8, at p. 166.

[52] Ernst Rabel, *Das Recht des Warenkaufs*, Vol. I (Berlin, 1936), Vol. II (Berlin, 1958). As to details of the road leading from Ernst Rabel to the CISG, *see* Peter Schlechtriem, 'Bemerkungen zur Geschichte des Einheitskaufrechts', in *Einheitliches Kaufrecht und nationales Obligationenrecht* (Peter Schlechtriem (ed.)) (Baden-Baden, 1980), at p. 27.

[53] As to the details of the lengthy procedure from the first considerations in 1968 up to the final stages in 1985, *see* Taschner and Frietsch *supra* note 24, Einführung, margin No. 171.

[54] *See* Com (95) 520/5 sub 5 of the general introduction and comments to Art. 3 (non-conformity provision); in German *see* ZIP 1996, pp. 1845–1850.

[55] As to Switzerland, *see* the Bundesgesetz über die Produktehaftungspflicht of 18 June 1993 (Produktehaftpflichtgesetz – PrHG), SR 221.112.944, which came into force on 1 January 1994, *see* Walter Fellmann and Gabrielle Büren-von Moos, *Das neue Bundesgesetz über die Produktehaftpflicht in der Schweiz (PrHG)* (PHi, 1993), at pp. 184–193; Heinrich Honsell, *Produktehaftung in der Schweiz* (PHi, 1996), at pp. 154–160. As to Liechtenstein, *see* Willibald Posch and Helgar G. Schneider, *Neues Produktehaftpflichtgesetz im Fürstentum Liechtenstein* (PHi, 1993), at pp. 56–59; as to Australia and Japan, *see* Hondius *supra* at p. 52 with further references.

Services may serve as a counter-example since it was not only the resistance of organized pressure groups that led to its defeat, but also the lack of proper preparation. Although it was persuasive in defining the liability for services by using the same basic approach as when defining the liability for products (why should there be a difference in liability for the collapsing of a bridge caused either by defective nuts and bolts or defective construction plans?), broad comparative research would have shown the pitfalls of contractual liability regimes in case of defective services and the problems of concurrence of actions or *non-cumul*. Thus, it was not only the resistance of pressure groups, but, even more so, of legal experts and scholars, who pointed out obvious deficiencies and undesirable consequences of this defective draft on defective services.[56] To return to the simile used at the beginning of this article: while the bricks and mortar for the Convention on the International Sale of Goods and the Products Liability Directive were prepared and tested by experts and, therefore, led to a very stable and solid edifice, the drafters of the Service Liability Directive underestimated the necessity of such preparation and testing and overestimated their capacity to devise concepts and solutions acceptable to the European legal community.

One last example: the draft Directive on Consumer Sales presented by the Commission in June 1996 is important not only because of its potential influence on the development of a common core of European rules for the law of obligations, but even more so for its own history and foundations. It is based on preparatory research by the *Centre de Droit de la Consommation* at the University of Louvain-la-Neuve, on which a Green book on consumer goods guarantees and services published in 1993 was based. A conference in Sheffield tried to analyse the consequences for the legal systems of the Member States.[57] The first draft, written by a working group of scholars, was rejected by the Commission because it tried to include the manufacturer in the concept of sales guarantees. The final draft, presented in 1996, was somewhat cut back in scope and brought into line with the basic warranty system of the CISG, modifying the concept of non-conformity by objective criteria, providing a minimum set of remedies for the buyer and restricting the circle of protected persons to non-professionals. Nevertheless, criticism abounds, and it has been pointed out in particular that the draft showed 'conceptual deficiencies', and that its omission of the most important remedy of damages conflicted with its own objectives.[58] Why this criticism and scepticism in spite of the involvement of and preparation by academic experts? The answer, offered with great reluctance, seems

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[56] *See* Sigurd Littbarski (ed.), *The Draft Directive on the Liability of Suppliers of Services* (Trier, 1992), in particular at pp. 97, 106.

[57] *See* Hans-W. Micklitz and Fabian Amtenbrink in (1995) 3 *Consumer Law Journal*, at p. 117; *see also* Hans-W. Micklitz, 'Ein einheitliches Kaufrecht für Verbraucher in der EG?' in (1997) *EuZW*, at pp. 229.

[58] *See* Abbo Juncker, 'Vom Bürgerlichen zum kleinbürgerlichen Gesetzbuch – Der Richtlinienvorschlag über den Verbrauchsgüterkauf' in (1997) *DZWiR*, at pp. 271–281.

to be that those involved in the preparatory work were mostly expert visionaries in the field of consumer protection, but cared less about the structures and basic solutions of the sales laws of EU Member States, which were used only selectively as models – such as the French solution of the manufacturer's contractual liability towards the last buyer, whose attempted incorporation into the Directive ran aground because of its inconsistency with the basic structures of other legal systems.[59] Again, it seems that at least in the final drafting stage, there should have been more consulting with experts in comparative sales law in order to forestall such setbacks and the unfavourable criticism as to the legal/technical draftsmanship.

The contribution of universities to the multi-faceted process of harmonization and unification is, however, not restricted to supplying experts for the preparatory work. In fact, this has to be seen as a rather minor part of what academic contribution could and should be. It was already emphasized that the intimate interplay of research and teaching is characteristic for universities and distinguishes them from other institutions of higher education as much as from research institutes, and it is the research-based teaching of European private law which must be regarded as universities most important contribution to the ongoing harmonization and unification of private law in Europe.[60] This means, first of all, that one needs to get away from the tradition of teaching mainly domestic law and return to the tradition subsisting in continental Europe until the 18th century (and the final *caesura* brought about by the great codifications), where the subject taught by law faculties was mainly the *ius commune*, and where it did not matter for law students and their professional career whether they received their education in Paris, Prague, Coimbra or Heidelberg.[61] But teaching the growing body of European private law at universities cannot simply consist of explaining the contents of the directives and the legal rules produced by conventions. It requires that law teachers define themselves first of all as researchers and scholars and try to find common features, common structures and basic concepts in the overwhelming mass of legal texts and provisions in order to make them teachable and manageable,[62] in the same way as law professors and scholars did when teaching the so-called *ius commune* derived from

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[59] *See* Micklitz *supra* note 57, at p. 230.

[60] Mauro Cappelletti, European law must be preceded by European legal education, *see* Kramer *supra* note 6, at p. 488.

[61] *See* the passionate speech (one of many) by Hein Kötz, 'Europäisches Rechtsdenken? – Entwicklung zum gemeineuropäischen Privatrecht', *Europäische Integration – schon eine 'Union des Rechts'? Zwischen Erfolgsbilanz und Balanceverlust, Kongreß der Hans Martin Schleyer-Stiftung* (Rupert Scholz (ed.)) (Cologne, 1996), at p. 15.

[62] *See* Sacco's claim that a 'circulation of legal ideas' is required, quoted from Hondius, p. 59, or Ulmer's hope that common principles for certain types of contracts could be developed before draft codes are elaborated, *see* Peter Ulmer, 'Vom deutschen zum europäischen Privatrecht?' in (1992) *JZ*, at pp. 1, 7. *See also* Hondius, at p. 60: 'Such circulation of ideas should in itself, apart from developments at a community level, make a contribution towards the development of domestic private law.'

the mass of Roman law sources and texts, which were in a similarly complicated and unorganized state as the 'European' private law which we see evolving today. In other words, roads have to be cut into the growing jungle of legal rules and provisions produced by conventions and directives, by commercial practices, by decisions of the European Court of Justice, by codified customs such as the ICC rules and many others. This requires not only comparing these rules and provisions themselves, but also comparing the legal systems of the Member States in order to understand what impact this or that legal provision contained in a directive or produced by a convention may have in the context of a national law. This is a task of overwhelming difficulty, and it has barely been tackled so far despite many noble demands and proposals to that end.

Since the law harmonized by directives or unified by international conventions is usually merged into the context of the relevant domestic laws or is enacted as special legislation, not always revealing the international origin of its contents, it is usually taught and understood in the framework of regular courses where it is presented as genuinely national law. Thus, while dealing with the liability of a hotel-keeper in the context of the corresponding sections of the German Civil Code, we are rarely mindful of the origins of these provisions in the Convention sponsored by the Council of Europe. Similarly, the Directive on Unfair Contract Terms was merged into the German Standard Terms Contract Act by slight amendments of two provisions of a pre-existing Act, so that despite the admonition of scholars that the whole of the Act now needs to be interpreted in the light of the directive, in practice little attention is directed towards this sector of harmonization. So the list goes on: the Directive to Protect the Consumer in respect of Contracts Negotiated Away from Business Premises was merged into the German *Haustürgeschäftewiderrufsgesetz*; the 1990 Directive on Package Travel, Package Holidays and Package Tours led to a modification and amendment of the existing provisions on this kind of tourism; and the 1986 Directive concerning consumer credits, as amended in 1990, was enacted as the *Verbraucherkreditgesetz*, which is widely thought of merely as the successor to the old *Abzahlungsgesetz* of 1894. Even the Products Liability Directive, though it was put into the form of specific legislation (the *Produkthaftungsgesetz*), is often described and taught as some sort of parallel to other legislation providing for no-fault liability in cases of dangerous activities (*Gefährdungshaftung*), although the European origin of this new legislation is regularly mentioned. This way of teaching and understanding uniform or harmonized rules as a kind of annex to pre-existing domestic law, although, of course, a necessary part of education and training in each participating country, does create the danger of missing an important point, namely that these directives and conventions have led to the use and (sometimes) to the invention of key concepts and structures which are becoming the common property of many European jurisdictions, and that we are thereby experiencing the growth of a body of European law which has to be appreciated in its own right, not as a mere amendment or improvement to relevant domestic laws. This is the reason why the law faculty of the Albert-Ludwigs Universität in Freiburg/Germany offers special seminars and courses emphasizing the degree of harmonization or even unification

which has already been reached by such key concepts, structures and uniform solutions, and by trying to show how they are rooted in, or contrast with, the results of comparing some of the national legal systems such as the French *Code Civile*, the German *BGB*, provisions of the Italian *Codice*, the new Netherlands *Wetboek*, and the rules of English law.

Freedom of contract and party autonomy presuppose parties in equal bargaining positions who can take care of their own interests when they conclude a contract and agree on its content. But all legal systems have to accept limitations of this general freedom of contract in order to protect weaker parties, although to varying degrees and in regard to different 'weak' persons.[63] Traditionally, there are many general legal instruments serving this purpose such as requirements of form and consideration, concepts such as good faith and fair dealing, *abus de droit*, *laesio enormis* or *Sittenwidrigkeit* (*contra bonos mores*), to name but a few. Basic to the traditional approach, however, is a fundamental division between those to whom special norms for commercial dealings apply, codified in commercial codes, and 'private' persons, i.e. those not commercially involved. Form requirements rarely protect merchants, who are regarded as more experienced and knowledgeable in business, and they are also subjected to notice requirements and shorter periods of limitation etc. The set of persons which remains after excluding business people and commercial enterprises is a far from homogenous group, so that during the last decades new groups of 'weaker' parties have been singled out for special attention, in particular the 'consumer'. While the concepts of 'the consumer' and its contrary, the person acting as a professional in the course of his or her business, are becoming the centre around which special regulations revolve, the old distinction between merchants and non-merchants has lost its importance; and it is only natural that modern codes or draft codes forgo special rules for commercial contracts or merchants altogether and include or draft special rules for consumers as opposed to other types of person instead.[64]

Consumer Protection Acts were first enacted in the US, Britain[65] and also, in 1968, in Japan. The concept simultaneously crept into national codifications in European countries as well as into international instruments, such as the report by the committee on consumer policy of the Organization for Economic Co-Operation

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[63] *See* in particular in reference to the new Dutch Civil Code, Hondius *supra* at p. 61, where the group of 'weak' persons encompasses employees, tenants and consumers, but leaves out less organized groups, the have-nots and the under-privileged.

[64] The new civil codes in Italy and the Netherlands, for example, have both given up the distinction between private and commercial law, *see* Hondius *supra* at p. 54. The replacement of the dichotomy of 'merchant' versus 'private person' by a new paradigm of 'consumer' versus 'professional' is clearly pointed out by Hondius *supra* at p. 64.

[65] The initial cause in the United States was President Kennedy's special message to Congress on protecting the consumer interest of 15 March 1962, reprinted in Eike von Hippel, *Verbraucherschutz* (Tübingen, 1986, 3rd ed.), at pp. 281–290.

and Development in 1972,[66] the Council of Europe Resolution 543 on a consumer protection charter passed by the consultative assembly in 1973, its Recommendation 705 of 1973[67], and the report of its committee on economic affairs and development on a consumer protection charter in the same year. The EC first reacted in 1975 by means of a Council resolution which promulgated a programme for a policy of protection and information of the consumer. The 1980 Rome Convention on the Law Applicable to Contracts contained in its Article 5 provisions for the special protection for consumers in cases of transnational consumer contracts by limiting the freedom of choice of law; the Brussels and Lugano Conventions on Recognition and Enforcement of Judgments provided for special venue and jurisdiction for litigation involving consumers;[68] the CISG, in Article 2(1)(a), excluded consumer transactions from its scope of application and its sometimes harsh imperatives. But it was, of course, the long line of directives designed to protect consumers, starting with Article 9(b)(i) of the Products Liability Directive of 1985,[69] through the Directive of December 1985 in Regard to Contracts Negotiated Away from Business Premises, the Directive on Package Travel, Package Holidays and Package Tours of 1990, the Directive on Consumer Credits 1986, amended in 1990, the Directive on Unfair Terms in Consumer Contracts 1993, the Directive on Protection of Consumers in Respect of Distance Contracts 1995 up to the proposed Directive on the Sale of Consumer Goods and Associated Guarantees, which meant that the consumer emerged not only as a subject of special protection, but also as a central concept in the law of obligations.[70] This flood of consumer protection measures and directives was, of course, further increased by the Treaty of Maastricht, which widened the competence of the EU to enact such measures.[71] It was only a logical extension of this development when Tilmann proposed the enactment of a European Consumer Code.[72] However, it may well be asked whether 'consumer protection' is really appropriate where affluent people buy luxury goods for their private use or consumption, because such 'consumers' normally act just like professionals and are quite 'market-wise'. The necessary limitation of consumer protection should not be

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66 Ibid., p. 308.
67 Ibid., p. 344.
68 Arts. 13–15.
69 Which must be regarded at least partly as a consumer protection directive not only because of its preliminary regards, but in particular because only consumers are protected against injury to property under it.
70 In Germany one of the first who proposed to treat consumer law as an important and special sector of the law of obligations was Eike von Hippel, who as early as 1974 published a monograph on *Verbraucherschutz* (1986, 3rd ed.).
71 *See* Arts. 129a I and 100a III of the EC Treaty, while before Maastricht consumer protection directives were mainly based on Art. 100a I of the EC Treaty.
72 *See* Winfried Tilmann, 'EG-Kodifikation des wirtschaftsnahen Zivilrechts' in (1991) *JZ*, at p. 1023; *see also* Hondius *supra*. Critical comments abound, however, *see* Meinrad Dreher in (1997), *Juristenzeitung* at p. 167, who belittles the concept of consumer as the phantom of the opera of European and German law.

achieved, however, by differentiating between rich and less rich consumers, but between different types of transaction and, perhaps, by a general clause restricting the scope of consumer protection provisions in certain cases through the use of estoppel or *venire contra factum proprium.*[73]

Thus, in the context of the subject matter of freedom of contract and its limits, the consumer and its protection have become a central focus in lectures. However, before 'internalising' the central concept of the 'consumer', its intellectual basis needs to be clarified. In this regard, however, uniformity is lacking; as the concept of the consumer is not used consistently throughout the directives and conventions.[74] If one accepts the optimistic viewpoint that the growing body of consumer protection law composed of directives and conventions may constitute an important sector of harmonized private law of the Member States of the European Union, then this central concept needs clear and homogenous treatment and understanding. In particular, a choice is necessary between the narrow definition of the consumer as someone acquiring for 'private use or consumption',[75] or buying 'for personal, family or household use',[76] and the frequent and wider definition as 'any natural person who is acting for purposes which are outside his trade, business or profession',[77] i.e. the so-called 'non-professional'.[78] However, the counterpart of the consumer also needs circumscription and definition in order to emphasize the underlying policy that (only) someone acting in the course of his or her trade, business or profession as seller, manufacturer, tour operator etc. should be treated more severely than a non-professional.

The central concepts of consumer as someone acting as a non-professional on the one hand and the professional trader on the other hand show just one example of the need to clarify concepts before using and explaining them in class. Numerous other examples from the growing body of law harmonized by directives and conventions

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[73] *See* Andreas Kappus, *Verbraucherschutz am Nadelöhr? Phantom, Phänomen, Fantomas* (NJW, 1997), at pp. 2653, citing the Bundesgerichtshof's doubts as to the applicability of Art. 13 of the Brussels Convention on Recognition and Enforcement of Judgments (special forum for consumer litigation) in a case of the purchase of a luxury yacht for DM 250,000. BGH NJW 1997, 2685.

[74] *See* Dreher *supra* note 72, at p. 168; Bradgate, 'Consumer Guarantees: the EC-draft Directive' in (1997) 1 *Web Journal of Current Legal Issues*, at p. 4; *see also* Jean-Pascal Chazal, 'Le consommateur existe-t-il' in (1997) *Chron*, at p. 260.

[75] Art. 9(a)(i) of the Product Liability Directive.

[76] Art. 2(a) of the CISG.

[77] *See* Art. 2(b) of the Unfair Contract Terms Directive; *see also* Directive 97/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, Art. 2: 'purchasing [a right to use immovable property on a timeshare basis] outside his professional capacity.'

[78] But even the wider definition varies, for the Consumer Sales Directive defines the consumer as a natural person who 'is acting for purposes *which are not directly related to his trade, business or profession*', *see* Micklitz *supra* note 57, at p. 230 ('nicht unproblematische[r] Begriff des non-professional').

could be given here and have, in fact, been used in university courses. One of these examples is the conclusion of contracts. Apart from the traditional instruments, offer and acceptance, and their variations in the different legal systems of Europe – and the attempt at unification visible in the formation of contracts provisions in the Convention on International Sale of Goods, the UNIDROIT Principles and the Principles of European Contract Law – the EC (or EU) has produced important provisions modifying the body of traditional rules on formation of contracts. Obligations to inform consumers in writing about certain decisive features of their contracts, and in particular the right to withdraw from a contract a certain time after its conclusion provided for by the Directive on Distance Contracts or the Time-Sharing Directive,[79] or the right to cancel the contract allowed under the 'Doorstep Directive',[80] weaken the traditionally binding consequences of offer and acceptance and have to be integrated in a wider concept of contract formation. But once again there is a great variety in the details which for teaching purposes has to be condensed to the basic points (duty of information and its basic context; the form the information is required to take; and the non-binding effect of the contract on the consumer for a certain period of time), which in turn might help practitioners to use these concepts more homogeneously in the future.

Yet another topic is 'breach of contract' and, in particular, the available remedies. First, the common core of obligations under certain types of contracts need to be analyzed, especially the obligations of the seller with respect to conformity of the goods and how to determine them. Clarity is also needed in showing how legal systems and projects of unification coincide in certain basic features, and that diverging rules diverge often intend protectection to certain groups such as, once again, consumers. Remedies then need to be analyzed. Again, the great variety of remedies found in national legal systems have to be compared before looking at the uniform rules of the CISG, but also of the UNIDROIT Principles and the Principles of European Contract Law, and at the minimum remedies specified in the draft Directive on consumer sales.

Remedies such as specific performance and repair, delivery of substitute goods, avoidance of a contract for non-delivery, late delivery or non-conformity, price reduction, withholding one's own performance, and – the most important remedy – damages, already form a set of similar, if not homogeneous, solutions and structures. It is not only for its policy of consumer protection that the draft Directive on Consumer Sales deserves attention and positive reception, but also for its recognition of some of the basic remedies as a common core of buyer's remedies, although it is regrettable that the most important remedy, that of damages, was not included.

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[79] *See* common position (EC No. 19/95 of the Council of 29 June 1995, 95/C288/01); as to the Timeshare Directive (*supra* note 77) *see* Art. 5(1).

[80] *See* Directive to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises, 85/577/EEC Art. 5 (right to renounce).

What impact can such teaching of common structures, based on comparison of national legal systems and harmonized or unified rules, have on the contribution of universities, law schools and academic teachers to the unification of law in Europe? Apart from the continuous task of analysing and clarifying central concepts, which obviously is in the spirit of von Savigny, except that the sources of Roman law he relied on have been supplanted by the raw material of international conventions, directives, customs and usages, rulings of the European Court of Justice and the results of comparative law research, it is hoped that this teaching will equip the generation of students with knowledge, capacities and tools not only to practise law on an international level,[81] but also to serve in those parts of the European organizations where future European law is prepared. In one of the most vitriolic attacks on the idea of a European Civil Code, one scholar described the legal experts of the EU Commission as 'uprooted civil servants' suffering from 'an ambivalent relationship with their national legal culture'.[82] If experience in comparing the different legal systems of Europe and the development of a common core of concepts and structure results in a certain distance to one's own legal heritage and the historical conditions which have influenced its details, there does not seem to be any disadvantage in such a critical relationship to one's own national legal culture. And if 'uprooted' means that, thanks to their comparative law skills and knowledge, the drafters of directives or conventions are less prone to bias, and that, therefore, they are immune from preferring their own domestic laws as models, this is no disadvantage either. If any criticism is justified at all, it would have to be based on the observation that the necessary comparative law training is sometimes missing, and that some drafts are produced on the basis of the rather narrow experience which the drafters had with their own legal system.

II. Bricks and mortar

As stated in the preliminary remarks, research in the field of comparative law can only produce basic knowledge and material, the use of which in the promotion of harmonization or unification of law in Europe is dependent on political circumstances and the will of those in power. Many of the results produced by this basic research will go unused and often unnoticed. But important exceptions where academic scholars have, in fact, laid the foundation for a successful unification or harmonization of law could be cited, too. They are an encouragement to go on in spite of the risk that the results of this work may be ignored. In the fields of contract and tort law the projects of Kötz and Flessner in outlining the structures

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[81] *See* Christian Kirchner, Weyers *supra* at pp. 103, 133, demanding, as many others, that the state regulation of law exams should take account of the teaching of, e.g., European contract law.

[82] Legrand *supra* note 7 who denounces 'the advance of a European Union bureaucracy consisting largely of up-rooted civil servants often entertaining an ambivalent relationship with their national legal culture'.

and common issues of the European Law of Contracts,[83] and a similar project relating to the various tort laws of the European countries undertaken by von Bar, have already paved the way. Although the authors modestly remark that their books are destined primarily for teaching purposes[84] or to help practitioners who need to apply foreign tort law,[85] it may be hoped and expected that in the future drafting of directives and conventions or in court decisions interpreting and applying uniform law, and in particular, in filling gaps within them, the overwhelming abundance of information in these books will be used and appreciated as an invaluable help. It may also be permissible to mention a comparable project in the field of restitution and *ungerechtfertigte Bereicherung* undertaken by the present author, and to sketch some of its interim results: although restitution or *ungerechtfertigte Bereicherung* is a mine field in national laws, and hence it might seem audacious to hope for common structures and shared convictions which could be used as a basis in the filling of gaps within existing uniform law or in the preparation of projects still to come, research shows that not only are the issues comparable, but very often the solutions, too, in spite of the fact that they are brought about by extremely different conceptual tools and expressed in different terminology. In a recent paper read in Brussels,[86] the following examples were used.

1. Payments 'de l'indu'

There are many situations where payments occur without a legally valid claim of the recipient, e.g. on account of mishaps in international payments. The money which a debtor in one country wants to have transferred to its creditor in another country may end up in the wrong account because of some mistake in transmission and/or identification of the recipient. Recent projects of UNCITRAL[87] and the EU[88] to regulate and harmonize the rules for money transfers are dealing more or less extensively with the liability of the banks involved, but leave open the question of the restitutionary obligations of the recipient. Or, a rather frequent occurrence in recent years, subsidies paid by a European government turn out to be in violation of EC rules and are now claimed back as '*indu*'.[89]

There are two particularly problematic issues in regard to the obligation of the recipient to restitute funds unjustly received. First of all, it needs to be asked whether

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[83] *See* Hein Kötz, *Europäisches Vertragsrecht*, Vol. I (Tübingen, 1996), and its programmatic introduction, at p. V.
[84] Ibid., at p. VII.
[85] *See* Christian von Bar, *Gemeineuropäisches Deliktsrecht, Vol. I: Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen* (Munich, 1996).
[86] On invitation of the Information Office of the Land Baden-Württemberg to the EU.
[87] UNCITRAL Model Law on International Credit Transfer, adopted on 15 May 1992.
[88] Directive 97/5/EC on Transnational Transfer of Funds of 27 January 1997.
[89] 1989 ECR 175; 1993 ECR I-3131; 1996 ECR I-3547.

an innocent recipient who has already spent the money is nevertheless obliged to restitute it in full. Secondly, it needs to be decided whether the recipient owes interest and from what point onwards, the moment of receipt or the moment where the recipient becomes aware of a duty to make restitution. These problems are not rendered nugatory by the terms of the contracts between the paying bank and the recipient, for even if these contractual terms oblige the recipient to make full restitution and pay interest, they have to stand the test of provisions implementing the Unfair Contracts Term Directive or of comparable provisions in national legislation and may well be held to cause a significant imbalance in the party's rights and obligations to the detriment of the consumer (Art. 3(1)). Two situations must be distinguished: the recipient who finds a sum of money in his or her account out of the blue, i.e. where the money is transferred to the account by a mere clerical error, is commonly treated like a debtor of a loan, at least when he or she is a so-called professional, having to repay in full and with interest, whether the funds were used profitably or not. The same holds true in case of subsidies to which the recipient was not entitled. On the other hand, where the money was, in fact, owed to the recipient but the debtor had countermanded the payment order and this was overlooked by the bank, the good faith recipient may well have a defence to the extent that he or she has disposed of the money without receiving any equivalent benefit or saving any expenses, so that he or she is no longer unjustly enriched. In addition, interest only needs to be paid to the extent that the recipient has actually received a corresponding income from the money, e.g. by investing it.

2. Unwinding of contracts

Avoidance, termination, cancellation of contracts occur in many instances of harmonized or uniform law, e.g. as a remedy in the CISG, the UNIDROIT Principles, the Principles of European Contract Law and the draft Directive on Consumer Sales (rescission of the contract for lack of conformity under Article 3(4)). But contracts may also be void for lack of capacity or because they are *ultra vires*. Finally, the right of consumers to withdraw from consumer contracts as of cancellation or renunciation of contracts negotiated away from business premises etc. may cause the cancellation of the relevant contract(s).[90] Contracts with unfair terms, although generally regarded as binding to the extent that their terms are acceptable, may be void altogether if they cannot be upheld without the unfair terms (Art. 6(1) of the Unfair Contract Terms Directive). In all these situations, performances may already have been exchanged, and the question of recovery and restitution arises. The directives are silent on these issues; the reform projects of the UNIDROIT Principles and the European Principles of Contract Law offer rather

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[90] *See* Art. 5(1) of the Directive to Protect the Consumer in Respect of Contracts Negotiated away from Business Premises, 85/577/EEC.

loose and vague solutions;[91] and even the more detailed CISG leaves many questions unanswered, not the least the rate of interest to be paid on a sales price which the seller has to pay back,[92] or the responsibility in case of loss or deterioration of goods which the buyer has to return. Obviously, the exact content of the obligations to restitute and the liability of the respective obligor cannot be regulated homogeneously, but must take into account reasons and responsibility for the avoidance, termination, cancellation etc. of the contract. But the fact that the drafters of the various provisions abstained from spelling out a more detailed solution may have been caused by a lack of comprehensive analysis of the national legal systems of Europe and how they resolve these questions.

3. Interference with property rights

Comparative analysis of restitutionary remedies might not only help to fill gaps in existing sets of uniform or harmonized rules, but may also be used in the future in the development of, or at least as a stimulus for, new instruments on the basis of pre-existing shared convictions, for example, restitutionary remedies in case of invasion of or interference with other people's property rights. Of course, in most cases such interference with property rights constitutes a tort, and the primary remedy is a claim for damages. Some legal systems even regard restitutionary claims as subsidiary to tort claims and therefore generally exclude restitution in these cases. Others, such as English law, for a long time required that the plaintiff had to waive all claims for the tort of conversion in order to recover the result or profits which the defendant had gained from wrongful use or abuse of the plaintiff's property. This applies not only to property in moveables or immoveables, however, but even more so to industrial or intellectual property rights which may have been infringed and may give rise to restitutionary claims, even if the holder of the right did not suffer any damage. Finally, the protection of privacy and personality rights could be strengthened by restitutionary remedies which do not look at the victim's loss, but try to skim off the infringer's gains.[93] In this field harmonization or even unification seems to be a matter of the distant future. But if we consider the restitutionary liability of, for example, certain types of media which make money by exploiting the lives of private individuals, or of industrial firms which woo away top managers or engineers of other firms in order to benefit from their know-how, the necessity of developing uniform rules may be felt in the not too distant a future. Getting to grips with such

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[91] *See* Art. 4.307–4.309 Principles of European Contract Law and Art. 4.508 as to interest; Art. 7.3.6 UNIDROIT Principles.

[92] *See* Art. 84(1).

[93] For example, the price received for photos of a celebrity taken without consent and outside the area where public exposure and/or the general public's rightful claim to be seriously informed may justify this infringement of the celebrity's 'property' right in his or her private life, a right which includes control over who may take and use pictures and how this is to happen.

practices is not only required for the protection of potential victims, but goes to the heart of a proper functioning of the Common Market and the creation of a level playing field for fair competition. Of course, restitutionary remedies or claims to skim off unjust enrichment may only have small significance compared with other legal instruments which may be available. But as in other areas of research and development, even details insignificant at first glance may become important or at least interesting tomorrow.

The ongoing process of unification and harmonization of private law in Europe and the possible contribution of law schools, academic teachers and scholars to this development may be regarded by some members of our 'guild' with suspicion and distanced derision. But it is, in my opinion, the most important part of law reform today, and since the law never stands still and cannot be preserved in a frozen state, the question is not whether there is development but how it is to be steered and guided. The latter, however, *is* reform, constantly and continuously ongoing.[94] To disregard the unstoppable and irresistible movements towards more unification and harmonization can only mean that any influence over the development and reform of the law will be lost. I am therefore grateful to the editors and publishers of this new law journal for having invited me to publish my article in the opening issue of a hopefully most successful voice in the swelling chorus asking for and contributing to law reform and unification on a European scale.

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[94] The resistance to reform seems to stiffen the older a certain rule is, even when it is obviously outdated. There seems to be 'a Pantheon of sacred principles that must be kept safe from re-examination forever', Arthur Rosett, *Improving the Uniform Commercial Code*, No. 29 of the papers published by the Centro di Studi e Ricerche di Diritto Comparato e Straniero di Diretto da M.J. Bonell (Rome, 1997), at p. 11.