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Materials de les Dotzenes Jornades de Dret Català a Tossa

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EUROPEANISATION OF PRIVATE LAW AND ENGLISH LAW

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Summary

COMPLIANCE WITH EU LEGISLATION THE INFLUENCE OF EUROPEAN IDEAS ON ENGLISH PRIVATE LAW ENGLISH ATTITUDES TOWARDS GREATER HARMONISATION OR UNIFICATION OF PRIVATE LAW CONCLUSION

To what extent is English Private Law being affected by the United Kingdom's membership of the European Union? I think we can try to answer this at three levels: (i) The United Kingdom's compliance with EU legislation; (ii) the influence of European ideas on English Private Law; (iii) the attitude in England towards greater harmonisation or possible unification of European Private Law.

COMPLIANCE WITH EU LEGISLATION

To my knowledge, the United Kingdom has a good record of compliance with EU legislation, in the sense of implementing Directives correctly. Of course, sometimes very little is required because our law already contains, in substance, what is required by the Directives. Indeed some Directives, for example those on consumer credit,[2] have been very heavily influenced by English law.

Our implementation has not always been by the deadlines set by the legislation. For example, the regulations which implemented the Directive on Unfair Terms in Consumer Contracts[3] came into force 6 months after

1 Any views expressed in this paper are purely personal.

2 Council Directives 87/102/EEC of 22 December 1986 and 90/88/EEC of 22 February 1990.

3 Council Directive 93/13/EEC of 5 April 1993.

the deadline, and we have not as yet implemented the directive on certain aspects of the Sale of Consumer Goods and Associated Guarantees although this should have been implemented by the 1 January 2002.[4] In part the delay may be the result of a very cautious approach on the part of the Government Department (in these two cases, the Department of Trade and Industry (DTI) took responsibility for implementation) to make sure that the legislation did indeed implement the Directive fully.

It is my personal view that the British Government's approach to implementation is actually over cautious, and our experience has not been altogether a happy one. The Unfair Terms in Consumer Contracts Directive was implemented by a set of regulations[5] that, for the most part, simply reproduced the Directive word for word. This method of implementation is known as "copy out" or, less favourably, as "cop out". The original Regulations[6] were replaced in 1999.[7] The principal reason was that the 1994 Regulations, in purporting to implement article 7 (which requires member states to ensure that effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers) had given preventive powers only to the Director General of Fair Trading. This had been challenged by, among others, the Consumers Association, as not fully implementing the Directive; and, rather than fight the case, the new Labour Government decided to extend the preventive powers to the Consumers Association and various other bodies. At the same time the opportunity was taken to align the working of the Regulations even more closely to the wording of the Directive.

This has caused two problems. The first is that we already have legislation dealing with certain types of unfair term. The Unfair Contract Terms Act 1977 applies to almost any kind of exclusion or limitation of liability clause in a contract. In consumer contracts it makes many exclusion or limitation of liability clauses completely invalid, even if they have been 'individually negotiated';[8] with other exclusions or limitations of liability in consumer contracts, and in many cases also contracts between two businesses, it requires that the clause be fair and

[4] Directive 1999/44/EC of 25 May 1999. Regulations have now been laid before Parliament (Sale and Supply of Goods to Consumers Regulations 2002, SI2002 No. 3045) and are due to come into effect on 31 March 2003.

[5] Made under the European Communities Act 1972, section 2.

[6] Unfair Terms in Consumer Contracts Regulations 1994.

[7] Unfair Terms in Consumer Contracts Regulations 1999.

[8] For example, a business selling to a consumer cannot exclude or limit its liability for the goods' failure to correspond to the description or sample, or to be fit for the purpose: section 6(2).

reasonable before it will be enforceable.[9] This Act was not affected by the regulations that implemented the Directive. The result is that there are two regimes, which to some extent overlap, which have different scopes of application and use different terminology and concepts. The result has been considerable confusion. Both consumers and businesses have complained about the unnecessary complexity to the DTI; and the DTI have referred the question to the Law Commissions (there are separate Commissions for England and Wales and for Scotland; this was a joint project). The Law Commissions have been asked to consider producing a unified piece of legislation which will both implement the Directive and preserve the additional elements of consumer protection which were granted by the 1977 Act.[10] In an ideal world, that would have been done in 1994. In other words, we would have incorporated the Directive into our general law.

The other problem with the "copy out" method of implementation is that it simply imposes on English law concepts and terminology which do not form part of English law and which are not easy for English lawyers to understand. The most obvious example is the test of fairness used by the Unfair Terms Directive, article 3(1): namely, that 'a contract term… shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.' English law does not have an equivalent concept of good faith. Good faith of course is relevant in English law in certain other contexts (for example, whether somebody is a bona fide purchaser of property, and in insurance contracts) but its meaning there is very different to the one that appears to be used here. The result has been a great deal of discussion as to the meaning of "good faith" in the context of unfair contract terms. In fact, the general conclusion seems to be that "good faith" means very much the same thing as the test of "fair and reasonable" which is used in the Unfair Contract Terms Act 1977.[11] It might have been a great deal easier to have used the terminology with which English lawyers were familiar in the

[9] Thus any other clause which would limit or exclude the business's liability when in breach of contract to the consumer is valid only if it is fair and reasonable: section 3(2)(a). The same applies to a clause that would allow the business to perform in a way that is substantially different to that which the consumer reasonably expected, e.g. to change the hotel in which a holiday maker is to be accommodated: s. 3(2)(b). The same controls apply to business-to-business contracts, but only if the party adversely affected is dealing 'on the other party's written standard terms of business': s. 3(1).

[10] The Law Commissions have published a Consultation Paper (LC no 166) on Unfair Terms in Contract. Copies may be downloaded from the Law Commission website: http://www.lawcom.gov.uk

[11] See *Chitty on Contracts* (28th edition, 1999), para 15-050; Law Com. Consultation Paper No 166, Unfair Terms in Contracts, paras. 3.70 to 3.71.

first place. However, there is some debate about the matter. Some argue that, even though using English terminology would make the legislation easier for consumer advisers and businesses to understand, it is more important to follow the words of the Directive, so that any jurisprudence from the ECJ that interprets the Directive will be readily applicable to our legislation also.

The Department of Trade and Industry seems determined to avoid making the same mistake twice. The Directive on Consumer Sales is to be implemented by amendments to the Sale of Goods Act 1979. However, these will be relatively slight, technical amendments; they will not involve a thorough-going revision of the Act. And again the Department is being rather cautious. For example, article 3(2) of the Directive requires that "in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement…". English sales law does not know a right to repair or to replacement of the goods as such. This is probably because of the general reluctance of English Contract Law to provide the remedy that we call "specific performance". Specific performance will be ordered only if damages would not be an adequate remedy for the claimant, and this means that specific performance is awarded in sale of goods cases only when the goods are completely irreplaceable because they are entirely unique. The case law is very strict about this requirement.[12] English law allows the buyer to achieve the same result in other ways. If the buyer wants the goods repaired, he may have the repairs done at his own expense and then reclaim that expense in an action for damages. If he wants the goods replaced, he may reject the goods and terminate the contract, and then buy replacement goods from another seller and claim any additional cost involved from the original seller. The question is whether it is necessary for English law, in order to implement the Directive, to introduce a specifically enforceable right to repair or replacement; or do the existing remedies form a "functional equivalent" to specific performance in these cases? At an early stage representatives of the European Commission indicated, at least informally, that they thought that it would not be necessary for the United Kingdom to change its rules on specific performance; we already had sufficient "functional equivalents". However, it seems from the draft regulations circulated for comment that the Department for Trade and Industry is likely to play safe and to give consumer buyers (but only consumer buyers) specifically enforceable rights to repair or replacement. This strikes me as excessively cautious and to cause unnecessary disruption to the structure of our law.

[12] See *Cohen v. Roche* [1927] 1 KB 169 (Contract for sale of set of antique chairs; specific performance refused.)

However, I am glad to say that the implementing Regulations[13] will not follow the Directive word-for-word. For example, they do not use the concept of 'non-conformity'. English law does not have different rules for different types of breach of contract. English law states, for example, that the obligation to deliver goods that are fit for the purpose is just a contractual obligation like any other, and the same remedies are available as for any other breach.[14] Having special rules for non-conformity, for example setting special notice-periods, does not fit with this structure.

THE INFLUENCE OF EUROPEAN IDEAS ON ENGLISH PRIVATE LAW

The second question is the extent to which the concepts and terminology from the continental European systems, or indeed from European Community Law, are actually influencing our private law. For example, it might be thought that the Directives (particularly if they are implemented by "copy out") may be a way in which continental legal concepts and terminology will infiltrate English law. Thus, the Unfair Terms in Consumer Contracts Regulations refer to "good faith", since they effectively copy out article 3(1) of the Directive. Will this result in the notion of good faith spreading into English law?

I think there are few signs of this happening as yet. What I think may happen is that there may be references to good faith when perhaps they would not previously have been those, but the substance of the law will be little affected. It is often recognised that English law has many rules which are functionally equivalent to the rules that in a continental system might be ascribed to the concept of good faith. As Bingham LJ once put it:

> 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith… English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'[15]

[13] See note 4 above.

[14] In this respect English law is very like the Principles of European Contract Law. See *Principles of European Contract Law, Parts I and II* (ed O Lando and H Beale) (Kluwer, 2000).

[15] Inter-Foto Picture Library Limited v. Stiletto Visual Programmes Limited [1989] QB 433, 439.

There is some evidence that, when court judges are referring to doctrine which are functionally equivalent to good faith, they may occasionally describe the doctrine as reflecting the principle of good faith. An example seems to be from contracts of employment. There have been some recent developments indicating the growth of an implied term that the employer will do nothing to bring about a loss of trust and confidence between the employer and the employee.[16] In some judgments one finds references to good faith in this context.[17] But it has to be said these references are only occasional, and amount to little more than 're-branding' of existing concepts.

It is perhaps not surprising that legislation has had a limited influence on our private law. This is consistent with the judicial attitude to legislation in the English system. Statute law is not seen as a base on which further common law development may be built. Rather legislation is seen as completely separate. It applies only when it expressly or by necessary implication deals with the situation, and otherwise it leaves the common law entirely untouched. Indeed, the existence of a limited form of legislation is sometimes given by the judges as a reason for not developing the common law in an area any further; they say that Parliament has indicated the limits to which the law should go and it is for Parliament to decide whether to go further.[18]

New legislation, other than that required by our membership of the EU, also shows relatively little influence of continental systems. Certainly continental systems are considered by the Law Commission when it is preparing its reports. For example, the recent reforms which allowed third party beneficiaries rights in English law for the first time[19] were preceded by the Law Commission Consultation Paper[20] that referred to continental legal systems. However, the notion of giving third parties rights in contracts was not solely derived from continental influences and the references to continental law provided little more than confirmation that what was proposed would be a good idea.

[16] See *Malik v. BCCI* [1998] AC 20, HL.

[17] See *University of Nottingham v. Eyett (No. 1)* [1999] 2 All E.R. 437, 440; and the speech of Lord Hoffmann in *Johnson v. Unisys Ltd* [2001] UKHL 13; [2001] 2 All ER 801, at [46]. In each case the claim that the implied term had been broken failed.

[18] See for example *National Westminster Bank v. Morgan* [1985] AC 686, HL; and *President of India v. La Pintada Compania Navigacion SA* [1985] A.C. 104. But compare the views of Lord Goff and Lord Woolf in *Westdeutsche Landesbank GiroZentrale v. Islington LBC* [1996] 2 All E.R. 961, at 698 and 724-726 respectively.

[19] Contracts (Rights of Third Parties) Act 1999.

[20] Law Commission Consultation Paper No 121, Privity of Contract: Contracts for the Benefit of Third Parties.

It is sometimes thought that English law has been completely separate from continental legal thinking for many years. In fact, I do not believe that to be true. In the 19th century, for example, English law was definitely was not cut off from continental thinking. It is of course the case that the vast majority of our private law was then and remains now judge-made law. We have no civil code; and although some areas have been covered by legislation, so that they are largely 'statutory', this is only true in certain areas. Family law, real property and sale of goods are covered in large part by statute; but the majority of the rules of contract and of tort (civil responsibility) remain governed by the common law. During the 19th century at least, the judges, and probably the counsel who argued the cases before them, were much influenced by Roman and continental legal ideas. If you look at the classic cases dealing with, for example, mistake or impossibility, you will find direct citations from the Digest.[21] If you look at the famous case on the amount of damages recoverable for breach of contract, *Hadley v Baxendale*,[22] you will find that it applies a principle exactly parallel to that of the French Civil Code, article 1150 (though without the special rule on fraudulent non-performance). It appears that this came to English law more or less directly from the writings of Pothier.[23]

In the 20th century, however, the English legal system became more self-enclosed. Possibly this was because fewer of the judges and practitioners had studied Roman law, which was then being replaced by common law as the subject of study at university. Possibly it was because there was a more rigid approach to following previous precedent. There was even a marked reluctance to rely on any authority other than previous cases. For example, when I was a student I was taught that it was not permissible to cite the views of an author in court, however well respected the author or his or her book might be, unless the author was dead and therefore incapable of changing his or her mind. Possibly it was simply due to the fact that there was much more material from the English legal system itself to put before the court, and other things were squeezed out or found not to be necessary. Cases from the other common law jurisdictions, even from the United States, were frequently cited but there was very little use of any other sources.

[21] See *Kennedy v Panama, New Zealand and Australian Royal Mail Co* (1867) LR 2 QB 580 (mistake); *Taylor v. Caldwell* (1863) 3 B&S 826 (impossibility).

[22] (1854) 9 Exchequer 341.

[23] See B. Simpson, 'Innovation in Nineteenth century Contract Law', (1975) 91 *LQR* 247.

This has begun to change. In the number of cases, Lord Goff, in particular, has cited German law quite extensively, though as yet German law has not yet formed the basis of any rule adopted in English law.[24]

Part of the reason that this is so rare is caused by rather curious and peculiar difficulties. First, English judges are supposed to confine themselves to matters which have been argued before them, so they are thus dependent to some extent on counsel. Thus they may have to suggest counselling that the court should consider foreign law, and invite argument on it. Counsel may not be willing to do this. Secondly, foreign law (whether it is the law applicable, or it is merely being argued that the court should adopt the same solution as does a foreign law) is technically speaking treated as a question of fact. The judge should not rely on his known knowledge of it; the parties are expected to prove what the foreign law is by bringing witnesses to give evidence of it. There is no equivalent of the service provided in Germany by the Max-Planck Institute of providing information to judges about foreign law. This rule has always been taken with something of a pinch of salt, particularly where decisions from the common law systems are concerned, and judges in practice are fairly flexible about considering foreign law when it is being cited simply as persuasive authority on how they should decide a case, rather than as the applicable law. Indeed I think the rule is beginning to break down. It is an open secret that Lord Goff, when he needs to know a point on German law on which he is not certain, rings up Professor von Bar.

There is also of course a linguistic problem. Most English lawyers are as bad as I am at other languages. I would expect that as more information about other legal systems becomes available in English, continental laws will be considered more regularly. Also text books, even by living authors, are now cited very regularly in court and text books will sometimes refer to continental systems.

Interestingly, this has turned out to be the field in which (to date) the *Principles of European Contract Law* prepared by the so-called Lando Commission[25] have proved most influential in England. They provide a statement of what is thought to be the common core of the different European legal systems. I have received several requests from judges for copies of this or information about the Principles, and they have been cited in the House of Lords on at least one occasion.[26]

[24] The principal example is *White v. Jones* [1995] 2 AC 207, in which Lord Goff reached the same result as German law but via different reasoning.

[25] See above, note 14.

[26] *Director General of Fair Trading v. First National Bank Plc* [2001] UKHL 52, [2002] 1 AC 481 at [36].

Thus English law, and perhaps the common law system as a whole, is rather a closed world on which continental legal thinking has limited influence. However, it is far from being hermetically sealed and I think that the influence of continental thinking is growing. The actual outcome in terms of cases and legislation to date do not reflect the degree of interest that English practitioners and English judges are showing in the laws of our fellow Member States. Judges are regularly now attending seminars with judges from other countries and attending colloquia on comparative law. Some of them are extremely knowledgeable on the subject.

Nor can we rule out Law Reform based on continental models. One of the issues being considered at the moment is whether the Law Commission should review those parts of English contract law that, in the light of the Principles of European Contract Law, appear to be seriously out of line with the laws of the majority of Member States – either in terms of substance or in terms of the concepts used. A prime candidate would be the area of mistake, misrepresentation and non-disclosure. Here many English lawyers find our law to be unclear and unsatisfactory; but in addition it has a very different conceptual structure, since the doctrine of mistake is of very limited importance, its work been done by 'misrepresentation', an outgrowth of the doctrine of fraud; and sometimes it produces startlingly different results, as we have no general duty to disclose facts known to one party but not to the other. To this I will return.

ENGLISH ATTITUDES TOWARDS GREATER HARMONISATION OR UNIFICATION OF PRIVATE LAW

I think we can best judge the typical English attitude towards the greater harmonisation or unification of European Private Law, perhaps by the adoption of a European Civil Code, by considering the reactions in England to the European Commission Communication on Contract Law of July 2001.[27] Some respondents from England pointed out that there are still specific barriers to trade created by national legislation, for example in the area of financial services.[28] But otherwise the reaction to the Commission's paper can at best be described as cool. I think it is fair to say that the response of the UK Government itself is fairly representative. It welcomes the proposed Option III, improving the quality of existing EC legislation. But it rejects Option IV, a new comprehensive legislation, "in

[27] COM (2001) 398 Final.

[28] See the response of the London Investment Bankers Association.

any of its forms". It is even very sceptical about Option II, promoting the development of common contract principles. The response states that the UK Government 'sees some potential value in comparative legal research aimed at identifying, and disseminating information about, common principles that may already exist between national laws'. However, it states explicitly that the Government 'does not agree with the suggestion in paragraph 52 of the communication that the objective of this option is to achieve more convergence of national contract laws. It considers that convergence should only be pursued when there is a demonstrable need and after careful consideration of the net effect." In other words, the UK Government does not see harmonisation of law across Europe and as an end in itself. I am sure that many others in the United Kingdom share this point of view.

Why is this? I think there is a number of reasons.

First, there is general hostility to codification. I have explored this issue elsewhere, and today there is not time to do more than make a few brief points.[29] Much of English law is "codified" in the sense that it is now in a statutory form. I have mentioned Family Law, Property Law and the Sale of Goods Act; the latter formed part of a widespread statutory codification of Commercial Law in the late 19th century.[30] However, these are not codes in the continental sense. They are statutes that the courts apply in a strict fashion. When a point is not covered by the statute then the common law applies just as it did before the Act. The statutes are interpreted narrowly in the sense that one may not apply them by analogy but only when they are directly applicable upon the wording.

Codification in the continental sense has been tried on one occasion but failed. In the 1960s the Law Commissions in England and Scotland were engaged in a joint project to codify the Law of Contract. A great deal of work was done, including the preparation of a complete draft by Dr Harvey McGregor.[31] However, in the 1970's the project was abandoned, first by the Scottish Law Commission and then by the English Law Commission, so that they could concentrate instead on areas which needed particular reform. There appear to have been a variety of reasons for this abandonment. One of them seems to have been a problem of legislative style. Dr McGregor produced a text with an accompanying

[29] See my 'Codification and the English Common Law – a model to be followed?', in *Towards a European Civil Code* (Eds G Barrett and L Bernardeau) (ERA 2002) 30, 32 to 34.

[30] See also Bills of Exchange Act 1882 and Partnership Act 1890.

[31] See McGregor, *Contract Code: drawn up on behalf of the English Law Commission* (Dott. A. Giuffre Editore, Milan, 1993).

commentary. The text was fairly general in style and reasonably brief. When the draft was passed to Parliamentary Counsel, the specialised kind of lawyer employed in the United Kingdom to produce Bills, the commentary was abandoned and the draft became much more detailed and closer to the traditional style of an English statute. One of the Scottish Law Commissioners at the time told me that the problem was ' the Scots wanted a code but the English appeared to want a statute'.

The difference between a code and a statute is really rather important. The English judges are rather wary of statute because, when it is interpreted as they do, it is rigid and inflexible. It may well prevent the development and refinement of legal concepts to deal with new situations. One often hears the phrase "statutory cement". By contrast, the development of the common law is one of constant refinement and (hopefully) improvement. English judges and indeed English lawyers generally think that this is one of the great strengths of our system. It means of course that the law is, at its edges, a little uncertain; it all depends on how the next court will interpret the existing precedents. That however should not be taken to mean that there is great uncertainty. Usually not only the basic rules but the application of the rues to the majority of cases are very clear. I would suspect that the English common law is no less certain in this sense than is any continental system, though the law in a code system may be a bit easier to find.

The second reason for hostility to a European Code relates to the history of English law as the law of choice of parties who may have very little other connection to England. In certain markets – for example, the ship-charter and commodity markets – it is very common for non-UK parties to agree that their contract should be subject to English law, frequently coupled with arbitration in London and sometimes insurance through Lloyds. The choice of English law may be partly because of the fairly effective court system that we have in the United Kingdom and the expertise of our lawyers. They are very expensive but they are usually regarded as knowing their business rather well. There is a fear that if English law were to be replaced by some European or international scheme, that unique expertise would be lost. The effect might be that legal business would move away from London.

There is also a fear that a change in the substantive law itself might result in a loss of business. Even though English law is not always easy to find, and though inevitably there are areas of uncertainty, it is a law which tends to produce fairly certain outcomes and to leave rather little to the judge. Indeed its rules sometimes seem draconian. For example, it is still the case that an insurance company may refuse to pay a claim made by the insured if the insured has committed any "breach of warranty" in

the insurance policy, even though the breach had no causal connection to the event giving rise to the claim. English lawyers worry that to adopt a general principle of good faith would make the law much less certain.

Our law is also rather individualistic. For example, it is well known that, outside the field of insurance contracts, there is no duty to disclose facts to the other party, even if the first party is aware that the second party is ignorant of some absolutely crucial fact and that, if the second party knew the truth, it would never enter the contract.[32]

I have argued elsewhere[33] that these rules may reflect the type of case which typically comes before the English courts. English contract law in particular is driven by a diet of commercial cases often involving parties of very great sophistication who are doing their best to compete in highly fluctuating markets. In these markets, to take advantage of knowledge that you have, and the other party does not have, is considered to be contrary to good faith; it is considered to be good business. In those circumstances the English rule seems quite justifiable. However, I think it is frequently acknowledged by English lawyers that our rule is too broad; it would apply equally to somebody who sells a house without telling the buyer that a pig farm is about to be opened next door.[34] But there clearly is a fear that any European Civil Code might contain law that in terms of substance was less attractive to commercial parties, and that they might turn to other systems as their 'law of choice'.[35]

CONCLUSION

So I think it is fair to say that at present English Private Law remains relatively immune to "Europeanisation". It is of course subject to the EU legislation but, compatibly with the tradition of treating statutes as affecting only the area of law directly covered by them, EU law is seen as somehow separate and the degree of infiltration of European ideas is rather limited. However, as I have said things are beginning to change. I hope that in 20 years time the picture may look very different.

[32] The famous French *Poussin* case, in which the seller of a painting was able to avoid the sale on the grounds that he did not believe it could possibly be by Poussin whereas the buyer, the National Gallery, knew that it was very likely to be by that painter, would be inconceivable in English law. (See Civ. 13.2.1983, D.1984.340, JCP 1984.II.20186; Versailles 7.1.1987, D. 1987.485, Gaz.Pal. 1987.34.)

[33] See H. Beale, 'The Europeanisation of Contract Law' in R.Halson (ed.), *Exploring the Boundaries of Contract* (Dartmouth, Aldershot, 1996), 23-47, 38.

[34] Cf Cass. Civ. 3, 2 October 1974; Bull.civ.III.330; D.1974, IR.252; RGLJ 1975.669. n. Blanc.

[35] See UK Government response, para 8.

EUROPE AND THE LEGAL REFORM OF THE LAW OF OBLIGATIONS

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Summary

I. INTRODUCTORY REMARKS

2002 has been an incisive year for German lawyers and for the time-honoured German Civil Code, the "Bürgerliches Gesetzbuch" (BGB) of 1900.[1] The law of obligations, this very core of the BGB[2] and of civil law at all, underwent deep-rooted changes and every practising lawyer in Germany, every law student and, even worse, every law professor had and

[1] The BGB entered into force on 1 January 1900.

[2] The law of obligations („Schuldrecht") is the second of the five Books of the BGB and comprises §§ 241 – 853. It contains a codification of the law of contractual and extra-contractual obligations.

still has to learn this part of the law almost entirely anew. It is tempting to present therefore a survey of all those changes as comprehensively as possible in a short paper like this and leave it to the reader to conclude how the German reform fits into the European development. I will, however, follow another path, namely first give some general information on the two reforms as it in fact were and on their background, then only indicate the main changes and put them in relation to their counterparts in other European countries, thirdly discuss the relationship between national and European developments in private law and finally draw some conclusions. The whole exercise serves the aim to state, if at all possible, how and into which direction private law legislation in Europe should proceed today.

II. SURVEY AND BACKGROUND OF THE RECENT GERMAN REFORM(S)

The recent German reform consists actually of two reforms: the 'great' reform[3] for the modernisation of the "Schuldrecht" (law of obligations) which aroused much publicity,[4] hot discussions in parliament and among lawyers and changed in substance comparatively little; and the 'small' reform[5] of the "Schadensersatzrecht" (law of damages) which passed all parliamentary hurdles nearly unnoticed but has some important practical consequences.

1. Reform of Contract Law and Limitation Law

The 'great' Schuldrechtsreform entered into force on January 1st 2002 and brought about changes of many provisions on the general law of contract, of the law of sales contracts and contracts for works and of the law of limitation. The main reason for the changes was the necessity to implement European directives, in particular the Consumer Sales Directive.[6] But the legislator did not confine itself to

[3] Gesetz zur Modernisierung des Schuldrechts (Act for the Modernisation of the Law of Obligations) of 26 November 2001, Bundesgesetzblatt (Official Bulletin, BGBl.) 2001 I 3138 ss.

[4] Not only every law journal but almost every newspaper reported extensively on the „Schuldrechtsreform".

[5] Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften (Second Act for the Amendment of Provisions concerning the Law of Damages) of 19 July 2002, BGBl. I 2647.

[6] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Official Journal L 171, of 7 July 1999, p. 12 ss.).

the mere implementation of the European enactments. Parliament took the occasion for a systematic renewal of the general law of obligations. Such an idea had been pursued already since 1984 when an official commission had been instituted with the task to prepare proposals for a reform of parts of the law of obligations. Then, in 1992 this so-called "Schuldrechtskommission" presented a comprehensive proposal[7] to amend central parts of the BGB's law of obligations. The proposal relied very much on the structure of the UN Sales Convention (CISG) of 1980[8] and now formed almost entirely the pattern of the reform.

At this stage a short remark on modern German legal history seems appropriate. The influential UN Sales Convention, to be correct its nearly identical predecessor,[9] had been initiated already 1929 by Ernst Rabel, one of the outstanding lawyers of the last century who lectured and researched then in Berlin. He – and further renowned scholars – prepared the first drafts of the uniform sales law on a comparative basis and found a convincing combination of the continental, Roman law based tradition[10] and the Common Law tradition.[11] His so to speak grandchild, the UN Sales Convention, influenced very much the European Sales Directive.[12] So ideas once developed in Germany returned home via the United Nations and Europe.

2. Reform of the Law of Damages and Strict Liability

The second reform of the year 2002 concerning the law of obligations entered into force on August 1st 2002 and amended many provisions of tort law and damages law. Its background was no European directives but

[7] Bundesminister der Justiz (Herausgeber), Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts (1992).

[8] United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980. This Convention has been ratified by 12 out of the 15 present EU member states. The United Kingdom is still contracting state of the Hague Uniform Sales Law (see next footnote). Only Ireland and Portugal have neither adopted CISG nor ULIS/ULF.

[9] The Hague Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and the Hague Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), both of 1 July 1964.

[10] The continental („civil law") tradition with its Romanic and Germanic branch.

[11] See his famous treatise *Das Recht des Warenkaufs*, Vol. I (1936), Vol. II (1958).

[12] Opinion of the Commission of 19 January 1999 [COM (1999) 16 fin., 96/0161 (COD)] under II.2.; see further Staudenmayer, „Die EG-Richtlinie über den Verbrauchsgüterkauf", *NJW* 1999, 2393; Magnus, „Der Stand der internationalen Überlegungen: Die Verbrauchsgüterkauf-Richtlinie und das UN-Kaufrecht", in: Grundmann / Medicus / Rolland (eds.), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (2000) 79 ss.

the generally accepted need to adapt this part of the law to current social and economic conditions and today's policy considerations. Even the aim to bring German law in line with that of Germany's European neighbours played a certain role.[13] In fact, some typical German features of this part of the law have now been abolished.

III. SOME DETAILS OF THE TWO REFORMS THROUGH THE EUROPEAN LOOKING GLASS

1. Limitation – General Rule with Few Exceptions

German law of limitation was complicated because of the great and confusing variety of different periods of limitation – from six weeks[14] to thirty years[15] – for cases which had to be distinguished rather often only for this purpose. If for example a buyer bought an enterprise which was less profitable than announced by the seller a limitation period either of six months[16] or thirty years[17] could apply depending on the court's discretion to classify the failure of profitability either as a defect of the bought good or as a case of misrepresentation.

Now there is a general limitation period of three years with only few exceptions.[18] The period starts running by the end of the year in which the claim became due and the creditor knew or must have known the debtor and the facts founding the claim.[19] If the creditor did not acquire knowledge nor was grossly negligently unaware of the claim, then irrespective of his lacking knowledge a limitation period of 10 years runs from the date on when the claim came into existence, and a period of 30 years in case of bodily injury claims.[20]

One of the exceptions to the general three-years-period is sales law. Here, a two-years-period applies instead of the former period of six months for claims concerning defects of quality or title.[21] This rule which

[13] See *Begründung zum Regierungsentwurf* S. 33.

[14] In case of sale of non-conforming cattle: old § 490 par. 1 and 2 BGB (old § means: in force until 31 December 2001).

[15] 30 years was the general period of prescription, which always applied when no special (shorter) period was provided for: old § 195 BGB.

[16] According to the old § 477 par. 1 BGB.

[17] When the former general period applied.

[18] New § 195 BGB (new § means: in force since 1 January 2002).

[19] New § 199 par. 1 BGB.

[20] New § 199 par. 2 – 4 BGB.

[21] See new § 438 BGB.

had to be implemented due to the Consumer Sales Directive for consumer sales has been extended to all sales and also to contracts for work.[22]

A view on the European scene shows a great diversity of prescription periods and distinctions also there. But periods of limitation are regularly longer than one year.[23] The concept of one general period of reasonable length with some exceptions encounters for example in the United Kingdom.[24] The new German limitation law is now more in line with these models.

2. General Contract Law

As already mentioned the most fundamental modifications concern the provisions on general contract law.[25] They have been modelled after the UN Sales Convention. This has consequences for the dogmatic structure of the law but almost no impact on the solution of concrete cases. It has now become only much easier to reach the same solution as under the old law.

a) Breach of Contract

The main change concerns the concept of breach of contract. The old BGB distinguished in general terms only between two cases of non-performance of obligations, namely impossibility of performance and default of performance.[26] Performance which was rendered but did not conform to the contract was not generally addressed but dealt with in few special provisions of sales law,[27] law of lease[28] and law of contracts for work.[29] Here – like in Roman law – specific warranty provisions ("Gewährleistung") applied; namely termination (the Roman *actio redhibitoria*)[30] and price reduction (the Roman *actio quanti minoris*)[31]

[22] See new § 634 a BGB.

[23] See, e.g., art. 2262 ss. French Code civil where only few prescription periods are shorter than one year. In England the normal period is six years (see following footnote).

[24] See Limitation Act 1980 with a general period of six years but a number of exceptions.

[25] These are §§ 241 – 432 BGB; not all but many of them have been redrafted.

[26] Old §§ 275, 280 – 283, 323 – 325, 327 BGB (impossibility and its consequences); old §§ 284 – 292, 326, 327 BGB (default of the debtor); §§ 293 – 304 (default of the creditor; these provisions remained unaltered by the „Schuldrechtsreform" except that they – like all provisions of the BGB – were given official headings).

[27] Old §§ 459 – 493 BGB.

[28] §§ 536 – 536d BGB (these provisions remained also unaltered).

[29] Old §§ 633 – 639 BGB.

[30] Old § 462 BGB for sales, old § 634 BGB for contracts for work. In case of lease termination and redelivery was always specifically regulated (see §§ 543, 543, 546 BGB).

[31] Old § 462 BGB (sales); old § 634 BGB (contracts for work). Lease of non-conforming goods or rooms entitles the lessee also to price reduction (§ 536 BGB).

and in some special cases even damages[32] were granted as specific remedies for the non-conformity. But apart from those specific warranty provisions the BGB did not provide a general remedy for any other kind of non-conforming performance of contractual duties. To fill this gap, only four years after the BGB's enterance into force in 1900 the German courts therefore invented the institute of "positive breach of contract" (positive Vertragsverletzung) as a general remedy for all other kinds of breach of contract than impossible and defaulted non-performance.[33] However, the relation of this remedy to the special provisions remained difficult. The distinction whether the specific warranty provisions or whether the distinct rules on the positive breach of contract applied was always problematical. The distinction had also practical importance since the warranty provisions did not require fault – except for damages where gross fault was required[34] – whilst the rules on the positive breach of contract presupposed fault.

This problem has now been solved. The new § 280 BGB[35] makes it expressly clear that any non-conforming performance – be it non-performance, belated performance or poor performance – constitutes a breach of contract and triggers at least the remedy of damages if the debtor is responsible for the non-performance. The specific provisions on remedies in sales law and law of contracts for works have been almost entirely deleted. This model has been taken from the UN Sales Convention[36] which in turn has taken over this concept from Common Law. In 2002 Germany has therefore given up much of its Roman law background.

b) Presumed Fault-Principle Retained

Under the UN Sales Convention like in Common Law a contractual debtor is liable for the performance of his duties irrespective of fault.[37] He is, however, exempted from liability when irresistible and unavoidable

[32] Damages were due when the non-conformity was the debtor's fault (§ 536a BGB for lease contracts, § 635 BGB for works contract); for sales contracts when the seller had breached a warrant or had maliciously hidden the non-conformity (§ 463 BGB).

[33] Reichsgericht (Imperial Court – RG) RGZ 54, 98.

[34] See in particular the old § 463 BGB which required that the sold good lacked a specifically agreed quality or that the seller had acted fraudulently („arglistig") if the remedy of damages should be applied.

[35] New § 280 par. 1 BGB now provides: „If the debtor violates a duty arising out of the contractual relationship the creditor may claim compensation for the loss resulting thereof. This does not apply if the debtor is not liable for the violation of the duty."

[36] See art. 45 CISG after which new §§ 437 and 634 BGB are modelled.

[37] See art. 45 and 61 CISG.

reasons beyond his control have impeded correct performance.[38] In contrast to this position the German reform has retained the fault principle on which German civil law has in principle ever relied.[39] Therefore, as under the prior law, a debtor is only responsible if he had at least negligently breached his contractual promise in any respect. But first, there are exceptions to this rule (e.g. it is no excuse to be even innocently unable to pay) and the reform has extended these exceptions;[40] secondly, fault is always presumed when an obligation is not correctly performed.[41] The burden is then on the debtor to prove that s/he was not at fault. And the courts have always seen to the fact that the proof is not too easily met.[42] In effect, the difference between the CISG model and the new German law is not very far-reaching in this respect.

c) Extinction of Obligation to Perform

Another of the plagues of the old contract law was the question whether and when performance had become impossible with the result that the obligation to perform ended. Moreover, the time of this fact played a decisive role for the fate of the contract. A contract whose performance was impossible at the time of its conclusion was invalid.[43] This has been changed. First, a contract directed at an impossible performance is perfectly valid now.[44] Secondly, the obligation to perform ends when performance is either in fact impossible or economically unconscionable or for the debtor personally unacceptable.[45] A case of the last category is for example given when a Turkish employee in Germany refuses to work because he is called to service in the Turkish army under the threat of death penalty.[46]

d) Damages for Breach of Contract

Prior German contract law required the creditor to choose between the remedy of termination (provided its preconditions were met) and the

[38] See art. 79 CISG.

[39] According to the new § 276 BGB (which in that respect was not modified) the debtor is generally liable if s/he was at fault, i.e. has acted with intent or negligence.

[40] The new § 276 par. 1 BGB now allows a stricter – or lesser – degree of responsibility (than mere negligence) if it so agreed or when it can be inferred from the contractual relationship.

[41] See new § 280 par. 1 sent. 2 BGB (cited in fn. 36).

[42] See, e.g., Bundesgerichtshof (Federal Court – BGH), *Neue Juristische Wochenschrift* (*NJW*) 1952, 1170; BGH NJW 1980, 2187.

[43] This was the old § 306 BGB.

[44] New § 311a par. 1 BGB.

[45] See new § 275 BGB.

[46] See the case of BAG (Federal Labour Court) *NJW* 1983, 2782.

remedy of damages. A cumulation – termination and additional damages for any remaining loss – was not permitted. Now, again following the example of the UN Sales Convention[47] such cumulation is expressly admitted.[48] This is one of the more substantial amendments of the "Schuldrechtsreform".

Another substantial change is the fact that now damages are always available in case of any breach of contract[49] while the old law restricted this remedy considerably when defective goods or services were supplied.[50]

e) Right of Termination of Contract

Termination of contract because of breach of contract is often the most severe remedy for the party in breach. This party loses the profit of the bargain and has often considerable additional expenditures like transport costs etc. in order to avoid further loss. Under the prior law the starting point was that the creditor could terminate the contract immediately after even a minor breach had occurred though a growing number of exceptions to this harsh principle had been developed by the courts.

Again, this heritage from Roman law has now been altered and the starting point has been changed into its contrary.[51] Termination is now granted only after the debtor had been given a reasonable further period – a second chance – to come up to his obligations. There are, however, exceptions: immediate termination is still permitted for example where the debtor has finally refused to perform his obligation or where performance at a fixed date had been agreed upon.[52]

3. Sales Contracts

Since the Consumer Sales Directive necessitated changes the legislator took the opportunity to revise the law of sales as a whole. The definition of defects of the Directive which is derived from art. 35 UN Sales Convention was more or less accepted as general definition.[53] Therefore, factual representations in advertising[54] can now amount to binding

[47] Compare art. 45 par. 2 and 61 par. 2 CISG.

[48] See the new § 325 BGB.

[49] New § 280 BGB.

[50] See the old §§ 463, 635 BGB as interpreted by the courts.

[51] New § 323 par. 1 BGB.

[52] New § 323 par. 2 BGB.

[53] New § 434 BGB.

[54] This is provided for in art. 2(2)(d) of the Consumer Sales Directive.

promises, for example the announcement either of the seller or of the manufacturer that a car needs only 3 l fuel for 100 kilometres. If it then needs 5 l the car is 'defective' and the buyer can advert to the normal remedies.[55]

The remedies for non-conforming performance are now placed in a certain order which the buyer is obliged to recognise – as in the Directive but also to a wide extent in accordance with the UN Sales Convention. First comes the right to demand performance (repair or supply of a substitute at the buyer's choice)[56] and only if this remains unsuccessful termination[57] or price reduction[58] can be invoked.[59] However, damages can always be claimed.[60]

Further amendments necessitated by the Directive concern the extended limitation period of two years which has already been mentioned.[61] Furthermore, the last seller who is subject to consumer claims for defective goods has now a recourse right against his own seller which prescribes not earlier than two months after the last seller has fulfilled the claims of the consumer.[62]

All EU member states had to implement the Consumer Sales Directive until the end of 2001 but the member states have a rather wide discretion how to effect this task.[63] Germany has extended the basic concept of the Directive to the general sales law and has integrated the Directive into the existing Civil Code.[64] It remains to be seen whether this 'German way' recommends itself. One problem of this kind of implementation is the European interpretation of the directive-inspired provisions. It is now

[55] To cases of that kind see P. Huber / F. Faust, *Schuldrechtsmodernisierung. Eine Einführung in das neue Recht* (2002) 302 ss.; U. Büdenbender, in B. Dauner-Lieb u.a. (ed.), *Anwaltskommentar Schuldrecht* (2002) § 434 no. 10 ss.; S. Lorenz / Th. Riehm, *Lehrbuch zum neuen Schuldrecht* (2002) 258 ss.; H. Putzo, in: O. Palandt, *Bürgerliches Gesetzbuch* (62nd ed. 2003) § 434 no. 31 ss.

[56] § 439 BGB.

[57] § 437 no. 2 in connection with § 440, § 281 and § 323 BGB.

[58] Also § 437 no. 2 in connection with § 441 BGB.

[59] Anwaltskommentar / Büdenbender (supra fn. 56) § 437 no. 4; Palandt / Putzo (supra fn. 56) § 437 no. 4.

[60] § 437 no. 3 BGB.

[61] See § 438 par. 1 no. 3 BGB.

[62] This is now regulated in § 478 and § 479 BGB.

[63] A survey on the different forms of implementation of the Consumer Sales Directive in the Member States can be found in M. Schermaier (ed.), *Verbraucherkauf in Europa* (2003).

[64] The provisions of the Directive have been inserted into the Sales Chapter of the BGB (§§ 433 – 479), in particular but by no means exclusively by inserting a new Subchapter on consumer sales (§§ 474 – 479 BGB).

rather difficult to detect whether a provision of the BGB is of European or mere national origin.

4. Integration of Consumer Protection Statutes into Civil Code

One of the further aims of the reform was to reintegrate the special consumer protection statutes into the Civil Code. The idea of a comprehensive and complete codification of the civil law underwent a renaissance to some extent.[65] And indeed, the manifold special statutes[66] which existed outside the Civil Code made the law intransparent and supported the development of inconsistencies between the Code and those statutes. The German example therefore might encourage codification ideas also on the European level.

5. Codification of Judge-Made Law

The idea to make the law more transparent, forseeable and certain led also to the codification of a number of legal institutions developed by the courts over the last century. I already mentioned the so-called "positive breach of contract". This legal instrument has now found its way into the new § 280 which covers every kind of "Pflichtverletzung" (violation of duty) irrespective whether it originates from impossibility, delay or any other non-performance of a – contractual – duty. Further institutes thus far developed by the courts but now codified are the doctrine of frustration ("Wegfall der Geschäftsgrundlage"),[67] the *culpa in contrahendo*[68] or the right to terminate long-range contracts on notice where their continuation is unconsionable for the terminating party.[69]

Contract law is now to be found in the Civil Code and can be understood by the reader – not just by the layman but by a professional

[65] For general considerations on modern codification see in particular J. Basedow, „Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex", *Archiv der civilistischen Praxis* (*AcP*) 200 (2000) 445 ss., 465 ss.

[66] Before the reform, the German legislator had regularly implemented the European consumer protection directives (e.g., on unfair contract terms, on doorstep sales, on timesharing rights, on consumer credits) through separate statutes: see among others the former Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act on unfair contract terms – AGBG); Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Act on doorstep selling – HwiG); Gesetz über die Veräußerung von Teilzeitnutzungsrechten an Wohngebäuden (Act on the purchase of timesharing rights on immovable property – TzWrG); Verbraucherkreditgesetz (Consumer Credit Act – VerbrKrG).

[67] § 313 BGB.

[68] § 311 par. 2 BGB.

[69] § 314 BGB.

lawyer for whom the Code is primarily written. Moreover the Code is helpful for the law student to learn the law.

6. General Compensation of Immaterial Loss

The reform of the law of damages and torts to which I now pass has done away with a peculiarity of German law, namely with the very limited possibility to recover immaterial loss.[70] The monetary compensation of such loss was generally excluded in contract law[71] and in the field of strict liability.[72] Only where a negligent tortious act could be proved a bodily injured person could claim money compensation for pain and suffering.[73]

This has been radically changed: now both in contract law and under strict liability statutes immaterial loss can be claimed.[74] It is not necessary any more to prove fault in any event in order to get compensation for that kind of loss. This eases the procedural position of bodily injured victims considerably and brings German law also a good deal closer to its European neighbours. In particular, French law has always been more generous with respect to compensation of immaterial harm[75] than German law. This gap has been narrowed if not bridged now. This development is further supported by the fact that the German reform has moreover doubled the maximum amounts up to which strict liability covers damages.[76]

7. Exclusion of Compensation of Ficticious Damage

Though limited in scope a further amendment may prove to be of similar importance. The reform has introduced a provision[77] which

[70] The old § 253 BGB allowed compensation of immaterial loss only where foreseen by statute.

[71] Only two exceptions were recognised: § 611a BGB (immaterial loss through discrimination in labour law) and § 651f BGB (immaterial loss for loss of holiday enjoyment in case of breach of travel contracts).

[72] The most prominent example of this kind which was also of high practical importance was the exclusion of recovery of immaterial loss under the strict liability statute for road traffic accidents: § 11 Strassenverkehrsgesetz (Road Traffic Act – StVG).

[73] This was provided in the old, well known § 847 BGB.

[74] Now provided by the new § 253 par. 2 BGB.

[75] The notion of „dommage" in art. 1382 Code civil has always been understood to include „le dommage moral".

[76] To take again the example of the StVG: before the reform the Act limited compensation (where a single person was injured and the person liable was not at fault) to an amount of 250.000 € as lumpsum and 15.000 € as annual rent; the amended Act increased the amounts to 600.000 € and 36.000 €; cf. § 12 par. 1 no. 1 StVG.

[77] § 249 par. 2 sent. 2 BGB.

excludes the victim whose property has been damaged from claiming value added tax (VAT) for repair costs where repair is not effected. The VAT – at present 16 % in Germany – is normally incurred when repair is actually effected by a professional who is entitled to add the 16 % to his bill. If the victim has the property in fact to be repaired s/he can also recover the VAT. But thus far, the courts permitted the 16% even if the damaged property, for example a car was never repaired and the 16% were never incurred thus gifting the victim a kind of windfall gain. The new provision signalises the tendency to reduce possibilities to claim compensation where the damage is only fictitious.

Again, Germany joins here the other European jurisdictions which never accepted similarly far-reaching recovery of a pecuniary damage which was in fact not suffered.[78]

8. Reduction of Children's Liability in Traffic Accidents

Psychological research and science but also the French[79] and Belgium[80] example have strongly influenced the decision of the legislator to increase in the traffic field the age at which children become responsible for their acts. Prior to the reform it was the age of seven from which on children were generally held liable according to their insight.[81] Concerning the responsibility for traffic accidents and except in case of intent the age of discretion has now been raised to ten.[82] Children below that age are not liable when they have negligently caused a traffic accident. And what is even more important under practical aspects they cannot be held contributory negligent in traffic situations either.

The main reason for the new provision (§ 828 par. 2 BGB) was that research had revealed that children below ten are unable to react adequately in traffic situations. They cannot realistically judge speeds, distances and dangers of traffic situations. But it is also evident that the French Loi Badinter[83] has been influential.

[78] For a comparative study cf. U. Magnus, *Schaden und Ersatz* (1987); id. (ed.), *Unification of Tort Law: Damages* (2001).

[79] The famous Loi Badinter: Loi no. 85-677 of July 5, 1985, Journal officiel 1985,

[80] Belgium has also introduced a statute modelled after the French Loi Badinter; see thereon H. Cousy / D. Droshout, in: B.A. Koch / H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 50 ss.

[81] This was provided by the old § 828 par. 2 BGB.

[82] See new § 828 par. 2 BGB.

[83] See fn. 80.

9. Extension of Strict Liability

Also the scope of strict liability was extended. But first, it must be stressed that strict liability is still regarded as an exception to the fault principle and therefore needs specific statutory regulation. With one exception[84] strict liability is not provided for in the Civil Code but in specific statutes which are interpreted restrictively. In order to improve the position of victims the recent reform has extended strict liability in several ways. It has been already mentioned that compensation of immaterial harm is now available under all strict liability statutes in contrast to the prior law.[85] And it has been also mentioned that the maximum compensation limits of the strict liability statutes have been doubled.[86] Moreover, in traffic accidents where the keeper of a car is strictly liable for any damage which the car has caused the possible exemption from liability has been reduced. Before the reform it was an excuse that even an ideal driver could not have avoided the accident.[87] Now only force majeure excuses.[88] Further improvements for victims concern the area of strict liability for damage through trailers,[89] through transport of dangerous goods[90] and through pharmaceuticals.[91]

From a practical point of view the changes improve the situation of bodily injured victims considerably. Partly European developments have influenced also these amendments.

10. Evaluation

The recent German reform of the law of obligations is to a considerable extent the reaction on European developments: developments either within the EU – which Germany was obliged to implement – or in the neighbouring countries which Germany voluntarily adopted (e.g. compensation of immaterial loss). With the UN Sales Convention even global unification of law has been taken into account and very much followed. Thus, legislation on private law is much more European and

[84] § 833 sent. 1 BGB [strict liability of the keeper of a so-called luxury animal (which is not needed for work or income)].

[85] See supra III.6.

[86] See also supra III.6.

[87] Cf. the old § 7 par. 2 StVG [„unabwendbares Ereignis" ("unavoidable event")].

[88] New § 7 par. 2 StVG [„höhere Gewalt" („force majeure")].

[89] § 7 par. 1 StVG.

[90] §§ 12a and 12b StVG.

[91] See the amendments in §§ 84 par. 2 and 3, 84a, 87, 88 Arzneimittelgesetz (Pharmaceuticals Act – AMG).

internationally oriented in Germany than it was few decades ago. The reform has brought German law closer to the other legal systems in Europe.

In substance, the amendments have reduced the Roman heritage still contained in German private law and have strengthened elements originating from Common Law. The amendments have also eliminated or at least reduced some of the too fine and abstract differentiations which the BGB of 1900 had introduced. They have improved the possibility to apply the law in an easier and more practical manner. They have strengthened the position of bodily injured victims and tried to re-establish a consistent system of value judgments and policy considerations.

IV. THE INTERRELATIONSHIP BETWEEN EUROPEAN AND NATIONAL PRIVATE LAW

The German reform is but one example of the growing interrelationship between the European law and the national laws of the EU member states. Some general considerations concerning the development and character of European Private Law and its interrelationship to national law might therefore appear useful.

1. Development and Character of European Private Law

It is evident that a body of law is emerging that can be addressed as European private law.[92] It is partly set by the European legislator (though thus far unsystematically); it is partly developed by the European Court of Justice (although the Court's judgments and influence on private law are not yet fully investigated).[93] Also international conventions on substantive law ratified in the member states may be regarded as adding to that body of European private law as well as the many initiatives developing European or even global principles in that field of law.[94] It is

[92] See in this respect very recently Th. Wilhelmsson, "The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law", *European Business Law Review* (*EBLR*) 2002, 541 ss.

[93] But as to the judgments of the European Court of Justice concerning tort law and the law of damages see U. Magnus / W. Wurmnest (eds.), *Casebook Europäisches Haftungs- und Schadensrecht* (2002); W. Wurmnest, *Grundzüge eines europäischen Haftungsrechts* (2003).

[94] Here the CISG is evidently the most influential of these conventions. But also the 'soft law' prepared by the International Chamber of Commerce (INCOTERMS, Uniform Rules on Documentary Credits, on Gurarantees etc.), this kind of a new lex mercatoria forms part of a Common European Law.

also evident that European private law is something else than one of the existing national legal systems in Europe. We face the emergence of what in comparative law is called a mixed jurisdiction which is composed of ingredients from different roots and legal systems.[95] A short glance at these roots may be allowed here.

a) International Conventions

There are only few international conventions which harmonise parts of substantive private law and which at the same time are ratified by all EU member states. Conventions concerning international transports[96] and immaterial property rights[97] belong to that rare species and form already a small part of the law common to all EU members. But even with respect to international sales the UN Sales Convention is in force only in 12 of the 15 member states.[98] Nevertheless this Convention has strongly influenced the EU Consumer Sales Directive[99] and to some extent also the Directive on Package Tours.[100] The CISG therefore left already its traces in European private law.

b) Regulations and Directives

Apart from special fields like air traffic[101] and company law,[102] the EU legislator did not use regulations as a means to enact substantive private law within the EU. The usual instrument for that purpose is the directive. About 25 directives concern the law of obligations in a rather general sense[103] while many further directives deal with particular

[95] See thereto K. Zweigert / H. Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996) 72 („hybride Rechtsordnungen").

[96] The Warsaw Convention (air transport) and the CMR (road transport) are examples of EU-wide ratified conventions.

[97] See the Paris Convention on immaterial property rights.

[98] Ireland, Portugal and the United Kingdom have not yet ratified the CISG though Greatbritain is still a member state of the CISG's predecessor, the Hague Uniform Sales Conventions.

[99] For instance the Directive's definition of non-conformity of the sold goods has been largely taken from art. 35 CISG.

[100] The definition of force majeure as an excuse for non-performance of contractual obligations (art. 4 par. 6 subpar. 2 no. ii of the Directive) is inspired by the art. 79 par. 1 CISG.

[101] See Regulation No. 295/91 (on overbooking) and Regulation No. 2027/97 (on air carrier liability).

[102] Regulation No. 2157/2001 (on a European company).

[103] See the trilingual collection of regulations and directives (in German, English and French) Magnus (ed.), *Europäisches Schuldrecht – European Law of Obligations – Droit européen des obligations* (2002).

areas as for example labour law, insurance law or company law.[104] It is no secret that the private law contained in the directives developed in a very unsystematic and uncoordinated way. This has now prompted the commission – urged also by the parliament – to consider a comprehensive action on the law of obligations.[105] Partly, the development of a common European terminology and of common concepts is already furthered by the jurisprudence of the European Court of Justice in interpreting central terms of private law contained in international conventions, regulations or directives as for instance the terms contract,[106] tort, causation, damage and the like.

c) The Lando Principles

A modern European development are the Principles of European Contract Law,[107] also known as the Lando Principles after the Danish scholar Ole Lando who initiated them. These Principles again follow very closely the model of the UN Sales Convention and conform also to almost 100% to the UNIDROIT Principles of International Commercial Contracts.[108] They combine elements taken from all European legal systems and state rules which could serve as a common European contract law. Although of no binding force they represent much of what could constitute the core of European private law.

d) Preparatory Work of Different Groups

Inspired by the Lando Principles and the preparing Lando Commission several further groups have started working in further fields of private law like tort law, property law, family law, procedural law etc.[109] The outcome of these initiatives will further add to the emerging structure and shape of Europe's future private law.

Besides, these initiatives have also brought about an extended network, and a specific class, partly a community of European scholars

[104] See thereon the fourlingual collection of regulations and directives: J. Basedow (ed.), *European Private Law* 3 vols. (2000)

[105] See in particular the Communication on European Contract Law of the Commission of July 11, 2001 (KOM(2001) fin) and the reactions thereon.

[106] A prominent example is the recent judgment (of September 17, 2002) of the European Court of Justice in Tacconi / HWS, *European Legal Forum* 2002, 306: There the Court decided under art. 5 no. 1 and 3 Brussels Convention that a claim based on culpa in contrahendo (violation of precontractual obligations) does not qualify as a contract claim but as a tort claim.

[107] O. Lando / H. Beale, *Principles of European Contract Law.* Parts I and II (2000).

[108] See M. J. Bonell, *An International Restatement of Contract Law* (2nd ed. 1997)

[109] A survey on these initiatives is given by W. Wurmnest (supra fn. 94) 3 s.

who are interested and involved in international, mainly inter-European relations, who have a good knowledge of other European legal systems and languages, who view their own law from some distance and educate their pupils in that sense of tolerance. This development will also have its impact on the creation of a truly European law.

e) Characterisation of European Private Law

If the European Private Law had to be characterised it is at the moment a colourful mixture of elements from many diverging sources and it is still in the making. As yet it lacks consistency and a clear structure. However, it is certainly becoming a body of law of its own, distinct from the preexisting law of any of the European countries. And it is rather certain that it will develop further – be it through legislative acts of the Community, through judgments of the ECJ or through the voluntary adoption of solutions of neighbouring countries by national legislators or judges.

The development of a Common European Law has been sometimes compared with an orchestra without a conductor. But if one believes in sound effects of competition even on the level of legislation – I doubt this idea – then the famous 'invisible hand' should lead all those competing sources to a final solution which serves the public good.

2. Impact of European Law on National Private Law

It is evident that purely national law giving is on the retreat in Europe – and similar developments can be observed elsewhere on our globe. Where regional integration is intended or begun – in Africa, America or Asia quite a number of integration blocks have been established in the last two decades[110] – the aim of harmonisation of law is always present. This development reduces the sovereignty and autonomy of the legislation of the single state. In Europe the EU legislation has not fully substituted national law giving but has done so to a good deal. By their direct applicability regulations replace any contradicting national law immediately.[111] Directives on the other hand leave a certain legislative discretion but only with respect to the way of implementation.[112] There is therefore a far-reaching formal influence of EU law on national law not only but also in the area of private law.

[110] See, e.g., in America: NAFTA, Mercosur, Andean Pact, OAS; in Asia: ASEAN, APEC; in Africa: OHADA, OAU, Comesa, EAC.

[111] Art. 249 EC.

[112] Art. 249 EC.

Some critique may be expressed here as to the specific European method of legislation through directives. This method was suitable in the early days of the Community. But today the necessary implementation especially of directives which concern parts of systematic codifications occupies the capacity of the national legislator to a large and growing extent. The implementation of European directives into national law – a procedure of quasi notarial character – and the adaptation of existing national law particularly in private law areas becomes more and more time-consuming and at the same time difficult and blocks the national legislator to a considerable extent from other tasks. In order to save this legislative capacity of national parliaments the time seems to have come that the EU legislator makes stricter use of the instrument of the regulation in private law.

As to substance and contents of private law the influence of European private law on national law is far-reaching and still growing as well. Taking the German example the recent "Schuldrechtsreform" would with all probability not have occurred without the need to implement European directives and certainly the contents of this reform has been influenced by European law much more than the mere implementation of the directives would have necessitated. I only mention the extension of the concept of the Consumer Sales Directive to the general sales law. Moreover, almost all consumer protection measures which were enacted in the last three decades in Germany had their origin in Brussels – and consumer protection was one if not *the* main legal development in German private law in that time.

In summary, the European influence on national private law is strong and still growing.

3. National Influences on European Private Law

Are there also influences from national laws on the development of European private law? The answer is yes but with some qualifications. To take again a German example: The Directive on Unfair Contract Terms of 1993 was to a large extent modelled after the German Act on Standard Contract Terms (AGBG) of 1976. In this case, an existing national regulation was influential for the European legislative action. But in other important areas like consumer sales law, consumer credit law, product liability law the respective directives merged elements from different legal systems or – as in case of sales law – from international conventions rather than to adopt one national model. And partly the directives

developed new instruments on their own like in electronic commerce or for door-step contracts.[113]

Direct influence of national laws on European legislation in the sense that a specific national solution is adopted for Europe seems to be rare. Indirect influence that the existing national laws are taken into consideration when European legislation is prepared is probably the rule though this influence is difficult to assess. And partly, completely new legislative ideas are created in Brussels.[114]

Some hoped influence of national legislators should also be mentioned. For instance the recent German "Schuldrechtsreform" was also accompanied by the hope that the amended Code would receive greater attention and estimation in the process of forming a European private law than the unamended Code would have had.

Compared to the influence European private law has on national private law the influence vice versa is, however, much less extended.

V. CONCLUSIONS

Which conclusions can be drawn with respect to future legislation on private law in Europe?

1. First, on the Community level: It is not only likely but for sure that there will be further private law legislation of the Community. In fact, legislation in this field will increasingly be taken over by the EU – certainly within the competency of the Community but this competency has been extended ever further and it is likely that this extension continues.

2. It has to be demanded that EU legislation on private law be more consistent and transparent than in the past where piecemeal and patchwork legislation governed. This means that future EU legislation on private law has to be more in the kind of comprehensive codifying legislation. This has the further effect that the instrument of regulation – instead of the directive – should be more frequently used – also in order to save capacity of the national legislators and also in order to bring about in the long run a true "area of law" as required by art. 61 Amsterdam Treaty.

3. What sources of inspiration should the EU legislation use? In the first line international conventions – like the Vienna Sales Convention – but also the European Contract Principles and the UNIDROIT Principles

[113] The consumer's right of withdrawal from a validly concluded contract – if concluded in a certain situation – is of European origin.

[114] See preceding fn.

and similar unifying instruments should be taken into account in order to form a basis for EU legislation. Evidently also the various national solutions must be considered though a simple reception of one country's solution will become an ever rarer case. From all these sources a new hybrid law family will develop.

4. Secondly, the national level of private law legislation: Is there still the need to enact national statutes or codifications of private law – even for small parts of EU member states (provided that the national constitutional law allows such local codifications)? It is evident that the space for national legislative actions in the field of private law is shrinking. Where the EU has made use of an existing competency for legislative action the national lawgiver can at best merely reproduce the EU solution. Only within the scope of these restrictions national lawgiving remains possible. But nevertheless, although I am no defender of the idea of a 'competition of legal orders' I see no disadvantage to have – or to create – various modern codifications from which a future European regulation can benefit and on which it can be erected.

5. However, as far as the national legislator still enacts private law 'on its own' the taking into account of international conventions and instruments like the Lando and UNIDROIT principles as well as the comparison with the neighbour laws should be self-understanding. Moreover, the outcome should be also guided by the consideration that the solution should be acceptable both for the neighbouring laws and on the European level.