



Australian
National
University

ANU Centre for European Studies Briefing Paper Series

Harmonising Private Law in the European Union: Past, Present and Future

Ken Oliphant



Vol.3 No.5 (July 2012)

ISSN 1838-0379

ANU COLLEGE OF ARTS & SOCIAL SCIENCES

The ANU Centre for European Studies Briefing Papers are an interdisciplinary series that aims to provide a concise overview of the latest research that promotes greater understanding of issues relating to Europe, the European Union and the Europe-Australia relationship.

They serve as a summary of these issues, and as a ready information source for the preparation of submissions, media releases or reports for use by university students, government departments, diplomats and other interested parties, as well as the general public.

The Briefing Papers showcase the work of the centre, providing an avenue of public outreach for the broad range of workshops, seminars, public lectures and conferences that form the Centre's work program.

They showcase, too, the research projects supported by the centre through its appointment of highly qualified scholars as staff members, postdoctoral research fellows, adjuncts and associates, and by its competitive visiting fellowship program.

Briefing Papers Available

France in the South Pacific: Countdown for New Caledonia ~
Review of Implementation of the Noumea Accord | Denise Fisher | May 2012 | Volume 3 Number 4

Towards the 9th ASEM Summit in Laos in 2012: Asia-Europe Relations in the 21st Century | Thomas Roe | April 2012 | Volume 3 Number 3

The Regulation of Electronic Communications in the European Union: Lessons Learned and Remaining Challenges | Marialuisa Costa | April 2012 | Volume 3 Number 2

France in the South Pacific: Countdown for New Caledonia ~
Options for the Future | Denise Fisher | March 2012 | Volume 3 Number 1

European Sustainable Construction Regulation: Homogeneity and Attention | Jeroen van der Heijden and Ellen van Bueren | November 2011 | Volume 2 Number 4

How Likely Is It That The European Union Will Disintegrate? A Critical Analysis of Competing Theoretical Perspectives | Douglas Webber | October 2011 | Volume 2 Number 3

Hungary's 2011 Constitution: Key Features and Political Background | Krisztina Osvát and Szabolcs Osvát | June 2011 | Volume 2 Number 2

Balancing exclusion, prosecution and non-refoulement: the application of article 1F of the Refugees Convention in The Netherlands | Deciana Speckmann | January 2011 | Volume 2 Number 1

EU Analogical Identity - Or the Ties that Link (Without Binding) | Pablo Jiménez | September 2010 | Volume 1 Number 2

Ukraine: A Sharp Turn Eastwards | John Besemeres | May 2010 | Volume 1 Number 1

Harmonisation and Regional Cooperation in Cross-Border Policing: Comparing European and Australian Frameworks | Saskia Hufnagel | December 2009 | Volume 1 Number 2

All these briefing papers can be viewed at

<http://ces.anu.edu.au/research/publications>

ANU Centre for European Studies
ANU College of Arts and Social Sciences
1 Liversidge Street, Building 67C
Australian National University
Canberra ACT 0200
Australia
W: <http://ces.anu.edu.au/>
F: +61 2 6125 9976

Harmonising Private Law in the European Union: Past, Present and Future

Ken Oliphant*

Institute for European Tort Law, Austrian Academy of Sciences, Vienna (Austria)

ken.oliphant@oeaw.ac.at

Abstract

The European Union (EU) has so far taken only hesitant steps towards the development of an autonomous, Europe-wide regime of private law. Initiatives have focused on equality/non-discrimination and consumer protection, the latter manifested in Directives on (for example) the sale of consumer goods, unfair contract terms and product liability. The legal basis for such reforms is limited and frequently disputed. Yet private law remains a focus of interest both in the European Commission and the European Parliament. In recent years, the Commission has been working towards a ‘common frame of reference’ intended to promote the coherence of private law in the EU, and in October 2011 it proposed a new ‘opt in’ legal regime for the sale of goods. This paper discusses the current initiatives in the context of previous developments in the area, and addresses the prospects for the future introduction of a European Civil Code.

1. Introduction

As Jean Monnet, Robert Schuman and like-minded contemporaries conceived their great plan for European integration in the years following World War II, it is doubtful they gave much thought to the harmonisation of private law. By which I mean the law regulating interpersonal relations – by which ordinary people buy or sell goods, enter into other contracts, owe each other duties of care, incur liabilities to compensate for damage, and order other aspects of their mutual affairs.

Yet the last twenty or thirty years have seen a growing emphasis on this aspect of the European project. The first steps have admittedly been somewhat hesitant, and arguably they have been taken without a clear sense of direction. The competence of the European Union (EU) to engage in such reforms is currently limited and frequently the subject of dispute. Yet private

* Director, Institute for European Tort Law, Austrian Academy of Sciences, Vienna; Professor of Tort Law, University of Bristol. This is the revised text of a public lecture given at the Centre of European Studies, Australian National University, on 10 November 2011.

law has become an intense focus of interest both in the Commission and in the European Parliament, and moves are afoot to extend and rationalise the EU's activities in this area.

My aim in this paper is to discuss the current initiatives in the context of previous developments in the area. My title gives away my basic plan: I shall discuss in turn the past, present and future of EU harmonisation in the field of private law. But before embarking on that chronological narrative, let me identify an important underlying theme or *leitmotif* to which I will make repeated reference.

2. An Underlying Theme

Three factors play a crucial role in the development of EU law – not just in this area (private law), but generally.¹ They are: (1) the aspiration of the Commission to introduce new legal provision; (2) the political acceptability of the new law to the Parliament and (especially) the EU Council; (3) the legal competence of the EU and its institutions to introduce the new law (as monitored by the EU Court of Justice, CJEU). (I put aside for the moment the creation of new legal principles by the CJEU itself, on the basis of their being inherent in EU law, even if not made explicit in any legislative text.)

A couple more words on legal competence are merited before we go further. Before the EU can create new law, it must satisfy two requirements: subject-matter competence, and a legal basis for action under the European treaties.² The subject matter must fall within an 'area of Union competence'. And there must be a specific legal basis, *e.g.* the approximation of laws whose object is the establishment or functioning of the internal market (Art 114 of the Treaty on the Functioning of the European Union). Depending on the precise legal basis, the new law may require unanimity from the Member States, or (as under Art 114) only a qualified majority. The legal basis also dictates the type of legislative procedure required, and in particular the extent to which the Council can act without the consent of Parliament. The availability of a suitable legal basis is therefore a very important factor in allowing – or obstructing – the passage of new legislation.

3. European Private Law Past: Two Illustrative Developments

Private lawyers in Europe have tended to see the Law of the EU as marginal to their endeavours, intruding in them only occasionally. But EU Law has colonised considerable areas of the law of contract and tort, in particular, from the mid-1980s, onwards. EU Contract Law and EU Tort

¹ For a general introduction to EU law-making, and the respective roles of Commission, Council, Parliament and Court, see Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2008) Chs 2 and 4.

² As to the EU's law-making competence and the legal basis required for legislation, see *ibid*, p 88 ff.

Law have consequently become larger and more significant categories than is commonly appreciated.³ However, they are the product of a piecemeal series of largely uncoordinated developments, which it would not be very productive to recount in comprehensive detail here today. So I shall content myself with reference to two important enactments which are illustrative of the broader trends.

3.1 Product Liability

My first illustration is the Product Liability Directive of 1985.⁴ It is arguably the first major foray of the EU legislator into mainstream private law – specifically, in this instance, the law of tort (or civil wrongs).

The Directive addresses the liability of product *manufacturers* – and certain others involved in the production or distribution process – for product *defects* that cause personal injury or damage to property. The context for the reform was widespread public concern arising from the Thalidomide tragedy of the late 1950s and early 1960s.⁵ Thalidomide (also known as Contergan) was a prescription sedative recommended for use by pregnant women to alleviate the effects of morning sickness. Tragically, its entirely unforeseen side-effect was to cause severe abnormalities in the fetus *in ventro* which led to thousands of babies being born without limbs or with foreshortened limbs.

Subsequently, legal claims were brought seeking compensatory damages for the children affected. But they ran up against the traditional requirements for establishing liability of *fault* and *foreseeability*. Because the manufacturers argued that the terrible side-effects associated with Thalidomide were unforeseeable at the time the drug was supplied, and consequently that they were not at fault.

Getting away from the fault-based approach of the past was a primary aim of the Directive, as its Recital makes clear: ‘liability without fault on the part of the producer is the only way of solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production’. The Directive therefore holds the producer liable for harm caused by a product defect regardless of the producer’s fault. It creates what is sometimes called a ‘strict liability’.

The Directive is frequently seen as a consumer protection statute. This impression is reinforced by the repeated reference in its terms – especially its Recital – to the need to protect the consumer. But in fact the Directive’s legal basis – *i.e.* the provision in the Treaties that allowed the then Council of Ministers to act – was the harmonisation of the laws of member

³ As to EU tort law, see further Helmut Koziol & Reiner Schulze (eds), *Tort Law of the European Community* (Springer 2008).

⁴ Directive 85/374/EEC on product liability.

⁵ On the background to the reform, see Jane Stapleton, *Product Liability* (Butterworths 1994) p 41 ff.

states so as to improve the functioning of the internal market.⁶ It addressed the concern that divergences in product liability laws between Member States could distort competition and affect the free movement of goods. The Directive thus had an economic, not social objective.

In fact, the Directive's economic objective can even be seen to have undermined consumer protection. It has actually prevented attempts made by national legislators to establish a more stringent form of liability – more protective of the consumer – than under the Directive, or even to maintain in force pre-existing national provisions which afforded greater consumer protection. The CJEU has consistently ruled that such provisions of national law are contrary to the Directive, because differences in levels of consumer protection in different member states might distort competition and impede free movement of goods. National legislation in Denmark, France, Greece and Spain has already fallen foul of such rulings.⁷

Consumer (and victim) protection is also obstructed by the defence provided in the Directive for unknowable defects (Article 7(e)). It is a defence if the producer establishes that 'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'.⁸ It only takes a moment's reflection to recognise that this so-called 'development risks defence' could well have prevented any claim by the Thalidomide children whose plight was so instrumental in bringing about the change in the law. So, it may be questioned whether the Directive achieves its goals.

3.2 Unfair Contract Terms

Our second illustration takes us from tort law to the law of contract. Since the mid-1980s, a stream (or at least a trickle) of Directives have sought to protect consumers in their contractual dealings with business: in purchasing goods or services, going on package holidays,⁹ taking out credit,¹⁰ etc. Business to business (B2B) contracts were also sometimes targeted.¹¹ But B2C (business to consumer) contracts were the main focus. And, here, perhaps the most important law was the 1993 Directive on unfair terms in consumer contracts.¹²

⁶ Article 100 of the EEC Treaty (no longer in force), corresponding to Article 115 of the (current) Treaty on the Functioning of the EU.

⁷ See Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (4th edn, Oxford University Press 2010) p 588, with further references.

⁸ Member States have the option of derogating from the defence, but only Finland and Luxembourg chose to do so. France and Spain have done so in part.

⁹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (*Official Journal of the European Union* (OJ) L 158, 23.6.1990, p. 59).

¹⁰ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) as modified by Directive 90/88 (OJ L 61, 10.3.1990, p. 14) and Directive 98/7 (OJ L 101, 1.4.1998, p. 17).

¹¹ Cf Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17), E-Commerce Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 (OJ L 171, 17.7.2000, p. 1).

¹² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

The Directive's objective was to eliminate unfair terms from contracts drawn up between businesses and consumers. It applies only to contractual terms that are not individually negotiated (*i.e.* to standard form contract terms).¹³ A term is 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' (art 3(1)). The words to emphasise here are 'contrary to... good faith', 'a significant imbalance in ... rights and obligations', and 'detriment of the consumer'. Contractual terms found to be unfair in this sense do not bind the consumer (art 6).

What sort of terms does the Directive catch? Well, the Directive itself provides guidance in the form of an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'. Not quite a 'black list' of unfair terms, because the examples are only possibly unfair, and not automatically unfair, but at least a 'gray list', because a strong inference of unfairness arises. These include the following: exclusions or limitations of liability for death or personal injury; exclusion or limitation of the consumer's rights on non-performance or inadequate performance; and any term making the contract binding on the consumer while the seller or supplier retains the option not to be bound.¹⁴

The Unfair Terms Directive can be seen to share two important features with the Product Liability Directive.

First, it is a radical intrusion in the area of private law, involving a derogation from long-standing principles seen as fundamental in several national systems in Europe. The Product Liability Directive discarded the established and widely (though not universally) recognised fault-basis of tort liability, adopting strict liability (liability without fault). The Unfair Terms Directive departed from a principle that several legal systems (though not all) have regarded as equally fundamental: the principle of freedom of contract. Previously alien considerations of fairness and good faith have now been given centre stage.

Secondly, like the Product Liability Directive, the Unfair Terms Directive is legislation that aims at consumer protection, but is nevertheless introduced under the legislative procedure intended for harmonisation of laws with the object of the establishment or functioning of the internal market. As the Recital to the Directive states: 'the laws of Member States ... show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States.'

¹³ Think of your own experience with the small print on the contract for a hired car, or the box you're asked to click when you try and buy a book online – to say you agree to the terms and conditions of sale. Do you actually click on the hyperlink to bring up the terms in a pop-up window? And if you do: do you actually read them all? From beginning to end? Really? And what do you do if you see something you do not like, or simply do not understand? Ask for an explanation, make a counter offer, or proceed regardless?

¹⁴ More accurately, quoting Annex 1(c): 'making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone'.

4. The Present

4.1 Introduction

The two enactments I have considered may be considered illustrative of a wider set of legal instruments addressing questions of tort or contract, or private law more generally. As I've mentioned, these have sometimes involved radical divergences from established principles of national private law. But the reforms have been pursued in piecemeal and ad hoc fashion, without any clear underlying strategy, and the result has been a patchwork quilt of different legal provisions that use inconsistent terminology and concepts, and leave substantial gaps which are hard to justify. Why (for example) should there be strict liability on the producer of a defective product, but not on the supplier of a defective service (whose liability continues to require proof of fault)?

Such concerns have not solely been raised by critical observers. The European institutions are also alive to the issues. For example, in a Communication dating from 2001 the European Commission highlighted two main areas of potential problems:¹⁵

- on the one hand, the diversity of national laws which may result in barriers to the smooth functioning of the Internal Market; in the Commission's view, divergences between national contract laws constitute a major obstacle to cross-border transactions.
- on the other, the lack of uniform application of EU law – in particular, the lack of consistency amongst EU legislative instruments.

This analysis – following previous calls to action from the European Parliament, and building on extensive preparatory work by academic researchers – paved the way for a Commission Action Plan intended to produce a more coherent private law.¹⁶ In fact, as we shall see, its initial focus was exclusively *contract* law, but it has proved hard – and arguably undesirable – to maintain that exclusive focus, and issues of tort law and other private law categories have periodically come to the fore.

Let me deal first with the academic initiatives in the area, before turning to the Commission's Action Plan.

¹⁵ Commission Communication on European Contract Law, COM(2001) 398 final, 11 July 2001. The Communication directly addressed contract law, but the problems are of general significance in EU private law.

¹⁶ Commission (EC), 'A More Coherent European Contract Law: An Action Plan' (Communication) COM (2003) 68 final, 12 February 2003.

4.2 Academic Initiatives¹⁷

A famous scene in the Monty Python film *The Life of Brian* makes fun of the factionalism of the revolutionary groups opposed to the Roman occupation of Judea: there is the Judean People's Front, the Peoples' Front of Judea, the Popular Front of Judea and the Judean Popular People's Front. As the revolutionaries trade insults, one shouts: 'The People's Front of Judea. Splitters.' To be answered by his colleague, 'We're the People's Front of Judea!' 'Oh,' says the first agitator, 'I thought we were the Popular Front.' European Tort Law can induce similar confusion. There is the European Group on Tort Law, the Institute for European Tort Law, the European Centre for Tort and Insurance Law – and those are just the entities with which I have a personal affiliation. Add in the Study Group on a European Civil Code, the Common Core of European Private Law Group, the Joint Network on European Private Law, the Research Group on Existing EC Private Law (also known as the Acquis Group), and several others I could name, and one might well be forgiven for feeling disorientated.

So let me give a whistle-stop overview of some – just *some* – of the major players involved.

First we have a project initiated by the Danish jurist, Ole Lando, in 1982. Incorporating scholars from other European countries, the Lando Commission set about the task of identifying 'Principles of European Contract Law' which represented an idealised statement of contract law principle for application in the EU. The first product of this work was published in 1995, with further instalments in subsequent years.¹⁸

By this stage, an equivalent project had already started in the law of tort, begun in 1992 by a law professor from Tilburg in the Netherlands, Jaap Spier, who later became the Dutch Advocate-General. With organisational responsibility soon shared with Helmut Koziol in Vienna, the Tilburg/Vienna group – the European Group on Tort Law – set about work on the Principles of European Tort Law, with a culminating publication in 2005.¹⁹

An early member of the Tilburg/Vienna group was a German law professor from Osnabrück called Christian von Bar. Following disagreements with his fellow group members, he left the group and founded his own organisation, the Study Group on a European Civil Code. This contained several members of the Lando Commission on European Contract Law, and the Study Group sought to build on the Lando Commission's work and extend it to other parts of private law. This included work on a rival vision of European Tort Law (or Non-Contractual Liability for Damage, as von Bar prefers to call it). The results were ultimately published as the Draft Common Frame of Reference (DCFR) in 2009.²⁰

¹⁷ See further Ken Oliphant, 'European Tort Law: A Primer for the Common Lawyer' (2009) 62 *Current Legal Problems* 440, from which some short passages in this article are adapted.

¹⁸ See Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law—Parts I and II* (Kluwer 2000); Ole Lando et al. (eds.), *Principles of European Contract Law—Part III* (Kluwer 2000).

¹⁹ See European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (Springer 2005).

²⁰ Christian von Bar & Eric Clive (eds.), *Principles, Definitions and Model Rules in European Private Law: Draft Common Frame of Reference (DCFR). Full Edition* (Sellier 2009).

The work of the Study Group provides a neat segue to my next topic, the Commission's Action Plan, because von Bar and his associates were to play a major role in the Commission's own intervention in the area.

4.3 The Commission Action Plan

Following the Commission's Communication of 2001 expressing its provisional view of the problems needing to be addressed, and asking for stakeholder feedback, a further Communication of 2003 announced a new Commission Action Plan in the area.²¹ The centrepiece was to be a Common Frame of Reference intended (inter alia) to improve the quality and coherence of the EU *acquis*. Without constituting directly applicable law, the Common Frame of Reference (CFR) would serve as a guide for the European law-maker. The European legislator should then draw on this 'toolbox' when drafting new directives and regulations, and when revising existing legislative acts.

After a competitive tender, the task of producing an academic draft CFR (the DCFR) was awarded to a consortium led by the Study Group on a European Civil Code. The initial focus for this work was the revision of the existing Principles of European Contract Law. But the scope of the DCFR was extended to neighbouring areas of the law of obligations and property law so as to highlight the interaction of contract law with other categories.²² Given the leading role played by the Study Group on a European Civil Code, it was decided not to include the existing Principles of European Tort Law, but the Study Group's rival set of principles on 'Non-Contractual Liability Arising out of Damage Caused to Another'.²³

The DCFR was presented to the Commission in December 2008 and published in 2009. The task now facing the European institutions is to decide whether to build on the academic draft to produce a 'political' CFR and what further steps to take in formulating an EU private law. In mid-2010, the Commission established an expert group to advise on the matter, as well as to edit the DCFR to make it more 'user-friendly'. At around the same time, the Commission also published a green paper identifying policy options, and this provides a link to the final section of this paper: European Private Law – the Future.

²¹ Commission (EC), 'A More Coherent European Contract Law: An Action Plan' (Communication) COM (2003) 68 final, 12 February 2003.

²² Christian von Bar & Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe – A Comparative Study* (Sellier 2004).

²³ See further John Blackie, 'The Provisions for 'Non-Contractual Liability Arising out of Damage Caused to Another' in the Draft Common Frame of Reference' (2009) 20 *King's Law Journal* 215.

5. The Future

5.1 Commission Green Paper

The policy options identified in the Commission Green Paper of July 2010 were the following:²⁴

Option 1 was the simple *Publication of the results of the Expert Group* ‘without any endorsement at Union level’. This would be for use ‘by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions. It could also be used in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. Extensive use of this work could contribute, in the long term, to the voluntary convergence of national contract laws.’

Option 2 was to treat the revised CFR as *An official ‘toolbox’ for the legislator*. The Commission would use the ‘toolbox’ when drafting proposals for new legislation or when revising existing measures. It would act as a reference tool to ensure the coherence and quality of legislation.

Option 3 was *A Commission Recommendation on European Contract Law* that would be addressed to the Member States, encouraging them to incorporate the instrument into their national laws.

Option 4 was *A Regulation setting up an optional instrument of European Contract Law*. This would create a second, alternative legal regime within each Member State – but available in *all* the Members States – into which parties could ‘opt in’ if they wished. The optional instrument ‘would need to offer a manifestly high level of consumer protection’.

Options 5 and 6 were, respectively, a *Directive or Regulation on European Contract Law*. The aim would be to harmonise national contract law on the basis of minimum common standards, with Member States free to retain more protective rules if they wished. The European rules could replace national laws in cross-border transactions only, or in both cross-border and domestic contracts.

Finally, *Option 7* was a *Regulation establishing a European Civil Code*. This – the most radical option – would cover not only contract law, but also other types of obligations (e.g. under tort law), and it would apply in a domestic context and not just in cross-border cases. Such an instrument would reduce even further the need to fall back onto national provisions.

For all the above options, not just Option 7 on a European Civil Code, it was contemplated that the legal instrument might embody a narrow view of its subject matter, embracing contract law only, or a broad view, incorporating non-contractual liability (liability in tort) as well as liability under the contract. This would enable, say, parties entering a cross-border contract to

²⁴ ‘Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses’ COM(2010)348 final, 1 July 2010, especially at para 4.1 ff.

have *all* their mutual rights, obligations and liabilities determined under the European law, rather than a mixture of rules from different legal systems being applicable.

5.2 Commission Proposal

In the end, the Commission has decided for now, following consultation, to adopt a combination of Option 2 (the toolbox) plus a streamed-down version of Option 4, the optional instrument.²⁵ The latter is to be pursued with a significant limitation of scope: the proposed optional instrument will apply only to contracts for the sale of goods. However, both B2C (business to consumer) and B2B (business to business) contracts would be covered.

In the Commission's view, an optional European Sales Law will help break down barriers and give consumers more choice and a high level of protection 'with [as the Commission likes to say] just one click of a mouse'.²⁶

Launching the reform, the EU Justice Commissioner, Viviane Reding, extolled the benefits of the proposed reform: 'The optional Common European Sales Law will ... provide firms with an easy and cheap way to expand their business to new markets in Europe while giving consumers better deals and a high level of protection.'²⁷

The advantages claimed for it – for both traders and consumers – are the following:²⁸

- For traders: no longer needing to wrestle with the uncertainties that arise from having to deal with multiple national contract systems; cutting transaction costs for companies that wish to trade cross-border; and helping small and medium-sized companies to expand into new markets
- For consumers: providing the same high level of consumer protection in all Member States; providing a wider choice of products at lower prices (because sales to online customers abroad are at present often refused); providing certainty about their rights in cross-border transactions; and increasing transparency and consumers' confidence (*e.g.* because their rights will have to be set out in their own language).

However, some Member States and stakeholders remain to be convinced of the justification for EU action in the private law sphere. Several have expressed scepticism about whether the Treaties provide a proper legal basis for such intervention. It is argued that harmonisation is unnecessary because there are so many other factors that distort or obstruct trade more significantly, for example, language difficulties, the use of different currencies,

²⁵ See Commission (EC), 'A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market' COM(2011) 636 final, 11 October 2011.

²⁶ Quoting from the Commission dedicated webpage on the Common European Sales Law: http://ec.europa.eu/justice/newsroom/news/20111011_en.htm (last accessed 10 November 2011).

²⁷ Ibid.

²⁸ Ibid.

differences in taxation, ignorance about foreign market conditions and especially the reliability of sellers acting in them, the lack of readily available after-sale service, etc.²⁹

Undoubtedly such factors *do* distort or obstruct trade in the internal market. But, with all due respect, some of them (like language differences) are obviously beyond the EU's competence to address. The EU should not be dissuaded on this ground from action that *does* fall within its competence.

6. Conclusion

This takes us full circle to where we started, with the observation that what can be achieved in this area is dependent not just on finding an appropriate legal basis for EU legislation, but also on the interplay between legal basis, Commission enthusiasm for reform, and the political acceptability of reform.

Harmonisation of private law is politically controversial as it threatens the separate identity of the various legal traditions (Common Law, Civil Law (itself comprised of distinct strands), and Nordic). Past reforms have already involved radical moves away from established principles that some systems see as fundamental, for example, the replacement of fault-based liability for defective products with strict liability and introducing questions of fairness and good faith in place of undiluted freedom of contract. (To cite just the two examples mentioned earlier.)

It may not be possible to find unanimity in favour of future radical reform of this nature, so it will inevitably have to be tested whether EU law allows legislation on the basis of a qualified majority of Member States. Which is why the question of *legal basis* is in fact of intense *political significance*.

One final observation. One may well ask why, at a time when financial crisis in several EU states is placing the idea of European integration under severe strain, one would wish to spend time addressing apparently technical questions of private law, rather than more pressing problems. My answer is simple: whatever happens in Greece, Italy or elsewhere in the Eurozone, European nations will continue to look for ways in which to facilitate cross-border trade between them. The desire for an efficient internal market will not cease. It is therefore important – even at times when other aspects of European integration are getting the headlines – to ensure that work continues on the internal market, and in particular on the legal principles by which its efficient functioning can be promoted.

²⁹ See the responses to the Commission Green Paper (footnote 24 above), available online at http://ec.europa.eu/justice/newsroom/contract/opinion/100701_en.htm (last accessed 10 November 2010).

ANU Centre for European Studies
ANU College of Arts and Social Sciences
1 Liversidge Street, Building 67C
Australian National University
Canberra ACT 0200
Australia
W: <http://ces.anu.edu.au/>
F: +61 2 6125 9976