

## CONTRACT AND COMMERCIAL LAW: The Logic and Limits of Harmonisation

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I begin with the pleasant duty of thanking you for the privilege you have conferred on me in appointing me this year's G.J. Wiarda Visiting Professor at this distinguished University and Law Faculty. I should like to express my particular appreciation to my hosts, Professors Ewoud Hondius and Patrick Honnebier, and to Mrs Ellen Hondius, for all their kindness and hospitality, to the secretaries who with cheerful efficiency dealt with my seemingly endless requests for photocopies and to my postgraduate class in transnational commercial law, whose intelligence and enthusiasm made my teaching such a pleasure, even if perhaps some of them had what might be described as a balanced attitude to study! And I am delighted to see here tonight several other old friends: Professor Pieter Sanders, the doyen of international commercial arbitration; Judge Rosalyn Higgins of the International Court of Justice; and Professor Teun Struycken, President of the International Private Law Association.

Gerard Wiarda was a distinguished member of a family that can trace its lineage back 600 years. Beginning as an advocate, he became beguiled by academe and in 1947 was appointed professor of administrative law in Utrecht. It is a testament to his outstanding qualities that, although he was at Utrecht for no more than three years, after which he accepted an invitation to become a judge of the Supreme Court and eventually President, his influence as a scholar of enormous range was such that the G.J. Wiarda Institute was set up in his honour as an umbrella for the research departments within the Law Faculty. He had an absorbing interest in human rights, and it was therefore no great surprise when he was later appointed a judge of the European Court of Human Rights, of which he eventually became President. So I feel honoured to be asked to deliver this year's Wiarda inaugural lecture, and I am conscious of doing so in the shadow of one of Utrecht's outstanding commercial lawyers and a former *rector magnificus* of this University, Willem Molengraaff.

My talk this afternoon is concerned with the harmonisation of contract and commercial law. The subject is vast and there are members of this law faculty possessing remarkable language skills which I lack and a knowledge of comparative law and of foreign legal systems vastly exceeding my own. My focus is therefore less on the broad theoretical underpinnings of the harmonisation debate and more on practical aspects of the harmonisation process, which I believe are all too often neglected and on the need to back up common assumptions with empirical evidence.

My talk will be in two halves. The first concerns harmonisation at the international level in a strictly limited field and by means of hard law, namely international conventions; the second addresses an altogether more ambitious project at regional level, namely the harmonisation of European private law with particular reference to a proposed European Contract Code, and in this context discusses the relative merits of hard law and soft law, that is, rules which do not in themselves have the force of law.

## I Harmonisation at the international level

Fascination with the idea of some great universal law which would transcend the boundaries of empire and state is of long standing. Some 2,000 years ago Cicero wrote: ‘There shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time.’<sup>1</sup> It is a tribute to the power of Cicero’s language that this passage was relied on by the founder of English commercial law, Lord Mansfield, in a case decided in 1759,<sup>2</sup> to resolve a disputed question of Admiralty law. Of course, Cicero’s dream was never realised or realisable. Nevertheless, we came astonishingly close to a pan-European law in that remarkable period in the High Middle Ages when Roman law was rediscovered, reshaped by the Glossators and taught in the University of Bologna, to which flocked students from all over Europe in such numbers that by 1160 AD this one university is estimated to have had between 10,000 and 13,000 law students. And from the teaching at Bologna and later elsewhere there developed a relatively unified approach to the science of law, with Roman law as its base and Latin as the universal legal language. This *ius commune*, as we know, eventually succumbed to the rise of the nation state and national laws. The question for us in the 21st century is whether we are in the course of establishing a new European, or even international, *ius commune*.

The process of harmonisation through an international instrument is almost always lengthy and arduous and involves the infusion of a prodigious amount of expertise, time and money. It is thus a process not lightly to be undertaken. I do not myself subscribe to the view that the existence of different national laws governing commercial transactions is self-evidently injurious to international trade. Rather I share the approach of that great commercial and comparative lawyer, Harold Gutteridge, who combined deep scholarship with a down-to-earth approach to his subject. In the second edition of his famous book *Comparative Law*, published in 1949 and still unsurpassed in its clarity and wisdom, he wrote in these terms of the limited progress in the unification of law: ‘It would seem that much of the blame for the failure to achieve more definite and permanent results must be attributed to an excess of zeal fostered by an exaggerated belief in the need for unification and over-confidence in its feasibility.’<sup>3</sup> And there, in this simple, elegant statement, we find what I regard as even now the sole criteria which justify a harmonisation project: the existence of a problem sufficiently serious to justify the labour and expense involved and the feasibility of the harmonisation proposed. I shall return to the grand idea of a modern *ius commune* in the context of European private law. At this stage, I would merely offer the reminder that the mediaeval *ius commune* was developed by scholars, not by legislators, and the question who produces the law is fundamental.

The globalisation of international trade and finance over the past 20 years has led to an upsurge in conventions on different aspects of private law governing commercial transactions. Among these may be mentioned the 1980 Vienna Convention on Contracts for the International Sale of Goods, the 1988 UNIDROIT Conventions on International Financial Leasing and International Factoring, the 2001 Cape Town Convention on International

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<sup>1</sup> *De Republica*, 3.22.33.

<sup>2</sup> *Luke v. Lyde* (1759 2 Burr 882).

<sup>3</sup> H.C. Gutteridge, *Comparative Law*, 2<sup>nd</sup> edn. (Cambridge University Press, 1949) p. 157.

Interests in Mobile Equipment with its associated Aircraft Equipment Protocol, the UNCITRAL Convention on the Assignment of Receivables in International Trade, also concluded in 2001, and the 2002 Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary. Time allows me to talk of only two of these Conventions, the Cape Town Convention and the Hague Convention, in both of which I was one of those involved from the early origins to their conclusion.

### I.1 The Cape Town Convention

The Cape Town Convention is by any standards ambitious. It provides an international regime covering the financing of interests in aircraft objects, railway rolling stock and space assets by means of secured loans, sales under reservation of title and leases. A financier taking security over these classes of asset faces serious problems arising from the fact that the assets in question are either earth-bound but constantly on the move, so that a financier has no guarantee that a security or title-retention interest created under its own law will be recognized and enforced elsewhere, or, in the case of satellites and other space assets, is not on earth at all. Huge sums of money are invested in the acquisition of aircraft, satellites and railway rolling stock. Yet there are countries whose law is hostile to the whole idea of non-possessory security or embodies restrictions and requirements which place obstacles to entry into a valid agreement and even more obstacles in enforcing security interests and giving them protection against the debtor's bankruptcy creditors. In consequence, developing countries either find it difficult or even impossible to obtain finance for the acquisition of such objects or, if they do obtain finance, it is expensive. So a key objective of the Convention is to provide a legal regime which will make creditors feel comfortable, open to developing countries access to funds and bring down borrowing costs.

The central features of the Cape Town Convention are the easy creation of an international interest, by security or title retention, with a set of basic default remedies and the ability to secure fast provisional relief; the establishment of an international public register to record these interests, operated by a Registrar under the supervision of a Supervisory Authority; and a simple set of priority rules based on the principle that a registered interest has priority over a subsequently registered interest or an unregistered interest and is protected from the general body of creditors in the debtor's insolvency. The Convention does not come into force as regards any class of object unless and until there is a Protocol in force for that class and it then takes effect subject to the Protocol. So far, only one Protocol has been concluded, namely the Aircraft Equipment Protocol, and this both modifies and supplements the Convention to accommodate the particular requirements of the aviation industry and its financiers.

The Convention and Protocol are complex instruments which together run to 99 Articles, only two fewer than the Vienna Sales Convention and infinitely more complex. Nevertheless, the Convention and Protocol were signed on the spot at the Diplomatic Conference by no fewer than 20 States, and others have since signed. To come into force, the Convention and Protocol require eight ratifications. There is every expectation that these will materialise during the present year or shortly thereafter and that the Convention will be a considerable success.

### I.2 The Hague Convention

This Convention, concluded at The Hague in December 2002 under the presidency of Professor Struycken and with Professor Stefania Bariatti as Chair, deals with the law governing the proprietary effects of the holding and transfer or pledge of securities through a custodian or other intermediary rather than directly from the issuer. Under traditional conflict of laws rules, issues relating to the transfer of securities are governed, in the case of registered securities, by the law of the place where the issuer is incorporated or alternatively keeps its register and, in the case of bearer securities, by the *lex situs* of the certificates at the time of the transfer in question. These rules do not, however, work well in the case of securities held through an account with an intermediary, since the root of title is not the register or the physical location of bearer securities but the securities account with the intermediary, and the law best suited to determine proprietary issues is the law of the place of business of the relevant intermediary. This ‘place of the relevant intermediary’ approach (PRIMA) is already embodied in a restricted way in Article 9(2) of the EC Settlement Finality Directive. What the Hague Convention does is to extend the concept, in modified form, to the international plane and in a relatively unrestricted way. The principal modification is that, to promote predictability, the law governing proprietary issues, whether as between the parties or in relation to third-party rights and priorities, will be that selected by the account holder and the intermediary to govern the account agreement. This is subject to a so-called ‘reality test’, which in essence requires that the selected law is that of a state or territorial unit of a State in which the intermediary carries on the business of maintaining securities accounts, though without necessarily maintaining the particular account in question in that State.

Though the Hague Convention is very much shorter than the Cape Town Convention and a good deal less complex, it nevertheless raised a host of difficult issues stemming in no small measure from the wide diversity of institutions and practices involved in the securities industries in different countries. Yet the Convention was concluded a mere 2½ years after work first began, an astonishing achievement. The existence of a major problem was quickly established. In world financial centres, dealings in securities may amount to billions of dollars *every night*. It is therefore of vital importance to the parties to know what law governs proprietary issues. Yet apart from the conflict rule in Article 9(2) of the EC Settlement Finality Directive, which is of limited application, and decrees in Belgium and Luxembourg, where the two international central securities depositories, Euroclear and Clearstream, are respectively based, there are few national laws laying down clear conflict rules.

### I.3 The ingredients of success

What can we learn from the working methods adopted in the preparation of these instruments? I would identify four crucial factors:

#### (1) The avoidance of excessive ambition

It is better to have a limited target that is achievable than a grand design that is not. Three factors are common to the five conventions to which I referred earlier. First, they are confined to commercial transactions, because consumer transactions are already highly regulated and strongly overlaid with mandatory laws. Second, they are limited to cross-border transactions, because it is primarily in international trade that problems of differences in national laws are likely to cause the most acute problems and because of a perception that states who have a strong sense of the superiority of their own laws will feel less sensitive to changes where these are confined to transactions between businesses in different states. Third, their *raison*

*d'être* is not simply the existence of differences in national laws but the fact that these were wholly inadequate to cater for the needs of those engaged in international trade.

### (2) Participation of all interested parties from the outset

The traditional method of preparing international conventions is for a study group or working party consisting of scholars and/or lawyers in government to prepare draft texts and send these out for comment. But consultation is not the same as participation. The quality of a project improves dramatically if from the very outset those who have first-hand knowledge and experience of the practices of the sectors affected are involved - not necessarily as members of the Study Group but as people committed to work together to produce proposals, criticisms and suggestions for the improvement of texts. Early participation of interested sectors is necessary in order to show that there *is* a serious problem to be addressed and that it is capable of solution. If the major players give an affirmative answer on these two points, then at least the case for harmonisation has been properly made, and the project can proceed.

A huge impetus was given to work on the Cape Town Convention by the massive input of the aviation industry, different groups holding meeting after meeting, preparing paper after paper, and organising seminar after seminar. Not only did this help to ensure that the resultant texts reflected commercial practices and needs, it also reduced the financial and administrative burdens on the hard-pressed UNIDROIT Secretariat and, equally important, generated a high level of interest in the project and support for it which in turn influenced the thinking of governments. In addition, an economic impact assessment was commissioned from two economists working under the auspices of INSEAD, whose report estimated that if a stable international legal environment could be provided for the creation, enforcement, perfection and priority of security and title-retention interests, the leading credit-rating agencies would upgrade the rating of aircraft receivables and the consequent reduction in borrowing costs could lead to savings of up to \$4 billion a year. There were those who viewed this estimate with a considerable measure of scepticism. But a mere ten days ago, Exim Bank - the Export-Import Bank of the United States - issued a press release offering a reduction of one third in its exposure fee on the financing of large US aircraft for all buyers in foreign countries that ratify and implement the Cape Town Convention. This announcement shows in dramatic form the enormous potential value of a sound international legal regime for the protection of international interests in aircraft.

The participatory approach was also strongly present in the Hague Convention project. The securities industry is highly complex and diversified. The major players include issuers, registrars and transfer agents, central banks, international and national central securities depositories operating clearing and settlement systems, custodians and sub-custodians, and broker-dealers, and the indirect holding system sets up what is often a long chain of intermediaries and account holders, each of which may be based in a different jurisdiction. As with aircraft, there was intense participation by the numerous international and regional organisations, essential if one was to obtain a complete picture, since no one group or individual could be expected to have a detailed knowledge of the whole industry. At least one of the rules, namely the rule that a choice of law agreed between parties A and B, would also govern third-party rights, was counter-intuitive and would have been rejected outright by the traditional conflicts lawyer but has been found essential in order to promote predictability.

### (3) Continuity of effort

One of the major problems in preparing international conventions is that full-scale meetings

are expensive and involve a lot of organisation. Thus a year or more may elapse between meetings, by which time the participants may have changed and memories may have faded. Under the old-style not a great deal was expected to happen between meetings. The drafting committee, if it had not already produced a text at the meeting itself, would prepare one on the basis of the decisions taken; some participants might send in papers; but otherwise it was left to the next meeting to carry the project forward. This process was largely responsible for the fact that work on a convention could take one or even two decades. A quite different approach was adopted for the two conventions to which I have referred. A great deal of work was undertaken between meetings with a view to focusing thoughts and saving time at the next meeting. In the case of the Hague Convention, a novel accelerating process was introduced. The Permanent Bureau and certain other key figures actively promoted discussion and debate among all the members of the Commission between meetings on key issues with a view to securing a consensus and the Drafting Committee was authorised to reflect any such consensus in drafting the text for the next meeting, instead of confining itself to decisions already taken. In this way, much of the groundwork for dealing with disputes issues was laid before the ensuing meeting took place.

#### (4) A driver

There is one final element that contributed hugely to the preparation and successful conclusion both of the Cape Town Convention and Protocol and of the Hague Convention, namely the enthusiasm and commitment of a single individual, whose self-appointed task is to generate interest and support for the project, draw in participants and secure their active and continuous involvement in the work. We were fortunate in that for each of the two projects there was just such a person. In the case of the Cape Town Convention, this was undertaken by Jeffrey Wool, who was UNIDROIT's consultant on aviation finance and whose energy and commitment almost single-handedly brought the aviation industry into the project, operating through a great driving force, the Aviation Working Group. Jeffrey Wool's counterpart for the Hague project was Richard Potok, who spurred academic, industry experts and governments into action, organised international conferences calls and seminars, and brought about a marked change in attitude on the part of those who were originally either uninterested or actively hostile, using the members of an extended Drafting Committee as the engine. Every project should, wherever possible, have a Jeffrey or a Richard.

## **II Regional harmonisation: The proposal for a European contract/civil code**

### II.1 The work of the Lando Commission and the UNIDROIT Group

The legislation of the European Community affecting contracts has hitherto been confined almost exclusively to supranational mandatory rules, particularly in the fields of competition and consumer protection. But these rules represented a superstructure imposed on foundations of general contract law which varied widely from one Member State to another. This led Professor Ole Lando to establish his Commission on European Contract Law, with participants from each Member State, to seek to formulate a set of contract principles for Europe. The work was done in three phases. Part I was published in 1995, and was republished with Part II in the year 2000. Part III was completed last year, ending the work of the Commission, and its publication is imminent. In parallel, UNIDROIT produced some

years ago the first part of its Principles of International Commercial Contracts under the direction of Professor Joachim Bonell, and work on the second and final part is proceeding. There was a certain degree of common membership of the two groups and a high degree of similarity in the two texts, both of which have attracted much interest and support and have been applied in numerous arbitrations and even in some judicial decisions. The two sets of principles are not, of course, legally binding instruments, they are restatements which have influence rather than authority, though they are frequently used as an indication of the best rule for a particular situation. The work of the Lando Commission has now been absorbed into the wider project being undertaken by the Study Group on a European Civil Code under the leadership of Professor Christian von Bar.

## II.2 The initiatives of the European Parliament and the European Commission

The European Parliament was clearly captivated by the idea of the harmonisation of European private law. In 1989,<sup>4</sup> and again in 1994,<sup>5</sup> it called for the preparation of a European civil code. In April 2000 it commissioned a report by Dr Klaus-Heiner Lehne on the subject which was presented the following year. In July 2001, the European Commission issued a Communication on European contract law,<sup>6</sup> in which it examined four options relating to the harmonisation of European contract law: no action; promotion of the development of common contract law principles leading to more convergence of national laws; improvement of the quality of existing Community legislation; and the adoption of comprehensive legislation at Community level. The Commission consulted widely on its paper. There was widespread agreement that to do nothing was unacceptable, and considerable support for the second and third options. By contrast, the fourth option, comprehensive Community legislation, proved very controversial. Academic opinion was divided; most governments that responded did not view it with favour and those that did felt that an essential prerequisite was to establish the need for a binding code; business interests for the most part felt it was unnecessary; and consumer organisations differed in their views. Many legal practitioners favoured a code but most who did so seemed to favour a non-binding or opt-in approach.

The European Parliament, in responding to the Commission's Communication, passed a resolution in November 2001<sup>7</sup> underlining what it described as 'the need to pursue a *targeted* harmonisation of contract law where mutual recognition of national rules cannot be applied and where divergence of these rules leads to obstacles to the functioning of the internal market as defined by the Court of Justice'. The resolution can fairly be criticised as

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<sup>4</sup> Resolution A2-157/89, OJ C 158, 26.6.1989, p. 400.

<sup>5</sup> Resolution A3-0329/94, OJ C 205, 25/7/94, p. 518.

<sup>6</sup> Communication of the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 (final), 11.7.2001, OJ C 255, 13.9.2001, p. 1. For an interesting set of academic comments on the Commission's Communication, see the ERA-Forum Special Issue European Contract Law 2-2002, reproducing the papers presented at a conference on European Contract Law at Trier in March 2002. The most comprehensive academic examination of the Commission's proposals is to be found in the Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code.

<sup>7</sup> Resolution on the approximation of the civil and commercial law of the Member States, COM (2001) 398 final, C5-0471/2001-2001/2187 (COS), OJ C 140E, 13.6.200, p. 538.

reflecting a high-minded idealism rather than a coherent statement of objectives, and for lawyers some of the tasks allotted to the Commission seem neither feasible nor useful, for example, the compilation of a data base of contract cases and legislation from every Member State to be translated into all eleven Community languages within three years - a task which would leave the Commission's Translation Service no time for anything else and would in my opinion serve little useful purpose. Nevertheless, one cannot but applaud the Parliament's interest in this very important project and its strong support for the work of the Lando Commission and the von Bar Study Group. For its part, the European Commission has gone to a great deal of trouble to lay out the various options in a relatively neutral way and has provided a very fair summary of the responses.

### II.3 Which way to go?

I shall assume that there is widespread agreement on the value of a restatement of European contract law, as, indeed, there is in a restatement of European civil law if this can be achieved. The Community does not need to invest time and money to prepare such a contract restatement because we already have one in the shape of the Principles of European Contract Law. In fact, if we extend the exercise beyond Europe we have not one restatement but three: the PECL, the UNIDROIT Principles and the European Contract Code prepared by the Academy of European Private Lawyers (also known as the Pavia Group) under the chairmanship of Professor Giuseppe Gandolfi. We certainly do not need any more. The question is not whether such restatements are useful - they have already proved their value - but whether Member States should be obliged to replace their existing contract laws with a European Contract Code. I shall not enter the controversy as to whether the Community has legal competence at all in this area; for the purposes of this presentation I shall assume that it does and that we can disregard the concept of subsidiarity. I do not propose to express a concluded view on this subject. In relation to the preparation of a European civil code, Professor Hondius, one of the most eminent authorities in this field and an ardent exponent of harmonisation, nevertheless urges caution in his contribution to that excellent work *Towards a European Civil Code*.<sup>8</sup> And where the course is thus charted by a direct descendant of the famous map engraver Jodocus Hondius, what can I do but follow it? What I should like to do is to return to the two key criteria mentioned so long ago by Gutteridge: Is there a problem? and are the means proposed feasible? But first I should like to make the point that there is a great deal of EC regulation of consumer contracts, which could certainly do with codification, but that outside consumer protection and competition issues the laws governing commercial contracts are almost entirely dispositive. An EC regulation would thus impose on courts of Member States the duty to apply a uniform contract law which the parties themselves would be free to vary or exclude. It would also impose on the parties the onus of so doing if they wished to retain the legal system with which they were familiar; in default, the rules with which they were wholly unfamiliar would apply. It has to be asked whether the citizenry of Europe regard such a major incursion into their long-established legal systems as meeting the test of legitimacy on which the need for the observance of law is based.

#### (1) Is there a problem?

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<sup>8</sup> A. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2<sup>nd</sup> rev. and exp. edn. (Nijmegen: Ars Aequi Libri / The Hague [etc.]: Kluwer Law International, 1998), at p. 8.

There is a curiosity here. It is assumed, mostly by academics, that differences in national contract and commercial laws are detrimental to business. As far as I can judge, in relation to dispositive law little or no empirical work has been done to substantiate this assumption, which, ironically, is disputed by the very sector on whose behalf it is made. Multinational enterprises are well used to dealing with different national laws. Differences in mandatory laws can, of course, be a problem; differences in dispositive rules are not, because *ex hypothesi* they can be varied or excluded by the contract so as to produce a standard set of terms. Moreover, to unify contract law would not obviate the necessity of consulting local lawyers on other issues, for example, the impact of specific rules governing sales, construction contracts, and all the other special classes of contract which would remain within the purview of domestic law. Yet uniformity is what Europe has always been about - hence the ploughing-up in England of orchards of apples in huge varieties because they did not fit the sizing standards prescribed by the bureaucrats in Brussels.

A further assumption is that 'consumers avoid buying in another state just because of the fact that they do not know the law'. This conjures up a vision of a woman from, say, Ruritania, who visits Rome and there, in the Via Condotti, sees a fabulous dress, a dress to die for. She is about to buy it but then caution prevails: I must not buy this dress because I am not familiar with Italian law. Clearly a very sophisticated consumer, and one who by inference *is* familiar with Ruritanian law. Perhaps in the interests of legal science the scholar who espouses this view should take his wife shopping in the Via Condotti and see what happens!

I do not say there is no problem arising from differences in contract laws, because I have not conducted any empirical evidence either. But I do think the collection of such evidence is an essential prerequisite. Moreover, it is necessary to ask the right question by making it clear that it is not concerned with mandatory rules and by asking business interests whether differences in purely dispositive rules are obstacles to business. Much of the difficulty of interpreting responses to the Commission's Communication is that some of the questions were insufficiently focused. Thus those sectors of business which did express some sympathy with the harmonisation of contract were concerned about problems created by wide divergences in *mandatory law*, and might well have given a different response if asked for their views on the harmonisation of dispositive law.

## (2) Is a binding Code feasible?

Again, I will not offer an answer to this question, being mindful of the fact that when law schools in England were asked whether property law could be taught in the first year half said it couldn't be done while the other half were doing it! But I should like to offer a few practical considerations. First, if law is to be responsive to the social, cultural and economic background of its citizens, then a binding European Contract Code presupposes a social, cultural and economic background common to the Member States. I believe that at present this is demonstrably not the case. Can it seriously be said that a contract law suitable for a country with a relatively small volume of international financial transactions is equally suitable for one of the world's leading financial centres? Can it be the case that a legal system based very strongly on the concept of *laissez-faire* and self-help in commercial transactions shares the same philosophy as a legal system which is opposed to self-help remedies? These differences are of limited significance in a restatement, which offers a resource to legislators, courts and arbitrators but not a threat to existing national laws. The assertion that the similarities in European legal systems are greater than the differences seems to me a

somewhat facile way of brushing aside the very different methods of legal reasoning and of interpretation of contracts, even if in many cases the end results are similar. Second, who is to do the work? Surely not the Commission, which lacks both the time and the technical expertise to do it. But binding law cannot be left to scholars, since the democratic process requires the involvement of all interest sectors, including, of course, government and the Community institutions. So the nature of the product changes from a work of scholarship couched in clear and comprehensible terms to a product derived from political pressures and compromises which will result in complete distortion. And then, of course, it passes through the Translation Service, by which time it will be barely recognisable as the offspring of the PECL.

This brings me to my third point, language. Language is a serious problem. Parallel texts of high quality can be produced only by those who work together in the different languages and who are experts not only in their own language but in their own law. And they need to work together. The production of a parallel text by a drafting committee produces something wholly different in quality from a translation done by a translation agency. This is not intended to imply any criticism of the Commission's highly professional Translation Service, which possesses not only well-qualified staff but also access to powerful data bases. But quite apart from the fact that the Service works under great pressure, its translation skills lie in language, not in the substantive law content of what is being translated.

My own experience as chairman of different drafting committees of Study Groups and Diplomatic Conferences over a period of many years is that a drafting committee can handle two parallel texts at most in the time available to it. Given the absence of the time pressure imposed on a study group meeting or a Diplomatic Conference it might be possible to add a third language, though this alone would produce an exponential increase in the work. Any collaborative drafting work in more than three languages would in my view be impossible.

Finally, let us consider the huge implications of enactment of the Code. Every textbook, every encyclopaedic work would have to be rewritten. Every scholar, every practitioner, every judge would have to be retrained in a major field of law, and would have to be prepared to surrender a substantial slice of hard-won knowledge and experience and return to the law school; good for the law schools, of course, but at what cost to national legal systems, let alone national cultures and traditions! As Julius Hermann von Kirchner so aptly remarked 155 years ago: '... three amending words from the lawgiver and an entire library becomes waste paper ...'<sup>9</sup> Do we really want to consign to the dustbin of history the elegant prose of Portalis in the French Code Civil or the limpid clarity of Huber in the Swiss Civil Code? Did Germany wish to jettison its BGB when it underwent a major revision coming into effect only a year ago? And what of the relatively recently revised Dutch Civil Code? We might also ask: why are some of our leading scholars of European comparative contract law so keen to destroy European comparative contract law?

### III Envoi

I would summarise my conclusions as follows. First, every proposal for harmonisation project must be rigorously tested against two criteria: the existence of a serious problem and the

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<sup>9</sup> In a lecture in 1848 on *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*: '... drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur.'

feasibility of a proposed solution. These factors having been established, thought must be given from the outset to the working methods, and in particular the need for participation, continuity of effort and the assumption of responsibility by a dynamic and committed individual for carrying the project forward. At the international level, the successful conclusion of recent Conventions and, equally important, the strong likelihood of their early adoption, results in large measure from the presence of these various features.

In the case of the proposed European Contract Code, we have yet to establish either that there is a need for a general European contract law to replace the largely dispositive rules of national laws of Member States or that the project is feasible. But I am strongly in favour of adapting our conflict of laws rules to allow the parties to choose the PECL as the applicable law, though this would involve identifying criteria for giving such status to the work of a private body. I am equally supportive of the hugely ambitious and imaginative project for a European Civil Code *as a restatement*. I agree with Professor von Bar that only the community of European scholars in the field of private law has the knowledge and the independence to undertake this and that there is an urgent need for a European Law Institute. Though I am strongly disinclined to see a restatement that has been crafted with meticulous care and accuracy taken over and wrecked by politicians and translators, yet as a restatement the project is of enormous interest and importance; and while the bulk of the funding has come from a German foundation, others too have contributed, including the NWO here in the Netherlands, which is supporting the study of sales and services law by a group of fine young scholars under the direction of Professor Hondius.

And why is this project so important? Because it responds to the desire of law students everywhere to learn more about other legal systems; because it gives further impetus to what the European Community has done so much to promote, the reappearance of the wandering scholar, who goes from a law school in one country to that in another and, perhaps, a third, always acquiring new experiences and stimulated by fresh ideas; because in understanding other legal systems, and in testing our own against a European restatement, we come to see more readily both the strengths and the weaknesses of our own civil law; and because it is through the work of scholars rather than legislators, and through finding unity of solutions in diversity of legal cultures, that we can best recreate the spirit of the European legal tradition.

## Postscript

The very next day after this lecture was delivered, the European Commission produced its Action Plan.<sup>10</sup> It acknowledged that a majority was against Option IV, which was aimed at a new instrument on European contract law, while noting that an important number of contributors suggested that further thought might be given to this in the light of future developments in pursuance of Options II and III. The Action Plan suggests a mix of non-regulatory and regulatory measures, including measures to increase the coherence of the EC *acquis* in the area of contract law, to promote the elaboration of European-wide general contract terms and to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument. The first of these

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<sup>10</sup> Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law*, COM(2003) 68 final, 12.2.2003.

objectives is particularly to be welcomed. There is widespread agreement that the drafting of consumer Directives is of indifferent quality, lacks adequate definitions, is too vague and abstract and is fragmented and inconsistent. Beyond dealing with this, the target is to establish a common frame of reference, establishing common principles and terminology in the area of European contract law. There is no reference to the Principles of European Contract Law in this context, nor are we told why the PECL do not already provide the required statement of common principles and terminology. Given that the Lando Commission devoted over 20 years to the three phases of its project, it may reasonably be asked why it is necessary to reinvent the wheel. But perhaps that is what lawmaking is all about!