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# THE FUTURE OF EUROPEAN CONTRACT LAW

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& WILLEM GROSHEIDE

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# The Future of European Contract Law

## Essays

## in honour of Ewoud Hondius

## to commemorate his retirement as Professor of Civil Law at the University of Utrecht

Edited by

Katharina Boele-Woelki
&
Willem Grosheide

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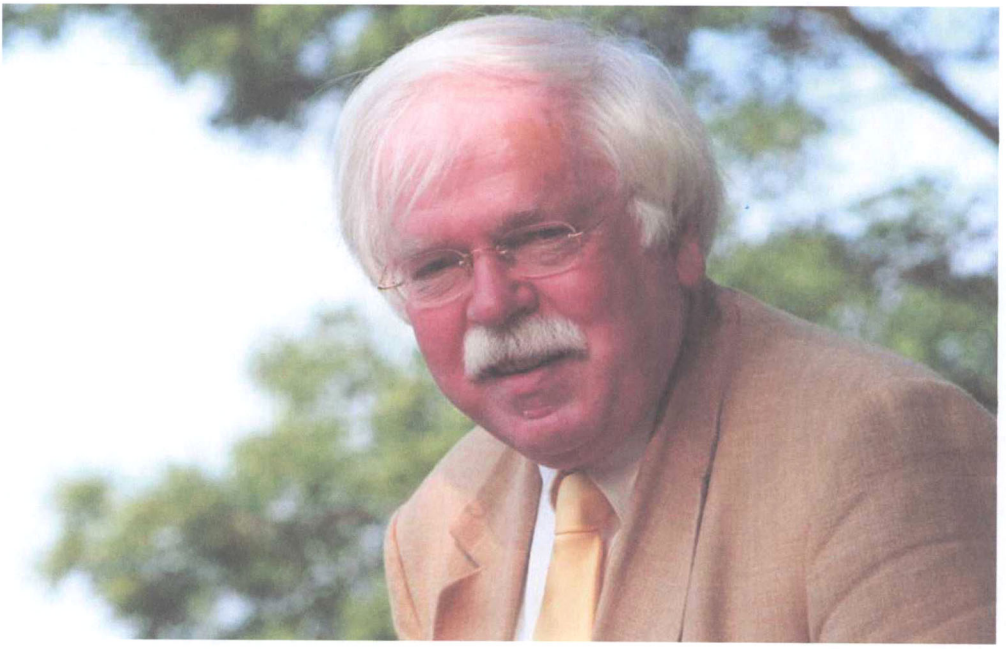
# The Future of European Contract Law



**Ewoud Hondius**

# Preface

Ewoud Hondius recently published a column in the Dutch student legal journal *Ars Aequi* dedicated to the following question: *Festschrift – a curse or a blessing?*[1] Under that ominous title the author writes the following inspiring lines for all those who undertake to edit a *liber amicorum et collegarum* for a retiring colleague. *The common* Festschrift, Hondius writes, *is offered to a professor whose main merit consists of becoming sixty-five years of age. It contains articles sharing the common factor that they are written by friends of the celebrated person. Because his circle of friends in most instances will be constituted by close colleagues of the laureate, often a binding theme presents itself. But some laureates have manifested themselves in more than one area and as a consequence one sees books partly dedicated to legal history, easements and military penal law. Assuming that the editors have managed to introduce some sort of a systematic ordering – unfortunately, often leading to nothing more than introducing the authors in alphabetical order. No less to blame are the editors for accepting ripe and non-ripe work. Since the authors are often given complete freedom in that respect, every possible contribution comes in. Indeed, being an editor requires one to stand firm – I speak from experience – if it means rejecting the contribution of the author's best friend.*

This quotation, taken from a column published on the eve of Hondius'own retirement, was read by the editors in the course of compiling this actual book. One may understand that reading the column caused some perplexity for, after having known Hondius for so many years, one thing seemed to be certain: this column was not published without cause – it most certainly carried a message. But what message?

Not, we assume, that Hondius would prefer a fond farewell by being presented with a new tv set - as he reports was once granted by him instead of a *Festschrift*. No, as we see it, Hondius took the opportunity to instruct us, the then still unknown editors, how to compose a decent book. And so we embarked on this task, indeed by firstly choosing a theme which is dear to the laureate, then inviting a related cross-section of his so many friends to contribute, thirdly arranging the contributors according to their special expertise, and, finally, struggling with some of them as to the content, the length or whatever other subject for a friendly quarrel that may come up in the course of compiling such a prestigious book. In our evaluation as editors, however, all went well and consequently ends well.

As the reader will see, the book is dedicated to the general theme of *The Future of European Contract Law*. Inevitably, such a broad topic has to be divided into sub-themes, many of them coinciding with the special interests of Hondius himself.

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1 *Ewoud Hondius*, De feestbundel: vloek of zegen? Ars Aequi 2007/5, p. 421.

For our part, as the editors, we express our great gratitude to all the authors for having enabled us to compile this book in order to appropriately admire Hondius' impressive contributions to the elaboration of European contract law.

So *tolle et lege*, we can recommend this book.

Utrecht, September 2007
Katharina Boele-Woelki & Willem Grosheide

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# EUROPEAN CONTRACT LAW: ITS POSSIBILITY, FEASIBILITY AND DESIRABILITY

# The Future of European Contract Law: Some Questions and Some Answers

*Guido Alpa*[*]

## 1. Introduction

I would like to put some of the answers to a questionnaire submitted to the Italian lawyers by the Italian Bar Council in a wider context and to touch upon some aspects of problems that the questionnaire itself refers to and which would also be worth discussing in the perspective of the practice of law.

Although the questionnaire does not radically question whether or not to begin the process of constructing a European Contract Law, one senses many reservations in discussions with lawyers who are involved in this theme. The reservations are varied; many fear that the introduction of uniform regulations may undermine the application of domestic ones. It is also feared that new regulations in the contracts sector may involve radical choices, starting over 'from scratch' and therefore resulting in unplanned and inevitable costs, such as extra study; as skills and experience already acquired may not in themselves be enough to form the set of notions and tools needed by a genuinely 'European' lawyer. Others fear a loss of their indirect advantage, thanks to the pre-eminence of one legal system over another or of one language over another – positions of advantage that would be reduced if all lawyers in a European context were subject to the arm's length principle.

These fears, doubts and scepticism are not only widespread in the field of legal practice: they reflect doubts and criticism that are also widespread in academic circles.

The basic questions on 'European Contract Law' were formulated with the usual perspicacious pragmatism by Roy Goode at a conference first published in *Ius Commune Lectures on European Private Law.*[1]

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* Professor of Civil Law at the University of Rome 'La Sapienza'; Dr. h.c. University Complutense; Hon. Master of Gray's Inn.

1 *Goode R.*, Ius Commune Lectures on European Private Law, METRO, 8, Maastricht, 2003; *F. Willem Grosheide* and *Ewoud Hondius*, International Contract Law. Articles on Various Aspects of Transnational Contract Law, 2003 (Intersentia, 2004), p. 309: 'Is there a problem with European Contract Law? Are the solutions proposed to resolve it appropriate?'

K. Boele-Woelki, F.W. Grosheide (eds.), *The Future of European Contract Law, Liber Amicorum E.H. Hondius*, p. 3-18.

### *1.1. Do we need a European Contract Law?*

The question regards European Contract Law in the sense of a harmonised or codified contract law. Many scholars have tried to provide an answer and, given the vast amount of literature on the subject, we cannot say who are more numerous: the supporters of European contract law, or the supporters of the current situation, which brings with it the approval of tradition, and favours diversity. In this case numbers certainly do not decree who is right and who is wrong. What does is the weight of the arguments, their persuasiveness and rationality.

We must first clear up some perplexities, however.

The first arises from the connection between the construction of a European contract law and the choice of an *applicable law* for negotiation between parties.

If everything could be resolved by applying the regulations of private international law to establish the law of the contract, the problem of European contract law would simply not arise. However, the problem does exist and it is different from a simple 'choice of law'.[2] What is under discussion is not which law is applicable, because a 'model code' established at a European level could also become the law chosen by the parties and applied to their contract. On the contrary, the rules of private international law do not function so simply and the choice of the applicable law could be imposed by one party on another. Furthermore, what we want to avoid is the real aim of private international law: not choosing between laws, but *establishing a single law for everyone*. Or at least to build a solid, minimal base on which to set special rules that do not disappear into space, but have a 'safety network' around them, a way to interpret and apply them correctly and in a uniform manner in all countries that are members of the European Union.

The second perplexity regards the 'beauty' or 'inalienability'of diversity: the assumption of *'the virtue of diversity'* has become a cliché.[3]

Once again we are outside our area and this is not the problem to resolve. Comparison is like a mine, knowing how to compare is a great quality and using the results of comparison is a great wealth, but this science (or method) does not come into play in our case. We do not want to ignore, or even worse, marginalize national traditions and the origins of national legal culture. The great codes are the history of our legal systems and the *grands arrets* have marked their evolution. We are considering how to act in order that goods and services can circulate on the basis of *uniform* rules, not rules that are *'different'* amongst themselves. Furthermore, if we accepted only the advantages of diversity (in

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2 See *Alpa* and *Andenas*, Fondamenti del diritto privato europeo, Milan, 2005, II, chap. 1.

3 See *Wagner G.*, The Virtues of Diversity in European Private Law, in *Smits (ed.)*, The Need for a European Contract Law. Empirical and Legal Perspectives, Groningen/Amsterdam, 2005, p. 3; *McKendrick*, Harmonisation of European Contract Law: The State We Are In, in *Vogenuaer and Weatherill* (ed.), The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice, Oxford and Partland, Oregon, 2006, p. 28.

rules)there would be no need for conventions, multilateral agreements or even the so-called uniform law.

And so is there a need for a European Contract Law?

### *1.2. A critique of uniform contract law from the point of view of business relationships*

As I stated above, the question has been gracefully posed by a distinguished scholar of business law and *lex mercatoria*, Sir Roy Goode. It closely follows one of the basic questions posed by one of the founders of comparative law in the United Kingdom, Harold C. Gutteridge: 'Is there a problem? Are the solutions suggested to resolve it appropriate?'

In order to answer the first question, Goode uses the same starting point as several institutions and study groups. He believes that the starting point for the construction of harmonised contract law (or even codified law) at a European level is incorrect. In other words, he believes that whoever supports the view that differences currently in existence between national systems of contract and business law damage trade, have not yet listed the reasons for these disadvantages and, furthermore, there is no evidence that business operators have ever complained about them. Multinational companies are used to using national regulations that are different and these differences only appear when national laws impose imperative regulations; otherwise, if rules can be deviated from, companies can prepare standardised contract forms for every legal system in which they carry out their activity.

Goode's criticism is also aimed at those who argue that transnational purchases of goods and services by consumers would be made easier by uniform contract law, for which there is no concrete evidence: it is merely hypothetical that success in business depends on the awareness (or otherwise) that consumers have of the law that can be applied to the contract.

In order to answer the second question, Goode maintains that a binding code for the parties involved would not be the best solution to the problem. A code presupposes that the member states have a common social, cultural and economic background, but this connective framework does not yet exist. It cannot be said, either, that there are more similarities than differences between legal systems, or that the European Commission has the time or the technical skill to achieve this aim, or that study groups dedicated to this theme are legitimised to impose rules on operators. A democratic process requires all market actors to be involved, together with evaluations of a political nature that first need to mature elsewhere.

Goode adds the problem of language to all these difficulties. Translation implies choices of a conceptual nature and the end-result is to invent an ad hoc language, in order to draft texts that are acceptable to all. However, legal science that would suffer most, just as all publications, would have to be rewritten and a comparison of contract law would also be gravely damaged.

According to his conclusions, that does not mean that a 'model code' is not to be hoped for, but in Goode's opinion, the indispensable condition is that the parties involved choose its application, according to the rules of private international law.

In just a few sentences Roy Goode summarises a trend that is sceptical of (when not opposed to) the harmonisation and codification of European contract law, in which many studies, carried out using different methods, converge. However, his position is not drastically negative, as he admits both the usefulness of a process of codification and its functionality, if the end-result arises from free choice between the parties to the contract.

The disadvantages of harmonisation have been studied in depth by Ewan McKendrick,[4] according to whom it is extremely difficult to achieve unanimous consensus on editing a uniform text on contractual law and the effects of its application might not bring the advantages that supporters of this initiative forecast. Furthermore, the range of choice that national systems offer to contract parties that want to carry out a business operation is such that a decision to harmonise contractual law would decrease this choice. The argument over competition between legal systems is one which is very important to many scholars of comparative law.

Further arguments against establishing a European contract law come from lawyers who work in situations where several legal systems exist side by side, due to multilingualism or the existence of different nationalities (for example, in Belgium, Scotland and England & Wales or the Autonomous Communities of Spain) and from lawyers who apply methods of economic analysis to law as a solution to this problem.

### *1.3. A critique of legislative intervention*

Among the many, interesting ideas that have arisen, there is also one, cloaked in deep scepticism, which sees in the 'European' code the illusion of reacting to the process of globalisation (which is now irreversible in terms of time-scales, methods and territorial borders) by preserving values and techniques of contractual law that are destined to be overwhelmed by supranational practices. Furthermore, this illusion is eroded not only at the highest level – that of the regulations of world globalisation – but also at lower levels, given that in many countries contractual law also has regional origins and is no longer subject to the rigours of state law but is in competition with it. The codification of a European contract law would therefore be in conflict with globalised law and would inevitably be defeated by it as well as being in conflict with local laws, as it would represent authoritarian and anti-pluralist tendencies.[5]

This line of thought is shared by those who believe that only the *lex mercatoria* – obviously the new *lex mercatoria* – would be able to provide for the economic needs of the market.[6] These are joined by the criticisms of those who conceive a contract not as the simple 'legal guise' of an economic operation but as the conventional means of realising private interests that the legislator can enrich with social content. So the discussion returns to the political, not technical, concepts of 'contract', 'freedom of con-

4 See *McKendrick*, note 3.
5 *Irti*, Nichilismo giuridico, Rome-Bari, 2004.
6 *Galgano*, La globalizzazione nello specchio del diritto, Bologna, 2005.

tract', 'private autonomy' and of the role of the legislator and the courts in controlling the conduct of the parties to the contract, and of the aim, form and content of their transactions.

### *1.4. A critique of the compression of the situation's spontaneous evolution*

In this area of liberal thought, there are those in favour of the natural evolutions of systems, as a solution to the most critical situations that derive from the applications of directives and the preservation of domestic principles that are, by now, out of date. Competition between legal systems, updating national systems on the basis of uniform rules set down by some sectors, such as that of international sales, imitating or transplanting principles worked out *ab externo* in order to render law uniform, would also be factors that come closer to national rules and would not require incentives or impositions from the Community legislator.

An attempt has been made to answer all these arguments in various works in favour of a 'model code' of European contract law;[7] in other words, a harmonisation of regulations in European transnational contractual relationships would, in my opinion, bring far greater advantages than the disadvantages outlined above.

## 2. What costs might the drawing up of a European Contract Law entail?

Many arguments in favour, or against, harmonising European contract law or rendering it uniform, have their basis in an economic analysis of law. These arguments are, however, not founded on concrete economic data or on research carried out 'in the field'. These arguments are rational, in that there is the common conviction that it is currently not possible to establish if it is more advantageous to maintain the existing situation or if it is more advantageous to change the system, by passing from a polycentric normative model to a centralised one, on the basis of economic analysis.

The perspective of the economic analysis of the process of creating European contract law is the basis upon which contributions from some scholars with different scientific and cultural backgrounds, as well as from different countries, converge.[8]

Some believe that rules of private international law and conventional rules – such as those included in the 1980 Rome Convention – lead to uncertainty in the choice of applicable law and, as a result, to costs that should be avoided.[9] However, the answer to this does not appear to be rendering them uniform, but rather offering the parties greater

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7 See *Alpa*, Harmonisation and Codification in European Contract Law, in *Vogenauer* and *Weatherhill*, op.cit., p. 149.; *Hondius*, Towards a European Civil Code, International Contract Law, cit., p. 147; *Hartkamp*, Principles of Contract Law, ivi, p. 171; *Hesselink*, The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience, in *Vogenauer* and *Weatherill*, op.cit., p. 39.

8 *Smits* (ed.), The Need for a European Contract Law (2005).

9 E.g. See *Wagner*, note 3, p. 14.