The Europeanisation of Contract Law

Christian Twigg-Flesner

Current Controversies in Law

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Preface

This book deals with the Europeanisation of contract law, that is, the impact of European Union legislation on domestic contract law. It is a fascinating area of study because of the interaction between EU law, contract law and comparative law, but it can also be a frustrating endeavour to attempt to get a firm grip on the subject. The absence of an introductory book, particularly from the perspective of a common lawyer, struck me as a gap in the literature, and I hope that this book manages to fill that gap. My intention has been to provide a way into this subject – accessible, but not simplistic, to enable a reader who is new to the material to gain solid foundations from which to launch into further research and study, although I hope that seasoned scholars may also find a return to basics helpful. I recall Hans Micklitz's observation at a conference a few years ago that it was about time for legal scholars to take a step back and ask 'what exactly are we doing here?' ('Was machen wir hier eigentlich?'). This is my attempt to ponder that question.

My approach in this book is to examine the contribution of EU law from the perspective of English law – it is, essentially, an 'English European law' book. Inevitably, my particular domestic law perspective will have coloured the analysis of both existing law and looming developments, although I have also borrowed from my continental colleagues, particularly with regard to the structure adopted for Chapter 3 (although I am sure my German colleagues will frown at my attempt to utilise a 'systematised' approach to setting out the *acquis communautaire* on contract law).

In preparing this book, I have benefited from discussions with friends and colleagues from around Europe, notably within the Acquis Group. Particular mention should go to Hugh Beale, Geraint Howells, Hans Micklitz, Hans Schulte-Nölke, Reiner Schulze and Thomas Wilhelmsson (not all members of the group, of course).

I am grateful for the support and guidance from friends and colleagues in the Law School at Hull, the Acquis Group and elsewhere. A special thank you goes to Catherine Mitchell (Hull) and Lorna Woods (Essex) for reading and commenting on various draft chapters. Any mistakes are, of course, my own. My thanks are also due to Routledge-Cavendish, particularly Fiona Kinnear, for their interest in this project and their patience in awaiting its completion.

Thanks are also due to Jan and Len Clucas for providing a quiet working environment away from busy university life during the early stages of writing this book. Above all, I would not have managed to complete the book without the support of Bev and Sophie – thank you both for being wonderful.

The law as stated in this book reflects the law in force in December 2007. Minor updates were possible during the production process. The changes which the Treaty of Lisbon will make – assuming that it is ratified – have, where appropriate, been indicated in the footnotes, but the main text is written on the basis of the Treaties as they were in 2007.

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1 The concept(s) of Europeanisation

1.1 INTRODUCTION

This book is about the Europeanisation of contract law. This is undoubtedly a controversial topic, which has already given rise to such an amount of scholarly analysis that Wilhelmsson has rightly remarked that writings on this have 'become so voluminous that it seems impossible to follow in all its details'.[1] The primary purpose of the present work, therefore, is to provide an overview of the field to serve as an introduction. It attempts to take stock of developments to date, as well as discuss current activities. More generally, it will also consider the arguments advanced on both sides of the debate about the need and desirability of the process of Europeanisation. It is assumed that the reader will have knowledge of both contract law and some European Union law, but is not familiar with the Europeanisation of contract law itself.

In this opening chapter, the different facets of Europeanisation will be explored. The driving force behind this process is, of course, the European Union (EU),[2] and the following chapters will concentrate on the EU's achievements so far, as well as its future plans. This is therefore predominantly a 'European law' book, concentrating on the EU's impact on contract law. However, to regard the process of

1 T Wilhelmsson, 'The ethical pluralism of late modern Europe and codification of European contract law' in J Smits (ed.), *The Need for a European Contract Law* (Groningen: Europa Law Publishing, 2005), p 123.

2 Historically, the law-making powers resided with the European Community, rather than the European Union. However, this distinction will disappear once the Lisbon Treaty 2007 enters into force (probably in January 2009), and this book will therefore refer to the EU throughout.

Europeanisation purely as a matter for the EU would be to ignore the work that has been undertaken by legal scholars across Europe in this sphere. The remainder of this chapter will therefore provide the context within which the EU's activities are taking place.

1.2 CONTRACT LAW

This book deals with the impact of EU law on contract law, that is, the law relating to the formation, performance and discharge of contractual obligations. It may be distinguished from the law of torts, which is concerned with wrongful acts or omissions causing harm. Both are part of the law of obligations and the wider category of private law.

Trying to provide a succinct definition of contract creates problems in itself, because the notion of 'contract' varies from jurisdiction to jurisdiction. Whilst Treitel's basic description of contract as 'an agreement [of the contracting parties] giving rise to obligations which are enforced or recognised by law'[3] goes a long way towards capturing the essence of what a contract is, particular jurisdictions may regard other forms of voluntarily created obligations as forming part of the law of contract. For example, English law does not regard a gift as a form of contractual obligation, unlike French law.[4] For present purposes, it is not necessary to explore this further save to note that the different conceptions of 'contract' in the various Member States create an initial hurdle on the way towards Europeanisation, because there may be disagreement about the precise target area of such activity.

1.3 DEFINING THE PROBLEM

1.3.1 A brief detour into legal history[5]

Although the current debate about Europeanisation is of recent origin, to some it may seem as if history is turning full circle. In the 12th

3 GH Treitel, *The Law of Contract*, 11th edn (London: Sweet & Maxwell, 2003).

4 Cf R Sacco, 'Formation of Contracts', in A Hartkamp *et al.*, *Towards a European Civil Code*, 3rd edn, Nijmegen: Ars Aequi, 2004, pp 353–4; B Pozzo, 'Harmonisation of European contract law and the need for creating a common terminology' (2003) 11 *European Review of Private Law* 754–67.

5 Generally, see RC van Caenegem, *European Law in the Past and the Future* (Cambridge: CUP, 2002).

century, continental Europe went through a process of re-developing and adopting Roman law (the *ius civile*), which evolved into the *ius commune*, that is, a 'common law'. In essence, the many different principalities and kingdoms that existed across Europe at the time shared a common law, which served to supplement existing local laws and customs. In addition, the *ius commune* provided a common legal language, and it was deployed in interpreting local laws to achieve a degree of consistency.[6]

The rise of the nation-State in the 19th century, and the creation of larger and stronger states on the continent, also resulted in the 'nationalisation' of the *ius commune*,[7] producing such well-known codifications as the German Civil Code,[8] or the French Code civil.[9] A side-effect of this development was that legal scholarship, which until then was European, concentrated on national law, and legal education, legal training, and professional requirements followed and became more divergent. Foreign judgments, as well as scholarly literature, were disregarded. Whereas previously, Latin had been the common legal language across Europe, it was replaced by the respective domestic languages.

English law was not part of the continental *ius commune*. It does not follow in the Roman tradition, unlike the continental legal systems, although some Roman law principles have found their way into English law, both in the common law and in the principles of equity. Unlike on the continent, there was never a wholesale codification of private law in England. Instead, the law of contract evolved through individual decisions by the courts. The fact that different paths were taken by English law on the one hand and the majority of the other European jurisdictions on the other is frequently referred to as the 'common law–civil law divide'. This divide is still regarded as perhaps the greatest

6 H Coing, 'European common law: historical foundations', in M Capelletti (ed), *New Perspectives for a Common Law of Europe* (Florence: European University Institute, 1978).

7 For an account of the various factors which brought about the demise of the *ius commune*, see P Steiner, 'The *ius commune* and its demise' (2004) 25 *Journal of Legal History* 161–7.

8 There may be interesting parallels between the German codification movement of the 19th century and present-day efforts towards a European private law: see AJ Kanning, 'The emergence of a European private law: lessons from 19th century Germany' (2007) 27 *Oxford Journal of Legal Studies* 193–208.

9 PAJ van den Berg, *The Politics of European Codification* (Groningen: European Law Publishing, 2007).

difficulty in the Europeanisation of contract law today.[10] It is, of course, an over-simplification to refer to all the non-English jurisdictions in Europe collectively as 'civil law' systems, because these sub-divide further, into for example those following the Romanistic or the Germanic legal tradition and the Nordic systems, which form a distinct group and do not have a civil code. The common features of these legal traditions permit their broad classification as 'civil law' systems. But even though the common law may appear very different from the civil law systems, Zimmermann has argued persuasively that these differences are less stark than is widely assumed.[11] But whatever common origins there are, the situation that obtains today is that there are more contract law systems in the EU than there are Member States,[12] and several different legal traditions.

1.3.2 The (inadequate?) solution of private international law

This variety of legal systems poses an obvious problem for any contract involving parties from more than one jurisdiction, particularly in the EU which seeks to promote cross-border trade. Whenever there are contractual negotiations between parties based in different jurisdictions, there are two questions to consider (in addition to whatever the substance of their agreement might be): (1) which court would deal with any disputes which might arise (jurisdiction); and (2) which law would govern the resolution of that dispute (applicable law)?

These questions are resolved through the principles of private international law (also known as the conflict of laws).[13] As an early example of Europeanisation, the Member States of the EU agreed separate conventions on jurisdiction (Brussels Convention[14]) and applicable law (Rome Convention[15]). Following the broadening of the EU's competence[16] in

10 See Chapter 6, pp 185–7.

11 R Zimmermann, 'Roman law and the harmonisation of private law in Europe', A Hartkamp *et al., Towards a European Civil Code*, 3rd edn, Nijmegen: Ars Aequi, 2004.

12 In Britain, English and Scottish contract law are different, for example.

13 See, eg, D McClean and K Beevers, *Morris – The Conflict of Laws*, 6th edn (London: Sweet & Maxwell, 2005).

14 (Brussels) Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968 (1998) OJ C 27/1 (consolidated version).

15 (Rome) Convention on the law applicable to contractual obligations 1980 (1998) OJ C 27/34 (consolidated version).

16 The EU can only act within the areas of competence conferred upon it. This is discussed further in Chapter 2.

this field,[17] the Brussels Convention has been replaced by Regulation 44/2001,[18] and negotiations for a 'Rome I' regulation were completed in December 2007.[19]

It is beyond the scope of this book to examine either measure in any detail. With regard to questions of *jurisdiction*, it suffices to note that the Brussels Regulation, in 'matters relating to contract',[20] allocates jurisdiction to 'the courts for the place of performance of the obligation in question' (Art 5(1)(a)). For consumer contracts (that is, those between a trader[21] and a person acting for a purpose regarded as outside his trade or profession), there are separate provisions which apply primarily[22] where a contract has been concluded in the consumer's domicile, or where the trader directs his activities to that Member State and the contract is within the scope of these activities (Art 15(1)(c)). In deciding where to take legal action, the consumer has the choice between the courts of his domicile or that of the trader (Art 16(1)), but he may only be sued in his domicile (Art 16(2)).

As far as the *applicable law* is concerned, the Rome Convention[23] provides the relevant rules to determine this. It starts from party autonomy; that is, the parties can choose the applicable law[24] by including an express term to that effect in the contract (Art 3(1)). If there is no choice of law clause in the contract, then the law of the country with which the contract is most closely connected is applicable (Art 4(1)). Art 4(2) provides guidance on how to establish the country with the closest connection:

17 At the time of negotiating these, no competence had been conferred on the EU to adopt legislation on aspects of private international law. Since the Treaty of Nice, a new Title IV in the Treaty provides an appropriate legal basis for such legislation.

18 Regulation 44/2001/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L 12/1.

19 At the time of writing, the UK had yet to decide whether to opt into the Regulation – under one of its 'opt-outs', it is not automatically bound by measures adopted in this field of law. A 'Rome-II' regulation on the law applicable to non-contractual obligations was agreed in 2007: see Regulation 864/2007 on the law applicable to non-contractual obligations (2007) OJ L 199/40, and the UK has opted into this. There will be a consultation in early 2008.

20 'Contract' has to be given an autonomous meaning for the purposes of the Regulation, and may therefore be understood differently from what it might mean in any particular Member State. On autonomous interpretation, see Chapter 4, p 109.

21 That is, a 'person who pursues commercial or professional activities' (Art 15(1)(c)).

22 For the full scope, see Art 15.

23 McClean and Beevers, *op. cit.*, chapter 13.

24 This has to be the law of a state.