Uniform Rules for European Contract Law?

A Critical Assessment

Edited by
Francisco de Elizalde

•HART•
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Elizalde, Francisco de, editor.

Title: Uniform rules for European contract law? : a critical assessment / edited by Francisco de Elizalde.

Description: Oxford [UK] ; Portland, Oregon : HART Publishing, 2018. | Includes bibliographical references and index.

Identifiers: LCCN 2018005591 (print) | LCCN 2018005872 (ebook) | ISBN 9781509916306 (Epub) | ISBN 9781509916283 (hardback)

Subjects: LCSH: Contracts—European Union countries. | Obligations (Law)—European Union countries. | Commercial law—European Union countries. | Contracts.

Classification: LCC KJE1640 (ebook) | LCC KJE1640 .U53 2018 (print) | DDC 346.402/2—dc23

LC record available at https://lccn.loc.gov/2018005591

ISBN: HB: 978-1-50991-628-3
ePDF: 978-1-50991-629-0
ePub: 978-1-50991-630-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

1

The First Stage of Modern European Contract Law

FRANCISCO DE ELIZALDE

The withdrawal of the United Kingdom from the European Union has provoked some of the most serious reflection on the development of the EU for many decades. The official starting signal for this was fired with the Commission's White Paper on the Future of Europe,[1] which aims to steer the debate on how the EU should look in 2025. The White Paper presents five different scenarios that cover various possibilities—from maintaining the status quo, to a change of scope and priorities that would result in further integration, or, by contrast, in the EU gradually being re-centred on the internal market.

In any of those scenarios, such reflections will affect the process of harmonisation of European contract law. The White Paper has triggered the opportunity to assess it critically, a task that could reinforce it, as even before the Brexit vote, various proposals containing uniform rules for European contract law had failed to become hard law. The last one, the Common European Sales Law (CESL), was officially withdrawn by the European Commission in 2014[2] and watered down to two projected directives on digital content (DCD proposal) and online sales (OSD proposal). This was a hard blow, given the efforts made to establish an overarching harmonisation in contract law.

The recent history of European contract law[3] goes back to the Principles of European Contract Law (PECL) drafted by the members of the Commission on European Contract Law, chaired by Professor Ole Lando, which began its work in 1982 and completed it in 2003. The PECL contained model rules addressing general contract law, including formation, validity, interpretation, contents and effects, performance, and breach of contracts.

[1] COM(2017) 2025 of 1 March 2017. I thank Juan Cianciardo for his remarks on the future of the EU. Usual disclaimer applies.

[2] European Commission, Commission Work Programme 2015, COM(2014) 910 final, Annex 2 (n 60).

[3] For a detailed account, see H Beale, 'The story of EU contract law—from 2001 to 2014' in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar, 2016) 432–62.

The European Commission moved forward in the construction of common rules with three communications: the 'Communication on European Contract Law',[4] the 'Action Plan on a More Coherent European Contract Law'[5] and 'European Contract Law and the Revision of the Acquis: The Way Forward'.[6] These paved the way for the Draft Common Frame of Reference (DCFR) of 2009 which was prepared by the Study Group on a European Civil Code, led by Professor von Bar, and the Research Group on Existing EC Private Law (Acquis Group), chaired by Professor Schulte-Nölke.

The DCFR was an ambitious project which went beyond contract law to propose model rules also for non-contractual liability, unjustified enrichment, acquisition and transfer of property rights over goods, security in movable assets and trusts. In respect of contracts, the DCFR contained rules for general contract law which incorporated the PECL in a revised form.[7] Additionally, it dealt with specific contracts: sale of goods, lease of goods, services (including, among others, construction, processing, storage and design), mandate contracts, commercial agency, franchise and distributorship, loan contracts, personal securities, and donations.

The DCFR was succeeded by a Feasibility Study, a draft optional instrument, produced by an Expert Group and published in May 2011.[8] The Commission asked the Expert Group 'to select those parts of the DCFR which were of direct relevance to contract law and to simplify, restructure, update and supplement the selected content'.[9] The last proposal in this trend, the CESL, already had a much more restricted scope as it was limited to sales. It derived from the Feasibility Study, was published in October 2011 and, as mentioned above, the European Commission withdrew it in 2014.

Parallel efforts were conducted by other relevant research networks. Among these, there is the work of the Academy of European Private Lawyers (chaired by Professor Gandolfi), which proposed a European Code of Contracts.[10] In turn, the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Legislation Comparée* prepared the *Principes Contractuels Communs* and the *Terminologie Contractuelle Commune*.[11]

[4] Communication from the Commission to the Council and the European Parliament on European Contract Law of 11 July 2001 COM(2001) 398 final.

[5] Communication from the Commission to the European Parliament and the Council of 12 February 2003, 'A more coherent European contract law—An action plan' COM(2003) 68 final.

[6] Communication from the Commission to the European Parliament and the Council of 11 October 2004, 'European Contract Law and the Revision of the Acquis: The Way Forward' COM(2004) 651 final.

[7] DCFR, pp 30–33.

[8] See 'A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback', ec.europa.eu/justice/contract/files/feasibility_study_final.pdf.

[9] ibid, 5.

[10] G Gandolfi (ed), *Code européen des contrats: avant-projet* (Giuffrè, 2007).

[11] In English, B Fauvarque-Cosson and D Mazeaud (eds), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Sellier, 2008).

The withdrawal of the CESL interrupted this enthusiastic trend. However, the history of successful uniform instruments, such as the UN Convention on Contracts for the International Sale of Goods (CISG), should remind us that achievements follow suffering, reconsiderations and patient wait. This might be the case for European contract law. The opportunities that the White Paper on the Future of Europe may offer should not start from scratch, as the amount and quality of the work that has been done in this field is unparalleled. However, the policies that have guided the harmonisation process and its outputs should be critically analysed before moving forward. The successes and failures of the process ought to be assessed in order to derive from them corresponding lessons for the future. The aim of this book is to offer a modest and necessarily limited contribution to the debate.

The collection is structured in four parts, to a large extent based on the aims of the uniform European rules on contract law set out in the PECL. Part I analyses the need for uniform rules to strengthen the internal market by facilitating cross-border trade. In Part II, the authors reflect on the impact of uniform rules on national legislators and courts. Part III deals with the effectiveness of uniform rules in bridging the gap between the common law and the civil law. Part IV assesses the influence of European uniform contract law in other non-EU countries. In addition to these four parts, Hugh Beale introduces the topic and Larry DiMatteo provides a conclusion.

In Chapter 2 Hugh Beale reflects on the inherent risks of comparative law and proposes ways to mitigate divergent interpretations of uniform rules. To this end, he highlights the importance of making policy choices before drafting a text. Additionally, Professor Beale gives importance to the task of elaborating commentaries of any proposed rules in order to justify and clarify their meaning as well as limiting their scope of application. Based on the comparative experience of English law and the civil law, his chapter then elaborates on the choice of drafting sets of contract rules rather than a unique model rule that does not distinguish between types of contracts or parties involved.

Part I ('Uniform Rules for the Internal Market') begins with Chapter 3, by Bart Wauters, who introduces the reader to the law of the Middle Ages. Professor Wauters illustrates that the *ius commune* (recurrently referred to in modern European private law) was by no means uniform in nature. Instead, he describes the experience of those times as a rich and multi-layered one in which civil, canon, local and merchant laws, among others, interacted with the work of scholars. The development of key concepts of contract law during the Middle Ages on occasion took place over centuries. This timeframe serves as a convenient warning against an impatient expectation of prompt results in respect of the ongoing European harmonisation process.

In Chapter 4, Juan José Ganuza and Fernando Gómez Pomar offer a law and economics perspective to harmonisation. The chapter assesses the efficiency of the process in a variety of possibilities, ranging from full to minimum harmonisation and taking into consideration the hypothesis of a binding or, alternatively,

an optional instrument. To this end, the authors contemplate different factual scenarios and relate them to actual proposals for a uniform European contract law to determine whether a specific model is desirable or, instead, if the option should be tailor-made based on the circumstances.

In Chapter 5, Zeynep Derya Tarman conducts a mostly empirical assessment of soft law in jurisdiction and arbitral proceedings, with a detailed analysis of cases. She discusses in depth the relationship of non-state uniform contract rules with *lex mercatoria* and its application even when not expressly agreed by the parties. Professor Tarman's empirical checking of the use of uniform law in practice provides the collection with a factual basis to assess the impact of harmonisation on businesses and lawyers.

Part II ('Uniform Rules for National Legislators and Courts') opens with Chapter 6 by Encarna Roca Trías, who builds on her experience as a judge to highlight the role that courts have in the harmonisation of European contract law. This occurs in two ways. The first, within a clear constitutional framework, is the harmonious application of EU private law, which is to be enhanced by the recourse of preliminary references to the Court of Justice of the European Union (CJEU). The second, which is more controversial, is the use of the European texts of soft law to modernise national law and, at the same time, harmonise it with others in Europe. Professor Roca suggests that both paths may require further judicial cooperation.

The role of judges in the harmonisation of European contract law is further analysed in Chapter 7. Here, Thomas Ackermann reflects on the influence of uniform rules in Germany. He distinguishes between the effectiveness of uniform rules in respect of the legislator and the judiciary. Professor Ackermann offers an interesting perspective. He argues that 'uniform law pays for its legislative appeal as a systematic synthesis of comparative insights'. However, it is his view that the 'lack of the thick descriptions needed for a powerful comparative legal argument in the judicial process' have failed to have a significant impact in the judiciary—an important drawback to harmonisation.

In Chapter 8, Bénédicte Fauvarque-Cosson focuses on the influence of uniform rules on national legislators. In particular, she describes the inspiration that the deep reform of the French law of obligations has drawn from soft law instruments, mainly the PECL, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the DCFR. Based on this fact, she points out the relevance of academics in shaping the law. Accordingly, Professor Fauvarque-Cosson reflects on the need for a 'genuine European teaching of contract law' that will highlight the common pattern of the new codes and legislations in the preparation of future lawyers.

Part III ('Uniform Rules to Bridge the Gap between the Common Law and the Civil Law') begins with Chapter 9, by Geraint Howells and Mateja Durovic. The authors present EU consumer law as an area of success in bridging the gap between different legal traditions. The chapter addresses two traditionally divergent rules and principles (the duty to provide pre-contractual information and the principle

of good faith) to highlight the approximation. Additionally, the authors present the criterion of the 'average consumer' as an autonomous European concept that also serves the same end of harmonisation.

In Chapter 10, André Janssen and Navin Ahuja reflect upon the CISG and its merits as a legal hybrid that bridges the gap between the common and the civil law traditions. Besides the relevance of the Convention as a source of hard law, the authors express the paramount influence that the CISG has had in the development of uniform rules in Europe. This may be perceived in binding legal instruments, namely the Consumer Sales Directive,[12] and also in the main proposals of soft law, such as the PECL, the DCFR or the CESL. Moreover, Professors Janssen and Ahuja point out the influence of the CISG in the common development of national law. This amalgam of facts allows the authors to reflect upon the success of the CISG and, based on this, expand the outcome of such an important legal hybrid to the European harmonisation process.

In Chapter 11, Francisco de Elizalde focuses on a particular aspect of general contract law, the terms of contracts, and from this he extrapolates how harmonisation may occur in the margins of uniform rules. The interaction between the common law and the civil law is clearly present in the concept of 'guarantee' as an effect of terms and, less noticeably, in the binding force of pre-contractual information. The chapter emphasises the role of comparative law in building European contract law.

Part IV ('Uniform Rules as a Model for non-EU Countries') opens with Chapter 12, by Mateja Durovic, who introduces the reader to the initiatives that are taking shape in Eastern and South-Eastern Asia under the auspices of prominent scholars. According to the author, the European experience, with its successes and failures, can shed light on relevant decisions that are to be taken regarding Asian proposals for uniform rules, the most relevant of which, the Principles of Asian Contract Law (PACL), are influenced by the PECL. Common issues such as diversity in language, culture and legal traditions, the character of the proposed uniform rules or even concern about an autonomous interpretation of them, are analysed looking to the European harmonisation process.

In Chapter 13, Iñigo de la Maza introduces the Principles of Latin American Contract Law (PLACL) as a syncretism of regional peculiarities, and sees it as a move forward by incorporating rules derived from the main international and European instruments. The uneasy tension between them in the drafting of the PLACL is a difficult task. It is yet to be seen whether the recent abandonment by France of certain well-established concepts in contract law will help to untie certain knots that derive from nineteenth-century dogmatism as understood by the *Code Napoléon*, which was so influential in Latin America.

[12] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

In Chapter 14, Işik Önay reflects on the new Turkish Code of Obligations (TCO) and assesses the influence of EU legislation and the proposals to unify European contract law on it. His critical study selects certain novelties of the TCO which have received a diverse degree of influence (from very direct to indirect or almost none) from the said legislation and proposals. The political drive underlying harmonisation may be clearly perceived in this chapter as black-letter EU contract law legislation—more properly termed consumer contract law—has had a notoriously more important effect on Turkish law compared to European soft law instruments. This is a clear outcome of Turkey's efforts to become a member state of the EU and it highlights that traditional state-originated (or supra-state) law may still be the best tool for harmonisation.

The concluding remarks of the book look to the process of harmonisation from overseas. In Chapter 15, Larry DiMatteo provides an American perspective. After paying homage to those who have most heavily contributed to the harmonisation of contract law, he argues for the importance of scholars in this process. In the same vein, Professor DiMatteo defends the existing efforts to establish European legal education, as this would provide the 'intellectual infrastructure' needed when European contract law matures. Beyond policy decisions (among others, the choice of opt-in or opt-out instruments, or the balance between diversity and uniformity), the chapter concludes with an enthusiastic call to pursue the efforts in European contract law.

The book reunites most of the contributions to an international conference that was organised at IE University (Spain) on 23 and 24 June 2016—coincidentally, as the Brexit vote took place. Both the speakers and the conference attendants represented more than 30 different nationalities, in an uncommon mixture of students, academics, judges and practitioners from around the world. The collection also incorporates the work of scholars who did not take part in the conference but generously agreed to contribute.

The spirit of the conference was one of friendship while maintaining a rigorous academic substance. I am grateful to all the participants for this. I am deeply indebted to my colleagues at IE Law School—Marie-José Garot, Charlotte Leskinen, Fernando Pastor and Víctor Torre de Silva—and to Esteban Leccese for chairing the sessions. Most of them took on even more responsibilities than initially tasked with. Mateja Durovic's advice was crucial at the early stages of the event.

The organisation of the conference enjoyed the invaluable support of a group of students who managed to take care of every detail in a unique way: Vanessa Ardabili, Teresa Artaza, Sarah El Azouzi, David Fåhraeus, Paulina Godinuka, Calum Hedigan, Michelle Meier, Gracia Pujadas, Elena Recla, Adriana Rodríguez, Marie Trapet and Wojciech Zaluska. As always, Elena Peña helped them with enthusiastic commitment.

The conference served as a closing event for the EU Jean Monnet Module 'Towards a Common Private Law of Europe', coordinated by Marco de Benito. I am grateful to him for this opportunity. IE University, IE Law School and

IE University's Centre for European Studies should also be credited for their assistance. In respect of these, my thanks go to Soledad Atienza, Salvador Carmona, Javier de Cendra and Marie-José Garot.

This book would never have seen the light of day without the meticulous work of four bright students who helped throughout the editing process. Led by Wojciech Zaluska, the team also consisted of Sebastian Arnold, Sharai Mpofu and Gracia Pujadas. I am indebted to Hugh Beale for his guidance in preparing this collection. Sinead Moloney and her team at Hart Publishing supported the project from the start – I am very grateful to them. The responsibility for any errors remains, of course, mine alone.