EUROPIAN AND INTERNATIONAL PANORAMA IN CONTRACTUAL LAW

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Abstract

Expansion of economic logic on the market and free competition, in the foundation of community culture has had a significant impact on national law, at least in two different levels: first, on the reforms of economic systems and state intervention in the economy, promoting privatization policies and, above all, the liberalization of markets; secondly, in terms of general discipline on private autonomy and contracts, forcing lawmakers to reshape national regulations, in connection with contractual relations between firms and above all between firms and consumers. From this point of view put forward, community legislators interventions have acted on substantive harmonization of contract law, in order to eliminate differences. From the point of view of the development of European private law, there is no doubt that great importance have legislators community interventions aiming at harmonizing substantive rules on contracts. European Commission has progressively limited and defined scope for the development of European private law. In particular, starting from the 2001 Communication on the European contractual right , the commission has clarified that as development prospects should relate to two types of interference that affect contractual issue: on the one side , interventions aimed at creating a European jurisdiction and on the other side interventions aimed at harmonizing substantive point of view of the rules of contract law. In contractual matters, the European private law implies the harmonization in a substantive way. The proposed study will examine the steps that were recorded in that direction, in academia and in the EU institutions: from the principles of European contract law principles to the "European Community Contract Law", in order to create a "common frame of reference" for European contract law.

***Keywords*:** hard law, soft law, harmonization of contractual law, the common frame of reference.

1. Creating a European jurisdiction

1.1 "Europeanisation" legal harmonization

The issue on Europeanisation (1) of the private law and contract law in particular, has been discussed in recent years. There were several European initiatives on the issue and many have been answers to those who are dealing with this issue. The literature is so vast that it is hard to be original. Although there is much diversity among the rules that apply to the contract, it is important to remember that there are some common

[1] It should be noted that the term "europianization" in this paper will be used occasionally being replaced by the term "harmonization". With this terms understand convergence of rules and practices in contractual law systems of the Member States of the EU, as gradual and immediate.

concepts that indicate that the process of Europeanization there since the beginning of contractual law. Are many systems that have a contractual right Roman similarities. All legal systems recognize the liberal concept of private autonomy. The right of the European Union together with the right to have comparable increase convergence between national systems. One of the first interventions Community legislator, in order to influence the private right of states, is connected with the need to create a common European legal area, especially after receiving importance topic of judicial cooperation in civil case to the Treaty Amsterdam (2). Another initiative for harmonization has been proposed by the European Parliament in 1989 (3), which induce the start of an academic research on the possibility of a European civil code. Since then, several groups have produced lawyers legal codes that may be the basis of a European law on contracts: among them the most important are the European Contractual Right Commission (4) and the Academy of European Private Lawyers (5).

In 2001, the European Commission published a Communication to the Council and the European Parliament, with the aim to "broaden the debate on European contractual right, including the European Parliament, the Council of Europe and interested third parties such as: business, academics, lawyers and consumer associations".

Regarding the use of binders uniform criteria, contractual always about the issue, it is now a reality, after the ratification of the Convention of Rome's applicable laws and obligations arising from contracts, today in a modified EU instrument (Regulation "Rome I", 593/2008).

The Communication proposed four options for the future development of European contract law:

1) lack of community action;
2) the promotion of a series of common principles on the right to reach a contractual greater convergence of national laws;
3) quality improvement of existing legislation;
4) the adoption of new legislation on European level.

Respond to the Commission's Communication were numerous, almost always favorable to opportunities, 2) and 3), and almost always against the possibility 4). After this consultation process the Commission produce an action plan, which although agree with the possibility of 2) and 3) do not lack the will to continue the search for a European codes. For this reason it seems that the idea of codification is not abandoned and will be a goal for the future. Currently, the base rules on jurisdictional competence and movement of judicial decisions are included in Regulation 44/2001, which has transformed into a Community instrument Brussels Convention 1968 (Brussels II Regulation). The latter refers to all civil and commercial matters (with some exceptions) so that the contractual issues.

1.2. The reasons of Europeanization

Reasons proposed for harmonization of European contract law are almost exclusively economics, a phenomenon not surprising because a major goal of the EU remains the realization of a sustainable internal market. The argument presented by the jurists in favor of harmonization is based on transaction costs: a variety of rules between countries may be not suitable for international firms that perform activities because it will often be necessary consulting local experts to understand unfamiliar rules. This increases the cost of a transaction with a foreign firm, reducing stimulation and tend to enter into international contracts. This situation is certainly not compatible with the idea of a common market. Europeanisation in this way can reduce transaction costs and facilitate the exchange of products in international markets. There are no economic reasons. It is clear that the presence of a uniform law represents cultural unity among the people. A European law on contracts has a role to contribute to the creation of a common European culture and to highlight its existence. Of course this topic is not addressed much in the literature as the link between the harmonization of contract law and cultural competence of the EU (Article 151 TEC) is not strong to overcome the principle of subsidiarity.

[2] On the argument C. KOHLER, Lo spazio giudiziario Europeo in materia civile e il diritto Internazionale privato comunitario, in P. Picone, Diritto Internazionale privato diritto comunitario, Milan, 2004, p. 65; F. Potter, La comunitarizzazione del diritto Internazionale privato: "European Conflict of Law Revolution", 2000, p. 873 ss ..
[3] OJ C 158, 26.6.1989, p.400 (Resolution A2-157/89)
4 O Lando and H Beale, Principles of European Contract Law Parts I and II, Kluwer, 2000.
5 Academy of European Private Lawyers, European Contract Code - Preliminary draft, Pavia, 2001.

1.3 Divergence of rules

Divergence and variety in the rules governing contracts in Member States are not easily quantifiable. While it is clear that the rules used to discipline contracts is different in the first impact, but that different rules may bring us to a similar result in special situations. Because a complete analysis of the contractual provisions of the Member States is not possible in this space, we shall confine ourselves only a few general comments.
Roman law has exerted a great influence in the system "civil law". Although the general part of contract law was not very developed, lawyers together with natural law schools have transformed Roman ideas in a complex processing system of rules, most important is the French civil code. Beyond European borders contractual law growth has been slower. It is generally accepted that the Roman law did not exert the same influence on the English system. For this reason, many of the English rules do not find in the continental system and conversely. Yet, despite these formal differences, there are many hidden convergence, as in rules (a good example are the rules that govern the formation of a contract), both in the outcome and consequences. This last observation is the basis of modern techniques of law that comparable, which analyze the results of the legal rules in a particular situation rather than compare them (6). Using this technique, we can see that many apparent differences in the rules does not constitute an obstacle right Europeanization. It is right to emphasize how different nationalities lawyers groups have achieved easily on common rules (7). This observation indicates that there is less divergence between national systems than it looks.

2. The mechanism of Europeanisation

This section will deal with different mechanisms that exist to promote the process of Europeanization to highlight divergence and convergence identified in the previous section. Can identify two types of lawyers in favor of Europeanization: those who propose the codification of a European law on contracts and those that support the argument that codification is not necessary or is ineffective to meet a coherent harmonization. The latter often recommend mechanisms "soft law" to promote the process of Europeanization. Difficulties Europeanization will bear depends which of these mechanisms will be favored. These two position are often considered overlapping. However, note that this distinction is not valid and, in fact, these two positions can be complementary (8). Stay protected that a complementary role between mechanisms "hard law" and "soft law" is not only possible, but also necessary for a sustainable harmonization.

2.1. Hard law

With this term we understand the rules of compulsory (mandatory Laws) that have been introduced in the legal systems of members, both from the legislative power of the EU and member states independently between a treaty between states. European legislation has so far played an important role to break some common market economic barriers created by different rules. However, there are many problems with the existing legislation. First, the "classic method" of the EU (9), used in the European legislative process does not help in the harmonization of European contract law.

Secondly, the choice of the Directive as legislative act translates into the fact that many differences in international law is not eliminated in the process of implementation. Moreover, in some cases, its implementation is ineffective, because the Directive itself has no value between two private persons a

(6) This technique of comparable law referred to as "common core", much used after the project Cornellne 60s. R. B. Schlesinger, Formation of contracts, a study of the common core of legal systems, New York, 1968, M Bussani, U Mattei, The Common Core Approach to European Private Law ', (Vol. 3, 1997/98) The Columbia Journal of European Law 339.

(7) Cf. O Lando, 'Optional or mandatory Harmonisation', (2000) European Review of Private Law, page 59, page 65.

(8) Cf. M Bussani, "Integrative Comparative Law Enterprises and the Inner Stratification of Legal Systems", (2000) ERPL p. 85, at pag. 92.

(9) J Scott and D Trubek, 'Mind the Gap: Law and New approaches to governance in the European Union 'ELJ 8/1 :1-18 (2002).

legal matter. For these reasons, civil existent in this area can be considered without sufficient and ineffective to address the economic needs of a common market. Some lawyers have argued the desire to design, implementation and application of a code of contracts on European level (10). The main advantage of a European code is its ability to reduce transaction costs, provided that binding rules to be limited to those absolutely necessary.

First, differences in legal rules indicate that a possible code will not easily accepted in Europe, but the most important is the relationship between the rules governing contracts and cultural identity of a society. This means that a European code of contract will determine the values of justice to replace existing values in the national system. Given the absence of an international agreement between countries in the field of social protection, is to be put in doubt that a code between member states will have the necessary stamina to determine these values. For this reason it is necessary to create a European contractual culture before can codification rules.

Second, changes in the national judicial styles present a serious problem for the sustainability and eventual consolidation of a codification. Is exaggeration to think that differences in judicial styles are such that it can completely stop the harmonization process (11). The presence of diversity does not exclude the possibility of a convergence in the future. However, previous analyzes on divergence leads to the conclusion that a uniform law on the books corresponds not a uniform law in practice. Given the different styles of normative and

judicial process, as well as a legal interpretation of the style of judicial decisions, it is clear that many differences would remain independent of the existence of a European code. Therefore a coherent codification requires a support institutional reform and methods for European coordination in judicial process (12).
Third, the divergence in legal proceedings creates another problem: a codification of contract law will not be effective o socially acceptable without the application of a harmonizing system, enforcement and sanction by law. It would be possible for individuals to choose the most appropriate procedural system in transactions, but this is not a satisfactory solution, given that individuals who possess less information and contractual power can not benefit from this opportunity. For this reason it is thought that a process of codification of contract law must be accompanied by harmonization of civil procedure law. U.S.A. experience verifies this argument. It is important to note that the U.S.A. market is not heavily damaged by the lack of a codification of contractual right. Although the advantages of a uniform law of contracts are clear, this does not mean that codification is the only way to benefit from these advantages, especially considering the various problems that codification would have to afford. It is necessary to increase the convergence of three directions that have been identified (rules, styles and legal procedures) before the codification to be a realistic plan.

2.2 Soft law

Given the criticisms of codification, many lawyers have proposed other mechanisms "soft" with which to promote Europeanization. Many of these lawyers have emphasized the importance of creating a European contractual culture, to facilitate the harmonization process. First, it is necessary to identify a European common law that regulates contracts. This means creating books that transcend the boundaries between countries. Several initiatives have been undertaken to this end. It is also important to create an European education on this common law: European universities have a very important role in the education of new generations of lawyers.
Relevance of this education becomes apparent when looking at the other side of the Atlantic: although the law of contracts is not fully harmonized law students grow with federal law and not state law.
However, these mechanisms are not only proven to be insufficient to have a European contractual common law, necessary to overcome the economic needs of a common market. For this reason, many lawyers not favorable to propose codification often an optional model in order to encourage greater convergence. This model may be similar to "Restatment of Law", a famous collection in the United States in the form of articles that expose systematically decisions in different states, according to the makers, deserve to be applied by judges.

(10) Cf. O Lando, see note 7.
(11) P Legrand, Against a European Civil Code, (1997) 60 MLR 44.
(12) Cf. suggestions from C. Schmid, nr. 12.

A similar pattern may have the advantage to allow the legislative as well as judges to engage in comparative research by adopting national laws under a European legal structure (13). Although a "Restatment of Law" has no legal validity, the example of the U.S.A. shows that can perform an important role. A greater convergence in legal procedures can be performed by a similar mechanism. However, many legal experts insist that such a mechanism would not be sufficient to achieve the unity necessary for the realization of a common market (14).

3. The harmonization of contract law in the substantive sense

Our contractual matters, the intervention of the Community legislator can not be limited by the prospect of judicial cooperation in civil case but the creation of a European jurisdiction. It is actually an issue that has a direct impact on market regulations imposed by the EU, and therefore calls for a proper functioning of an estimate existing laws of different states. Expanding economic logic on the market and free competition, in the foundation of community culture has had a significant impact on domestic law, at least two different levels: first, on the economic reforms and state intervention in the economy, promoting privatization policies and, above all, the liberalization of markets; secondly, in terms of general discipline on private autonomy and contracts, forcing lawmakers to reshape national regulations, in connection with contractual
relations between firms and especially between firms and consumers. From this point of view put forward, Community legislators interventions have acted on substantive harmonization of contract law, in order to eliminate the differences. Therefore the use of Directives referring to different fields occasionally (travel contracts, contracts closed out the unfair trade offices, consumer goods sales, etc.). Adopt the principles and new rules, based on the principles of transparency provision of information obligations, the use of a new formalism on agreements, the introduction of new forms of protection of consumer awareness and so on.

3.1. Improvement of the "acquis" of the EU and the adoption of an optional instrument for the regulation of cross-border contractual relations

From the point of view of the development of European private law, there is no doubt that great importance are interventions of Community legislators that aiming at harmonizing substantive rules on contracts. In systems "civil law", the implementation of the principles and rules arising from the Europian contractual law has introduced somewhat in confusion, which in some cases has led to a review of the legislation of the member States. Worth mentioning the example of Germany to reform "Schuldrecht" to take in the late 1970 that launched a decisive push to fit with EU legislation.
Faced with this reality, in which the contractual right of the member States already characterized by an influence of European law, it is worth asking what the point of a major harmonization of private law and the prospect of further development of a European private law contractual?
The goal is really a European codification to replace national codes or private law systems of the member
States?
Answers to questions we find in those actions which the European Commission has progressively limited and defined scope for the development of European private law. In particular, starting from the Communication 2001 on European contractual entitlement, the Commission has clarified that as development prospects should relate to two types of interference that affect the contractual issue, and that in these pages we have tried to describe the: on the one hand, interventions that aimed at creating a European jurisdiction and on the other interventions aimed at harmonizing substantive point of view of the rules of contract law. In both cases, the goal pursued is to go beyond the approved strategic interventions to date.
Exactly:

a) in connection with contractual issue on cross-border relations, the aim of uniting connecting criteria already been realized, as stated by the Rome Convention's which has now been translated into EU Regulation. Under this legislation (Article 3), the main criteria in the applicable law on contractual relations

(13) Cf. suggestions from C. Schmid, nr. 12.
(14) Cf. O Lando, note number 7.

is the autonomy of the parties. However, the Commission notes that the possibility of choosing one means not an optimal solution, in terms of contractual relations that affect the European market. In fact, the choice refers to a foreign law, you must first be recognized, affecting the growth of transaction costs. In any case, the uncertainty in the application of foreign law can deter use of international transactions, especially for small and medium-sized firms; to not mention that in practice, the choice of law can be imposed by strong contractor. For these reasons the Commission warns that it would be appropriate, with the aim of creating a common market and a legal space without limits, allowing the parties a review on European contract law rules which could serve as an instrument to lead the choice of law that will discipline agreement.

b) In connection with the numerous interventions from the point of view that includes substantial harmonization contractual issue, the Commission has used as an instrument Directive which introduces restrictions on the possibility to obtain a sustainable result on the whole European territory. Europian directives use abstract legal terminology which does not provide a specific definition and can have different meaning in the legal framework of the beneficiary countries; furthermore intended as a means of determining the fragmentary, the Directive may contain contradictions inside; imposing a minimum harmonization fails to eliminate completely the problems about legislative divergence of the member States. Then the goal is to go beyond an in direct harmonization perspective and fragmentary, represented by Directive instrument.

The Commission does not stop at reviewing analysis, documents arriving after the Communication 2001, identifies the path to follow: the adoption of a “Common Frame of Reference”. This instrument CFR, the Commission appoints a double mission: on the one hand that of a text that aims to create a common terminology in the field of European contract law, in order to be used as a reference law in Community law and national production; on the other side as a "corpus" of rules applicable to contractual issues by using the optional instrument. CFR has a structure and composition that serves as an instrument that makes concrete perspective of the development of European private law in the direction of the double: the improvement of the "acquis" community through a reference text suitable for the removal of contradictions present in numerous interventions EU to give legal definitions of the terms used in the Directive; at the same time the use of uniform rules for the discipline of European contractual relations in order to overcome the conflict between rules through harmonization.

4. Considerations

It is clear that the mechanisms described in the previous section is not missing criticized aspects: Europe is not ready for a codification because of an excessive divergence in laws and legal procedures styles. Current legislation lacks coherence mechanisms "soft" are not sufficient to meet the needs of European integration. At this point it is necessary to be considered general debate on the European integration of outside the area of private law. Conflict between jurists in favor of "hard law" against the lawyers of "soft law" be noted also

in the European social program. Some lawyers prefer to use the classic method of the EU, while others prefer soft mechanisms, such as the open method of coordination. The first group assumes that the lack of central legislation provokes a fall "race to the bottom" in social standards, while the second group supports diversity and considered a right edge research in new solutions to the problems created by European integration. However, the truth is that the conflict between these two groups is not unavoidable: a greater
convergence can be achieved through a merger of these two ideas. These reasons are also applicable to the debate on European contract law: while the role of "hard law" is indispensable to achieve a coherent coupling to achieve a common market, on the other hand, the role of "soft law" is being also irreplaceable for the coordination of the legislative process and increasing convergence between member states.
Other mechanisms "soft" are necessary for the creation of a European contract culture is important to prepare a coherent basis for the admissibility of European law.

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