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**Non-State rules as the applicable law in contracts**  
**Harmonisation of contract law in the European Union**

Dissertation Private international law

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## Summary

This thesis concerns (the role of non-State rules in) the harmonisation of contract law in the European Union. When it comes to harmonisation, there are many arguments against and in favour of it, but the advantages appear to outweigh the possible drawbacks. There are chiefly two types of harmonisation. The EU can achieve harmonisation from the top down, which is the implementation of a mandatory, national-law-replacing Code, or from the bottom up, e.g. leaving it up to parties to apply a general, neutral set of rules as the law in their contracts. Examples of such non-State rules (or soft law instruments) are the UNIDROIT Principles, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).

Regarding top-down harmonisation, it is doubtful whether the EU has the competences to adopt such a measure. When it comes to bottom-up harmonisation, the Rome I Regulation is important. Rome I regulates, among other things, the law applicable in contracts. Under art. 3 (1) Rome I, parties can freely choose the applicable law, but it must be a State law, and not a soft law instrument. Recital 13 does allow parties to incorporate non-State rules, meaning that the provisions of a State law is replaced by such soft law instruments, except for mandatory rules of said State law.

In a small, qualitative research conducted for this paper, participants stated that Recital 13 is almost never used, because both parties as well as lawyers are mostly unaware of or unfamiliar with non-State rules. If soft law instruments were used, the UNIDROIT Principles were clearly favoured. The same goes for arbitration. The designation of non-State rules as the applicable law happens only sporadically. Arbitral tribunals typically use non-State rules as a tool interpretation.

So how can the EU proceed? Most participants were in favour of further harmonisation, but they are not very optimistic on the matter. Top-down harmonisation is politically unrealistic and there are questions regarding the competences of the EU. Bottom-up harmonisation does not suffice to harmonise contract law, as the research showed.

In my humble opinion, the EU ought to include non-State rules in the legal education, and courts and tribunals should refer to soft law instruments more often. KADNER suggests adopting a 28<sup>th</sup> regime, that would apply in cross-border situations, unless the parties opt out. In domestic situations, the national law would apply. If the European Union truly wishes to change the contractual legal landscape, I believe that this is the way forward.

## **Word of thanks**

Like many other dissertations, this thesis has absorbed much time and many thoughts, in this final year of law school. Although the jury is still out on the quality of it, this thesis would not have reached its current standard if not for a select group of individuals. I would like to express my gratitude for their support in this small word of thanks.

Firstly, I would like to thank my friends and family. With patience, they listened when I spoke at length on the topic of my thesis, time and again. With common sense, they offered advice that cleared my mind when I was doubting my research. With determination, they pushed me to persist when I was slacking off.

Secondly, I am appreciative for the guidance provided by my supervisor, professor Geert Van Calster, and my monitor, Mr. Michiel Poesen. Their experienced counsel was invaluable, their enthusiasm both inspiring and reassuring.

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All these people have my gratitude. Though this dissertation was primarily written for educational purposes, it was also written for them.

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## **LIST OF ATTACHMENTS**

1. Overview of the nodes

## **INTRODUCTION**

**INTRA-EU TRADE** – Starting from the end of the 20<sup>th</sup> century up until 2009, there have been several initiatives to harmonise private law in the European Union. Such uniformity is deemed essential for the improvement of the internal market. Therefore, the EU has introduced not only the Rome I Regulation (on conflict of law rules), but also directives on consumer protection and in specific sectors, such as package travels and time sharing. The further elaboration by the European Court of Justice on the freedom of goods, services, workers and capital, has improved and stimulated intra-EU contracts.

**EUROPEAN CONTRACT LAW** – There are voices that state that there remain more than a few obstacles for intra-EU trade; variations between domestic laws, the costs of litigation and foreign legal advice, psychological barriers such as cultural and language differences... Many of those hindrances can be addressed through legal reforms. These voices propose harmonisation of the core of contract law, either *from the top down* or *from the bottom up*. The former would entail the adoption of a mandatory European contract code that substitutes domestic contract laws, while the latter could e.g. involve leaving it up to the parties to choose for an international body of neutral, fair rules – *non-State rules* or *soft law instruments* such as the UNIDROIT Principles, the Principles of European Contract Law and the Draft Common Framework of Reference – as the applicable law in their contracts. Thus, contract laws could coalesce in a more organic way.

**RESEARCH QUESTIONS** – The aim of this dissertation is to analyse the current state of harmonisation of contract law in the European Union and how it might evolve in the next years. This can be clarified through the following questions:

- (a) Is harmonisation of contract law in the EU a good idea?
- (b) What are the advantages and the drawbacks of the different types of harmonisation?
- (c) What is possible under current EU law regarding harmonisation of contract law?
- (d) Is (bottom-up) harmonisation happening in practice at the moment?
- (e) What will happen and what might happen in the area of harmonisation of contract law in the future?

**RESEARCH METHOD AND DESIGN** – To understand the theoretical aspects of harmonisation, I have researched *the law in the books*, which helped me to answer the first three of my questions. However, I also needed to acquire insight into what transpires in reality. *The law in action*. Therefore, I have conducted a small-scale, empirical research, questioning seven lawyers in seven different member states, with a survey sent by email. I inquired into what they observe in their practice and how they expect contract law to develop in the coming decades, with a specific focus on the application of non-State rules. By taking on this subject, the paper studies a world that can be found halfway between *private international law*, *contract law* and *European law*.

**RELEVANCE OF THE RESEARCH** – Studies have shown that contractual parties occasionally select a legal system other than their own as the applicable law, if it is generally considered to be neutral. One may expect that parties are inclined to choose non-State rules as well, as they are established on the basis of simple, unbiased and universal principles of law. Yet, this is a topic that has essentially been neglected by the legal world. Many texts have been written on non-State rules and harmonisation of European contract law, but that is mere theory. To what extent is *law in the books* congruent with *law in action*? That is what I wished to explore in this dissertation. The significance of this research is that the results can inform possible prospects for contract law in the European Union.

**CONTENTS OF THE DISSERTATION** – As this paper attempts to bridge the gap between the EU contract law theory and practice, it will discuss the existing literature and the results of the empirical research in turn. The first section of *chapter one* will briefly describe the history of harmonisation, analyse the arguments for and against harmonisation and consider the benefits and difficulties of both top-down and bottom-up harmonisation. The second section will explain the relation between bottom-up harmonisation, namely the use of non-State rules, and private international law in the European Union. The *second chapter* contains the qualitative research I conducted. The *third and last chapter* contains what I believe is the best way forward. The conclusion gives a synopsis of this thesis and answers the posed questions.

## CHAPTER 1. BACKGROUND

### SECTION I. HARMONISATION OF CONTRACT LAW

#### §1. A very brief history

**THE HAGUE CONFERENCE AND UNIDROIT** – To understand the fascination with a harmonised (contract) code, one must go back to the 19th century, when the idea of a new *lex mercatoria* emerged for the first time.<sup>1</sup> Arguably the eldest body that gave it some serious thought, is The Hague Conference for Private International Law (hereinafter: HCCH), an intergovernmental organisation created with the primary goal of unifying legislation on private international law.<sup>2</sup> The first four Conferences (of 1893, 194, 1900 and 1904) were very successful, as they resulted in six treaties.<sup>3</sup> But, the HCCH was not the only body that realised that legal harmonisation would stimulate global trade. The International Institute for the Unification of Private International Law (hereinafter: UNIDROIT) was founded by the Council of the League of Nations in 1926.<sup>4</sup> Although UNIDROIT did not produce any significant conventions up until the second half of the 20<sup>th</sup> century, the organisation is still present on the world stage to this day.<sup>5</sup> It is worth mentioning that these organisations mainly focus on the regional (i.e. European) harmonisation and this mindset persisted until after the Second World War.<sup>6</sup> Only then did other, non-European countries join the HCCH and UNIDROIT, which led to a period of *universalism* (as opposed to the European focus), BASEDOW observes.<sup>7</sup>

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<sup>1</sup> F. BLASE, « Leaving the Shadow for the Test of Practice-On the Future of the Principles of European Contract Law », *Vindobona Journal of International Commercial Law and Arbitration*, 1999, vol. 3, p. 1; L.A. DIMATTEO, « Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law Recent Developments », *Harvard International Law Journal*, 2002, vol. 43, p. 570.

<sup>2</sup> X, « HCCH | About HCCH », 15 January 2018, available on <https://www.hcch.net/en/about> (Consulted on 30 March 2019).

<sup>3</sup> K. LIPSTEIN, « One Hundred Years of Hague Conferences on Private International Law », *The International and Comparative Law Quarterly*, 1993, vol. 42, n° 3, p. 557.

<sup>4</sup> M. MATTEUCCI, « The History of Unidroit and the Methods of Unification », *Law Library Journal*, 1973, vol. 66, p. 286.

<sup>5</sup> X, « UNIDROIT », 21 September 2018, available on <https://en.wikipedia.org/w/index.php?title=UNIDROIT&oldid=860571125> (Consulted on 30 March 2019); « 90th ANNIVERSARY », 2017, available on <http://www.unidroit.org/about-unidroit/overview> (Consulted on 30 March 2019).

<sup>6</sup> J.A.E. FARIA, « Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage », *Unif. L. Rev.*, 2009, vol. 14, p. 7; J. BASEDOW, « Worldwide Harmonisation of Private Law and Regional Economic Integration - General Report », *Uniform Law Review*, January 2003, vol. 8, n° 1-2, p. 32.

<sup>7</sup> J. BASEDOW, « Worldwide Harmonisation of Private Law and Regional Economic Integration - General Report », *op. cit.*, p. 33.

**RABEL AND THE HAGUE CONVENTIONS** – Inspired by the HCCH, an Austrian professor by the name of Ernst Rabel began in the late twenties of the 20<sup>th</sup> century on a *universal sales law*, a project which was taken over by UNIDROIT on his insistence decades later.<sup>8</sup> UNIDROIT hosted a diplomatic conference in 1964 that lasted three weeks. There, Rabel’s preparatory works laid the foundation for the *Uniform Law on the International Sale of Goods* and the *Uniform Law on the Formation of Contracts for the International Sale of Goods*, the first two UNIDROIT conventions.<sup>9</sup> Although neither of those projects ever amounted to much more than a footnote in the history of harmonisation, they were influential nonetheless, as they formed the basis for the *Vienna Convention on Contracts for the International Sale of Goods* of 1980 (hereinafter: CISG).<sup>10</sup>

**CISG** – In 1966, the United Nations (hereinafter: UN) founded the UN-Commission for International Trade Law (hereinafter: UNCITRAL).<sup>11</sup> This Commission used the above mentioned treaties to draft the CISG, which was approved in 1980 and entered into force in 11 States, 8 years later.<sup>12</sup> The purpose of the Vienna Convention is the development of international trade, by means of eliminating legal divergences and creating a neutral, legal landscape.<sup>13</sup> Therefore, the CISG focuses on the formation of contracts and the obligations of both seller and buyer. It is universally acknowledged that the CISG has been a great success. The Vienna Convention is automatically applicable in sales contracts where both parties come from Contracting States, or when the conflict of law rules indicate the law of a Contracting State.<sup>14</sup> No less than 85 States acceded to the CISG by 2017.<sup>15</sup> Furthermore, the amount of case law and scholarship on the CISG is nearly limitless<sup>16</sup>, available on the websites of (among others) PACE University<sup>17</sup> and the University of Basel<sup>18</sup>.

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<sup>8</sup> E. MCKENDRICK, « Harmonisation of European Contract Law : The State We Are In », in S. VOGENAUER and S. WEATHERILL (eds.), *The Harmonisation of European Contract Law : Implications for European Private Laws, Business and Legal Practice*, Oxford, Hart Publishing, 2006, p. 6.

<sup>9</sup> J. HONNOLD, « The Uniform Law for the International Sale of Goods: The Hague Convention of 1964 », *Law and Contemporary Problems*, 1965, vol. 30, n° 2, p. 1.

<sup>10</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, pp. 6-7.

<sup>11</sup> J. CAREY, « Uncitral: Its Origins and Prospects », *The American Journal of Comparative Law*, July 1966, vol. 15, n° 3, p. 625.

<sup>12</sup> PACE INTERNATIONAL LAW REVIEW, *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002-2003*, The Hague, Kluwer Law International, 2004, p. 24.

<sup>13</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, Antwerp, University of Antwerp UA, 2017, p. 29.

<sup>14</sup> Art. 1 (1) of the CISG.

<sup>15</sup> X, « CISG: Table of Contracting States », 14 December 2018, available on <http://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states> (Consulted on 30 March 2019).

<sup>16</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 7.

<sup>17</sup> INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, « CSIG Database », available on <http://iicl.law.pace.edu/cisg/cisg> (Consulted on 30 March 2019).

<sup>18</sup> UNIVERSITY OF BASEL, « CSIG-online », available on <http://www.cisg-online.ch> (Consulted on 30 March 2019).

**UNIDROIT PRINCIPLES** – Similarly, UNIDROIT had been working on its own project (which initially had the deceptive title ‘*Progressive Codification of International Trade Law*’) since 1971.<sup>19</sup> However, it became a priority only after the CISG was approved. In 1980, the Governing Council of UNIDROIT set up a small Working Group and tasked it with drawing up ‘principles of common sales law’.<sup>20</sup> During the fourteen years that followed, the group worked diligently on several chapters of these purposed principles, drawing inspiration from the most recent versions of contract law over all of Europe, but also the CISG.<sup>21</sup> In 1994, they published the results of their enquiries as the *UNIDROIT Principles of International Commercial Contracts* (hereinafter: UNIDROIT Principles).<sup>22</sup> The second, third and fourth editions were released in 2004, 2010 and 2016, respectively.<sup>23</sup> Only two years after the first publication, more than 3000 copies were sold. The project has – next to its five official languages – many other translations in Arabic, Chinese, Dutch, Russian...<sup>24</sup> Additionally, the UNIDROIT Principles are more frequently integrated in the curricula of law faculties worldwide.<sup>25</sup> Increasingly more tribunals and courts refer to the Principles, even though they are non-binding (*soft law*), unlike the CISG.<sup>26</sup> MARELLA reports that the UNIDROIT Principles are popular in arbitration contracts (see *infra*, pp. 19-20).<sup>27</sup>

**PRINCIPLES OF EUROPEAN CONTRACT LAW** – The next step in the evolution towards a harmonised (European) contract law are the *Principles of European Contract Law* (hereinafter: PECL). They are the result of the work of a group of academics, not unlike the UNIDROIT Principles, but this time under the leadership of the Danish professor Ole Lando.<sup>28</sup> Officially, they are referred to as the Commission on European Contract Law,<sup>29</sup> but the Lando-Commission is the name that is more

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<sup>19</sup> M.J. BONELL, « The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes », *Uniform Law Review*, 1996, vol. 1, p. 230.

<sup>20</sup> *Ibid.*, p. 231.

<sup>21</sup> *Ibid.*, p. 229.

<sup>22</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, *op. cit.*, p. XV.

<sup>23</sup> *Ibid.*; E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 8.

<sup>24</sup> M.J. BONELL, « The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law », *op. cit.*, p. 229.

<sup>25</sup> M.J. BONELL, « The UNIDROIT Principles in Practice: The Experience of the First Two Years », *Uniform Law Review*, 1997, vol. 2, p. 36.

<sup>26</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, *op. cit.*, p. 30.

<sup>27</sup> F. MARRELLA, « Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts », *Vanderbilt Journal of Transnational Law*, 2003, vol. 36, p. 1157.

<sup>28</sup> J. POOLE, R.M. MERKIN and J. DEVENNEY (eds.), *Essays in memory of Professor Jill Poole: coherence, modernisation, and integration in contract, commercial, and corporate laws*, Abingdon, Oxon/New York, NY, Informa Law from Routledge, 2019, pp. 35-36.

<sup>29</sup> M.W. HESSELINK and G.J.P. DE VRIES, *Principles of European contract law. Vereniging voor Burgerlijk Recht. Preadviezen*, Deventer, Kluwer, 2001, pp. 11-12; E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 7.

commonly used (in all likelihood, because it is not such a mouthful).<sup>30</sup> The Commission worked from the mid-seventies until 2002 on the PECL.<sup>31</sup> The UNIDROIT Principles were by then nearly a decade old, but the similarities in content between both instruments is staggering.<sup>32</sup> Both documents prescribe the contractual freedom of the parties to elect the instrument as applicable law in cross-border contracts, within the boundaries of the mandatory State law.<sup>33</sup> Yet, the PECL aims at application in Europe,<sup>34</sup> unlike the CISG and the UNIDROIT Principles, which are in line with BASEDOW's *universalism* (global application, see *supra*, p. 3). Moreover, what sets the PECL apart from the others is its approach and focus, as it does not attempt to draft a binding instrument. The PECL is a progressive set of principles that combines the best solutions to both old and new difficulties in contract law,<sup>35</sup> completely separate from a specific law system,<sup>36</sup> which might prove to be the foundation for later unification of European contract law.<sup>37</sup> Note that its scope of application is not limited to international sales but is as broad as general contract law.

**CFR** – Clearly, the PECL and the UNIDROIT Principles stimulated the European Union to officially harmonise contract law within the Union.<sup>38</sup> To that end, the European Commission dispatched a memo, the Communication on European Contract Law,<sup>39</sup> to the European Parliament, the Council and other stakeholders.<sup>40</sup> This was an appeal to consumers, merchants, professional organisations, administrations, academics... to convey their thoughts on the matter, in order to broaden the debate. The Commission submitted four possible ways forward, ranging from a status quo,<sup>41</sup> to the implementation of (binding) European legislation, which would substitute existing, national contract

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<sup>30</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *European Review of Private Law*, January 2000, vol. 8, n° 1, p. 72.

<sup>31</sup> In 2002, the third and last part of the PECL was published.

<sup>32</sup> M.J. BONELL and R. PELEGGI, « UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table », *Uniform Law Review*, 2004, vol. 9, pp. 315-396.

<sup>33</sup> Art. 1.103 PECL versus art. 1.1, 1.4 and 1.5 UNIDROIT Principles..

<sup>34</sup> F. BLASE, « Leaving the Shadow for the Test of Practice-On the Future of the Principles of European Contract Law », *op. cit.*, p. 2; M. del P.P. VISCASILLAS, « The Formation of Contracts & the Principles of European Contract Law », *Pace International Law Review*, 2001, vol. 13, n° 2001, p. 372.

<sup>35</sup> H. KÖTZ, *European Contract Law*, Oxford, Oxford University Press, 2017, pp. 3-4; E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 8.

<sup>36</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, *op. cit.*, p. 31.

<sup>37</sup> O. LANDO, « Principles of European Contract Law: An Alternative to or a Precursor of European Legislation Symposium: Contract Law in a Changing World: Regional Harmonization », *American Journal of Comparative Law*, 1992, vol. 40, p. 577.

<sup>38</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 10.

<sup>39</sup> EUROPEAN COMMISSION, « Communication on European Contract Law », 2001, available on <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52001DC0398> (Consulted on 30 March 2019).

<sup>40</sup> C. MAK, « Instrumentalisme, legitimeit en de onderstroom van het Europese contractenrecht », in M.W. HESSELINK *e.a.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 42.

<sup>41</sup> In other words, taking no action and leaving it up to the parties to solve their problems in cross-border contracts.

law. Numerous parties responded to the call, which demonstrates the relevance of the topic,<sup>42</sup> though there was no clear preference for one option in particular. This was followed by the Action Plan of 2003, which identified several issues for the internal market.<sup>43</sup> It jumpstarted the drawing up the *Common Frame of Reference* (hereinafter: CFR), an amalgam of fundamental principles, definitions and model rules,<sup>44</sup> envisioning an *acquis communautaire*<sup>45</sup>. The Commission hinted at an *Optional European code*.<sup>46</sup> The response was all in all rather positive.<sup>47</sup>

**DCFR** – In a press release in 2004, the Commission revealed its intentions to amplify the impact of the CFR. An academic study group delivered the revised CFR, the *Draft Common Frame of Reference* (hereinafter: DCFR) in 2009. This purely academic (and thus, not politically acclaimed or democratically supported) work counted more than 600 pages, taking up 10 books.<sup>48</sup> The resemblance between the DCFR and the PECL (and thus the UNIDROIT Principles) is apparent, though the former adds some chapters, such as one on insurance contracts.<sup>49</sup> All these instruments may form the foundation on a *European code*.<sup>50</sup>

## **§2. Is harmonisation recommended?**

**STATE OF PLAY** – Before one can decide on how to achieve such a Code, one must determine whether harmonisation is recommended in the first place. Whether it is advisable, has divided the legal world, which remains at odds until this very day. The next paragraphs dive deeper into the specific positions of acclaimed academics and lawyers in this debate.

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<sup>42</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 11.

<sup>43</sup> EUROPEAN COMMISSION, « A More Coherent European Contract Law - An Action Plan », 2003, available on <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52003DC0068> (Consulted on 30 March 2019).

<sup>44</sup> W. VAN GERVEN, « Harmonization of Private Law: Do We Need It? », *Common Market Law Review of Cambridge*, April 2004, vol. 41, n° 2, p. 528.

<sup>45</sup> This term refers to Community law and, in the context of further harmonisation, the general principles of law and the ideology of the Union.

<sup>46</sup> S. GRUNDMANN, « The Optional European Code on the Basis of the Acquis Communautaire - Starting Point and Trends », *European Law Journal*, November 2004, vol. 10, n° 6, p. 699.

<sup>47</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, pp. 11-12.

<sup>48</sup> F. EMMERT, « The Draft Common Frame of Reference (DCFR) - The Most Interesting Development in Contract Law Since the Code Civil and the BGB », Rochester, NY, Social Science Research Network, 17 March 2012, pp. 16-17, available on <https://papers.ssrn.com/abstract=2025265> (Consulted on 30 March 2019).

<sup>49</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 12.

<sup>50</sup> F. EMMERT, « The Draft Common Frame of Reference (DCFR) - The Most Interesting Development in Contract Law Since the Code Civil and the BGB », *op. cit.*, pp. 4-6.

## A. Opponents of harmonisation

**ESTEEMED OPPONENTS** – The arguments against European harmonisation come from authors, such as LEGRAND,<sup>51</sup> WIER,<sup>52</sup> GOODE<sup>53</sup> and MARKESINIS.<sup>54</sup> Six main arguments can be distinguished.

**TRADITIONS** – Those against harmonisation argue that every State is focused on its own traditions, in such a way that harmonisation (and hence abandonment of those ideals) would never be accepted. The law can be seen as an expression of culture,<sup>55</sup> and no country ought to be obligated to sacrifice her own (legal) principles.<sup>56</sup> The cultural, political and legal inconsistencies cannot be set aside so easily.<sup>57</sup> Moreover, the simple fact that legal systems differ, does not justify dismissal of said legal system's fundamentals. On the contrary, divergences in contract law must be acknowledged as an enrichment of legal culture.<sup>58</sup>

**COMMON LAW COUNTRIES** – Opponents often refer to the United States or Canada, where States and Provinces respectively have their own rules on contract law. This is not considered to be a hinderance to the efficiency of trade.<sup>59</sup> The same could be said for the United Kingdom.<sup>60</sup> So why could several legal systems not exist in the European Union, without it (significantly) encumbering the internal market? Furthermore, harmonisation would require the analysis of the different legal solutions and the choice of one of those above all others. According to those scholars, the differences between *common law* and *civil law* are unbridgeable,<sup>61</sup> and lawyers from the first legal family fear losing the essence of their legal system, since they are already a minority within the Union.<sup>62</sup> This last assertion

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<sup>51</sup> P. LEGRAND, « Against a European contract code », *The Modern Law Review*, January 1997, vol. 60, n° 1, pp. 44-63.

<sup>52</sup> H. KÖTZ, *European Contract Law*, *op. cit.*, p. 12.

<sup>53</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 26.

For more on this, see: the Response of Professor Sir Roy Goode op COM(2001), paragraph 11.

<sup>54</sup> B. MARKESINIS, « Why a Code is Not the Best Way to Advance the Cause of European Legal Unity », *European Review of Private Law*, 1997, vol. 5, pp. 519-524.

<sup>55</sup> P. LEGRAND, *Le droit comparé, Que sais-je*, Paris, Presses universitaires de France, 1999, p. 12.

<sup>56</sup> H. KÖTZ, *European Contract Law*, *op. cit.*, p. 12.

<sup>57</sup> O. LANDO, « Optional or Mandatory Europeanisation of Contract Law », *European Review of Private Law*, January 2000, vol. 8, n° 1, p. 60.

<sup>58</sup> P. LEGRAND, « Against a European contract code », *op. cit.*, p. 62; E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 27.

<sup>59</sup> H. KÖTZ, *European Contract Law*, *op. cit.*, p. 13.

<sup>60</sup> A. BOWKER, « Towards a European Contract Code: Harnessing the Gradual Convergence To Solve the Economic Problems of Divergent Contract Laws », *Edinburgh Student Law Review*, 2009, n° 1, p. 41.

<sup>61</sup> P. LEGRAND, « Against a European contract code », *op. cit.*, pp. 44-47.

LEGRAND refers to the difference in *mentalité* in *common law* and *civil law*, stating that they concerns two different 'epimistological formations'.

On the other hand, there is an obvious rapprochement between *common* and *civil law*. For more on this, see: K.P. BERGER, « Harmonisation of European Contract Law. The Influence of Comparative law », *International Comparative Law Quarterly*, October 2001, vol. 50, n° 4, pp. 884-885.

<sup>62</sup> M.W. HESSELINK, « The Politics of a European contract code », *European Law Journal*, November 2004, vol. 10, n° 6, p. 679; T. WILHELMSSON, « The Legal, the Cultural and the Political - Conclusions from Different Perspectives on Harmonisation of European Contract Law », *European Business Law Review*, 2002, vol. 13, n° 6, p. 541.

has lost much of its power and persuasion, as the UK has since indicated its wishes to withdraw from the EU. This leaves only Cyprus and Ireland as ‘real’ *common law* countries within the Union.

**DIFFERENCES** – Furthermore, we need to consider that harmonisation itself might not be attainable (pragmatically), due to the fact that the law systems differ too much. A legal conundrum has numerous solutions and approaches.<sup>63</sup> It is challenging to disconnect these resolutions from their underlying, political ideologies, which can originate from an individualistic/autonomous point of view or the complete opposite, the altruistic/solidary position, HESSELINK thinks.<sup>64</sup> As a result of the upsurge in Member States, the uniformity of the law has become less evident.<sup>65</sup> We must also take into account the other actors that are involved in law making in the Union and the powerplay that goes on between them behind the curtains.<sup>66</sup> The European Commission, Parliament, consumer groups, lobbying groups, academics... are all interested parties that might hamper the process.

**LEGAL TRANSPLANTS** – There is also the problem of the legal transplant. It is very likely that the transfer of one legal tradition or solution to another legal culture, does not accomplish the intended goals, because that ordinarily requires complementary regulations inherent to the legal regime.<sup>67</sup> Harmonisation on the EU-level would only bring about fragmentation. LEGRAND deems the promotion of a European contract code not only impossible<sup>68</sup>, but also arrogant and a resolute step backwards.<sup>69</sup>

**ROLE OF THE EU** – Adversaries are frequently of the opinion that, if there are problems as a result of diversity of the legal systems in the EU, it is not for the Union to address the issue. A development of the last few decades, is the dissatisfaction with the interference of the Union in several areas. Various Member States are tired of new regulations being foisted on them against their wishes. Furthermore, it is correct that the Union has limited competences to facilitate (top-down) harmonisation (see *infra*, pp. 13-14).

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<sup>63</sup> M.W. HESSELINK, « The Politics of a European contract code », *op. cit.*, p. 676.

<sup>64</sup> *Ibid.*, pp. 676-678.

<sup>65</sup> W. VAN GERVEN, « Harmonization of Private Law », *op. cit.*, p. 507.

<sup>66</sup> M.W. HESSELINK, « The Politics of a European contract code », *op. cit.*, p. 683.

<sup>67</sup> P. LEGRAND, « The Impossibility of ‘Legal Transplants’ », *Maastricht Journal of European and Comparative Law*, June 1997, vol. 4, n° 2, pp. 114-115.

<sup>68</sup> For more on why LEGRAND thinks that a European contract law is unachievable, see: E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, pp. 26-27.

<sup>69</sup> P. LEGRAND, « Against a European contract code », *op. cit.*, p. 56.

**CISG** – Lastly, opponents of harmonisation also point out that there is a perfectly viable alternative available already: the CISG.<sup>70</sup> The Convention applies when both parties are located in contracting states,<sup>71</sup> or if the conflict of law rules of the forum lead to the application of the law of a State that has acceded to the CISG.<sup>72</sup> In this last situation though, States can make a reservation under art. 95 CISG.<sup>73</sup> Considering the amount of Contracting States, the CISG is fairly quickly applicable. It is worth mentioning that the CISG only applies in contracts of sale.<sup>74</sup>

### ***B. Proponents of harmonisation***

**FOREMOST AUTHORS** – The arguments against European harmonisation are legion, but the same can be said about the arguments pro-harmonisation. Renown authors on this side of the battlefield are BOWKER,<sup>75</sup> HARTKAMP,<sup>76</sup> GADOLFI,<sup>77</sup> LANDO,<sup>78</sup> KADNER<sup>79</sup> and BERGER.<sup>80</sup>

**ECONOMICS** – Globalisation and industrialisation result in a rise in cross-border transactions. This offers opportunities for both traders, companies and consumers,<sup>81</sup> but the discrepancies in contract laws still hinder international trade.<sup>82</sup> A study by Clifford Chance in 2005 pointed out that almost two-thirds of all participants, encountered *some or large* obstacles in cross-border trade.<sup>83</sup> There is also a lack of consumer confidence when buying products from another member State.<sup>84</sup> This diversity is an obstacle of free movement of goods and services and competition, reasons

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<sup>70</sup> H. KÖTZ, *European Contract Law*, *op. cit.*, p. 13.

<sup>71</sup> Art. 1 (1) a) CISG.

<sup>72</sup> Art. 1 (1) b) CISG; P. SCHLECHTRIEM, « Requirements of Application and Sphere of Applicability of the CISG Symposium: CISG », *Victoria University of Wellington Law Review*, 2005, vol. 36, pp. 782-783.

<sup>73</sup> J. LOOKOFSKY, « Chapter 3. Convention Scope and General Provisions », in J.H. HERBOTS, R. BLANPAIN and F. HENDRICKX (dirs.), *Contracts, International encyclopaedia of laws*, The Hague, New York, Kluwer Law International, 2016, pp. 39-40.

<sup>74</sup> Y. NIE, *The Application of the United Nations Convention on Contracts for the International Sale of Goods Uniformity Interpretation Principle in U.S.*, Indiana, University of Indiana Maurer School of Law, January 2018, p. 18.

<sup>75</sup> A. BOWKER, « Towards a European Contract Code: Harnessing the Gradual Convergence To Solve the Economic Problems of Divergent Contract Laws », *op. cit.*

BOWKER takes up several of LEGRAND's arguments from P. LEGRAND, « Against a European contract code », *op. cit.*

<sup>76</sup> A.S. HARTKAMP, « Modernisation and Harmonisation of Contract Law : Objectives, Methods and Scope », *Uniform Law Review*, January 2003, vol. 8, n° 1-2, pp. 82-83.

<sup>77</sup> G. GANDOLFI, « Pour un code européen des contrats », *Revue trimestrielle de droit civil*, 1992, p. 707.

<sup>78</sup> O. LANDO, « Principles of European Contract Law - A First Step toward a European contract code », *International Business Law Journal*, 1997, vol. 1997, pp. 189-202.

<sup>79</sup> T. KADNER GRAZIANO, « Does Europe Need a Contract Code? - A Case for Coexistence », in *Comparative contract law: cases, materials and exercises*, Cheltenham, UK, Edward Elgar Publishing, 2019, pp. 569-590.

<sup>80</sup> K.P. BERGER, « Harmonisation of European Contract Law. The Influence of Comparative law », *op. cit.*

<sup>81</sup> E. MCKENDRICK, « Harmonisation of European Contract Law », *op. cit.*, p. 14.

<sup>82</sup> T. WILHELMSSON, « The Legal, the Cultural and the Political - Conclusions from Different Perspectives on Harmonisation of European Contract Law », *op. cit.*, p. 542.

<sup>83</sup> S. VOGENAUER and S. WEATHERILL, « The European Community's Competence for a Comprehensive Harmonisation of Contract Law - An Empirical Analysis », *European Law Review*, December 2005, vol. 30, n° 6, pp. 821-837.

<sup>84</sup> L. RICHARDSON, « The DCFR, anyone? », 20 January 2014, available on <http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx> (Consulted on 30 March 2019).

BOWKER,<sup>85</sup> and therefore, must be removed if possible. It can be said that “legal harmonisation follows economic harmonisation.”<sup>86</sup> BLASE refers to the German unification of 1871, which was followed by economic growth.

**EUROPEAN IDENTITY** – Harmonisation would also reinforce the sense of the unity among the citizens of the European Union<sup>87</sup> because a European contract code would have an immense symbolic value.<sup>88</sup> This is often referred to as the *identity argument*.<sup>89</sup> The idea that the majority of all law systems of the Union originate from a common ancestor (the *ius commune*), would only expedite the process.<sup>90</sup> LANDO indicates that, within the Lando-Commission, there was a surprising degree of consensus, whilst dissenting opinions were usually the result of personal perspectives, rather than national mindsets.<sup>91</sup> This suggests that the creation of a European contract code would not be such a herculean task as often imagined by the opponents of harmonisation.<sup>92</sup>

**HARMONISATION THROUGH COMPARATIVE LAW** – Harmonisation is not only an imaginary feat but already a common occurrence in case law. Courts and tribunals increasingly cite the approaches of other legal systems, for instance the German Bundesgerichtshof,<sup>93</sup> English courts and the European Court of Justice.<sup>94</sup> This in turn influences new legislation. Some excellent examples are the Dutch *Nieuw Burgerlijk Wetboek*,<sup>95</sup> the Russian civil code,<sup>96</sup> but also French *Code Civil*<sup>97</sup>.

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<sup>85</sup> A. BOWKER, « Towards a European Contract Code: Harnessing the Gradual Convergence To Solve the Economic Problems of Divergent Contract Laws », *op. cit.*, p. 20.

<sup>86</sup> F. BLASE, « Leaving the Shadow for the Test of Practice-On the Future of the Principles of European Contract Law », *op. cit.*, p. 9.

<sup>87</sup> T. WILHELMSSON, « The Legal, the Cultural and the Political - Conclusions from Different Perspectives on Harmonisation of European Contract Law », *op. cit.*, p. 545.

One of WILHELMSSON's counterarguments is that the plurality of languages and cultures are part of the European identity and that harmonisation would eradicate this added value. See: E. HONDIUS, « De rode bundel, het groenboek en de blauwe knop - Optioneel instrument: optie of niet? », in M.W. HESSELINK *et al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 57.

<sup>88</sup> M.W. HESSELINK, « The Politics of a European contract code », *op. cit.*, p. 684; E. HONDIUS, « De rode bundel, het groenboek en de blauwe knop - Optioneel instrument: optie of niet? », *op. cit.*, p. 57.

<sup>89</sup> T. WILHELMSSON, « The Legal, the Cultural and the Political - Conclusions from Different Perspectives on Harmonisation of European Contract Law », *op. cit.*, p. 545.

<sup>90</sup> O. LANDO, « Optional or Mandatory Europeanisation of Contract Law », *op. cit.*, p. 66.

<sup>91</sup> *Ibid.*, p. 65.

<sup>92</sup> Naturally, this argument can easily be turned around. If there are so many similarities between the legal systems of the Union, one might wonder whether harmonisation is necessary at all.

<sup>93</sup> R. SCHULZE, « Vergleichende Gesetzesauslegung und Rechtsangleichung », *Zeitschrift für Rechtsvergleichung*, 1997, p. 183.

<sup>94</sup> K.P. BERGER, « Harmonisation of European Contract Law The Influence of Comparative law », *op. cit.*, pp. 885-886.

<sup>95</sup> E. HONDIUS, « European Contract Law: The Contribution of the Dutch », in H.-L. WEYERS and GESELLSCHAFT FÜR RECHTSVERGLEICHUNG (eds.), *Europäisches Vertragsrecht: Referate und Sitzungsbericht der Arbeitssitzung der Fachgruppe Zivilrecht der Gesellschaft für Rechtsvergleichung auf der Tagung vom 20. - 22. März 1996 in Jena*, Baden-Baden, Nomos Verl.-Ges, 1997, p. 45 and 62.

<sup>96</sup> K.P. BERGER, « Harmonisation of European Contract Law The Influence of Comparative law », *op. cit.*, p. 894.

<sup>97</sup> J. SMITS and C. CALOMME, « De herziening van het Franse verbintenissenrecht: les jeux sont faits », *Ars Aequi*, 2016, pp. 727-728.

**OTHER COUNTERARGUMENTS** – When it comes to the *identity argument*, it should be said that the emergence of the European identity would not in any way undermine cultural, historical, political and legal traditions of the Member States, if harmonisation would be achieved from the bottom up (see *infra*, pp. 15-16). The opponents that make reference to the situation of the United Kingdom, the United States and Canada<sup>98</sup> should be made aware that there are two key differences with the European Union, that inhibit that comparison. First of all, those common law countries all share the same language, due to which legal advice and comparative law is cheaper and easier.<sup>99</sup> Moreover, those legal systems deviate so little from one another that they typically lead to the same result.<sup>100</sup>

### §3. Is harmonisation feasible?

**POLARISATION** – There is still the issue of how we move forward. LANDO signposts two different approaches for European harmonisation: “The Union could either aim at a creeping uncodified harmonisation brought about by the scholars and the courts or a codification, i.e. a [mandatory] *European contract code*.”<sup>101</sup> He distinguishes these two groups as the *codifiers* and the *cultivators*,<sup>102</sup> or the *Thibauts* and the *Savignys* respectively.<sup>103</sup>

#### A. Top-down approach: limits

**AUTHORS** – The *codifiers* are of the opinion that harmonisation is best achieved by the legislator,<sup>104</sup> who must impose an obligatory code.<sup>105</sup> Not only LANDO,<sup>106</sup> TILMANN,<sup>107</sup> GANDOLFI<sup>108</sup> and SACCO,<sup>109</sup> but also the European Commission, have entertained the notion of *top-down harmonisation*.<sup>110</sup> It is simple and efficient,<sup>111</sup> and an obligatory, national law-replacing Code would make it possible for lawyers to predict how a case will proceed.

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<sup>98</sup> Examples of countries where the legal systems function efficiently next to each other, see *supra*.

<sup>99</sup> A. BOWKER, « Towards a European Contract Code: Harnessing the Gradual Convergence To Solve the Economic Problems of Divergent Contract Laws », *op. cit.*, p. 45.

<sup>100</sup> *Ibid.*

<sup>101</sup> O. LANDO, « Optional or Mandatory Europeanisation of Contract Law », *op. cit.*, p. 59.

<sup>102</sup> *Ibid.*, p. 65.

<sup>103</sup> LANDO refers to two German professors and their (heated) debate on the development of the German civil code. They both published a manifesto in 1814 on how to move forward. For more on this, see: O. LANDO, « Why codify the European Law of contract? », *European Review of Private Law*, January 1997, vol. 5, n° 4, p. 525.

<sup>104</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 79.

<sup>105</sup> O. LANDO, « Optional or Mandatory Europeanisation of Contract Law », *op. cit.*, p. 60.

<sup>106</sup> *Ibid.*, p. 69.

<sup>107</sup> W. TILMANN, « Eine Privatrechtskodifikation für die Europäische Gemeinschaft? », in *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, Baden-Baden, Nomos, 1993, p. 485.

<sup>108</sup> G. GANDOLFI, « Pour un code européen des contrats », *op. cit.*, p. 707.

<sup>109</sup> R. SACCO, « The System of European Private Law. Premises for a European Code », *Italian Studies in Law*, 1992, p. 71.

<sup>110</sup> Think about the *Communication on European Contract Law* of 2001, that led to the CFR and DCFR. See *supra*.

<sup>111</sup> T. KADNER GRAZIANO, « Does Europe Need a Contract Code? - A Case for Coexistence », *op. cit.*, p. 580.

**LIMITED COMPETENCES** – The problem with a top-down harmonisation lies with art. 5 (1) of the Treaty on the European Union (hereinafter: TEU).<sup>112</sup> This is the *principle of conferral*, according to which the Union only has the competences which are attributed to her.<sup>113</sup> When it comes to contract law, the European Union has already admitted the lack of explicit competences.<sup>114</sup> There is no clear mandate for such a measure, never mind that the EU might impose it *de rigueur*.<sup>115</sup>

**GENERAL HARMONISATION GROUNDS** – Of course, there is always art. 114 and 115 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). Art. 114 (1) TFEU (*the harmonisation clause*) enables the Union to adopt measures “which have as their object the establishment and functioning of the internal market”,<sup>116</sup> excluding fiscal provisions, those relating to the free movement of persons or to the rights and interests of employees.<sup>117</sup> Art. 115 TFEU is another general harmonisation ground that is notably useful for harmonisation in those three exceptions. There is also art. 352 TFEU, the *flexibility clause*, which empowers the Union to act outside the scope of application of the Treaties when it is necessary to achieve the goals of the European Union.<sup>118</sup>

**CHOICE OF THE EC** – The European Commission wishes to apply art. 114 TFEU for harmonisation purposes,<sup>119</sup> meaning that a measure should effectively contribute to the improvement of the internal market,<sup>120</sup> and that it must also be proportionate.<sup>121</sup> The primary complication is that a mandatory *European contract code* would be disproportionate.<sup>122</sup> Furthermore, art. 114 TFEU mainly results in directives in specific areas, inducing fragmented unification.<sup>123</sup> For a *European contract code*, this

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<sup>112</sup> Treaty of the 2<sup>nd</sup> of February 1993 of the European Union, C191 29 July 1992.

<sup>113</sup> K. LENAERTS and P. VAN NUFFEL, *Europees recht*, Antwerp/Cambridge, Intersentia, 2017, p. 72.

<sup>114</sup> R.R.R. HARDY, « Harmonisatie van het overeenkomstenrecht in Europa en artikel 95 van het EG-Verdrag als rechtsbasis daarvoor », *Vermogensrechtelijke Analyses*, 2005, vol. 2, p. 50.

<sup>115</sup> O. LANDO, « Optional or Mandatory Europeanisation of Contract Law », *op. cit.*, p. 60.

<sup>116</sup> K. LENAERTS en P. VAN NUFFEL, *Europees recht*, *op. cit.*, p. 113.

<sup>117</sup> Art. 114 (2) TFEU; *Ibid.*, pp. 206-207.

<sup>118</sup> *Ibid.*, p. 79; P.C.J. TAVERNIER, « Is Europa bevoegd een gemeenschappelijk kooprecht uit te vaardigen? », *Maandblad voor Vermogensrecht*, 2012, pp. 204-205.

<sup>119</sup> Whether this is an appropriate legal basis, is another matter entirely. For more on that, see: P.C.J. TAVERNIER, « Is Europa bevoegd een gemeenschappelijk kooprecht uit te vaardigen? », *op. cit.*, p. 205.

<sup>120</sup> Meaning the mere divergence of legal rules is not a sufficient justification for harmonisation. See: M. LOOS, « Naar een optioneel instrument », in M.W. HESSELINK and *al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 158.

<sup>121</sup> Court of Justice 12 December 2006, 'Tobacco Advertising II', C-380/03, [https://www.navigator.nl/document/id280020061212c38003admusp/ecli-eu-c-2006-772-ecli-nl-xx-2006-az6795-hvj-eg-12-12-2006-nr-c-38003?ctx=WKNL\\_CSL\\_10000001](https://www.navigator.nl/document/id280020061212c38003admusp/ecli-eu-c-2006-772-ecli-nl-xx-2006-az6795-hvj-eg-12-12-2006-nr-c-38003?ctx=WKNL_CSL_10000001); S. VOGENAUER and S. WEATHERILL, « The European Community's Competence for a Comprehensive Harmonisation of Contract Law - An Empirical Analysis », *European Law Review*, December 2005, vol. 30, n° 6, pp. 821-837.

<sup>122</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 80.

<sup>123</sup> R.R.R. HARDY, « Harmonisatie van het overeenkomstenrecht in Europa en artikel 95 van het EG-Verdrag als rechtsbasis daarvoor », *op. cit.*, p. 51; J. SMITS, « Over de ongekende legitimiteit van een optionele code », in M.W. HESSELINK and *al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 29.

article is unusable. This leaves art. 352 TFEU, yet this article requires unanimity, which is – especially when it comes to an obligatory Code – unfeasible. The European Commission appears to have come to the same conclusion, as it has undertaken no (significant) steps ever since the DCFR to harmonise contract law in the Union.

## **B. Bottom-up approach: opportunities**

### *1. Choice of law in contracts*

**POLARISATION** – From the lack of further harmonisation, we might conclude that the second groups of authors – the *cultivators* – such as ZIMMERMAN,<sup>124</sup> KÖTZ,<sup>125</sup> BEALE,<sup>126</sup> VAN GERVEN<sup>127</sup> are in the right.<sup>128</sup> Each State is too focused on her own *mentalité*<sup>129</sup> to accept a foreign law. The sudden introduction of a (compulsory) European contract law, replacing national legal systems, would encounter considerable resistance. No, the European process of integration calls for a flexible, dynamic harmonisation instead of something as inert or far-reaching as a mandatory *European contract code*. A more lenient approach might prove advantageous.

**FREEDOM OF CHOICE** – RIEDL denotes *optional* Europeanisation.<sup>130</sup> We could leave it up to the contractual parties to choose for further harmonisation, via incorporation of *non-State rules* in their contracts, such as the UNIDROIT Principles or the PECL.<sup>131</sup> This *bottom-up method* requires approval for harmonisation and consensus among the public and the contractual parties.<sup>132</sup> Furthermore, TERRYIN holds that harmonisation through directives has reached its limits. The optionality would prevent fragmentation, while still encouraging cross-border trade.<sup>133</sup> If the courts and tribunals of the EU were to refer to soft law instruments, this would support bottom-up harmonisation as well. Finally, this approach caters to nearly all the arguments of the opponents of harmonisation. It is the opposite way forward.

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<sup>124</sup> R. ZIMMERMANN, « Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science », *Law Quarterly Review*, 1996, vol. 112, p. 576.

<sup>125</sup> H. KÖTZ, « Gemeineuropäisches Privatrecht », *Festschrift für Konrad Zweigert*, Mohr Tübingen, 1981, p. 481.

<sup>126</sup> H. BEALE, « The Development of European Private Law and the European Commission's Action Plan on Contract Law », *Juridica International*, 2005, pp. 15-16.

<sup>127</sup> W. VAN GERVEN, « Harmonization of Private Law », *op. cit.*, p. 532.

<sup>128</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 80.

<sup>129</sup> P. LEGRAND, « Against a European contract code », *op. cit.*, p. 44.

<sup>130</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 81.

<sup>131</sup> C. FOUNTOLAKIS, « The Parties' Choice of Neutral Law in International Sales Contracts », *European Journal of Law Reform*, 2005, vol. 7, pp. 328-329.

<sup>132</sup> E.M. MESLIN, « The Value of Using Top-Down and Bottom-Up Approaches for Building Trust and Transparency in Biobanking », *Public Health Genomics*, 2010, vol. 13, n° 4, p. 207.

<sup>133</sup> E. TERRYIN, *The Common Frame of Reference: an optional instrument?*, Brussels, The European Parliament, 2010, pp. 7-9, available on <http://dare.uva.nl/search?metis.record.id=337758> (Consulted on 30 March 2019).

## 2. Illustration: the Restatements of the Law

**RESTATEMENTS OF THE LAW** – A successful example of bottom-up harmonisation is the *Restatements of the Law* of the American Law Institute (hereinafter: ALI).<sup>134</sup> The ALI was founded in 1923 as an independent organisation to improve the law within the United States. With that goal in mind, it has thousands of members worldwide, including judges, in-house-counsel, academics...<sup>135</sup> The Restatements is one of its greatest achievements and it aims at “...the clarification, simplification and adaptation [of the law] to the needs of life”.<sup>136</sup> Scholars and practitioners publish the common core of law,<sup>137</sup> in subjects such as contracts, liability, property...<sup>138</sup> The Restatements are *soft law*, but they enjoy a near binding status and are indispensable for the American courts, both on the federal and the State level, that often refer to them for interpretation purposes.<sup>139</sup>

## 3. Optional instrument?

**THE NEXT STEP?** – Some authors have also proposed the introduction of an *Optional Code*,<sup>140</sup> meaning that the EU would adopt a separate regime next to the current domestic legal systems.<sup>141</sup> It should be regarded, says HESSELINK, as “...the next step in a process that started with the CISG, and led to the UNIDROIT Principles, the PECL and the DCFR.”<sup>142</sup>

**LEGAL GROUNDS** – The issue of possible legal grounds poses itself once more. Art. 114 and 352 TFEU offer limited competences. The first article has two conditions: genuine, positive effect on the internal market and proportionality (see *supra*, p. 14). Art. 114 was unusable for the adoption of a mandatory *European code*, because it was not proportionate. An *Optional Code* in contrast, easily passes the proportionality test, because it does not impede the sovereignty of the Member States.<sup>143</sup>

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<sup>134</sup> M.W. HESSELINK en G.J.P. DE VRIES, *Principles of European contract law*, *op. cit.*, p. 13.

<sup>135</sup> AMERICAN LAW INSTITUTE, « Annual Report 2016-2017 », 2017, p. 4.

<sup>136</sup> N.E.H. HULL, « Restatement and Reform: A New Perspective on the Origins of the American Law Institute », *Law and History Review*, 1990, vol. 8, n° 1, p. 81.

<sup>137</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 81.

<sup>138</sup> A. KULL, « Three Restatements of Restitution », *Wash. & Lee Law Review*, 2011, vol. 68, p. 868.

<sup>139</sup> K. RIEDL, « The Work of the Lando-Commission from an Alternative Viewpoint », *op. cit.*, p. 82.

<sup>140</sup> M.W. HESSELINK, « An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade? », in M.W. HESSELINK and *al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 11.

<sup>141</sup> V. MAK, « Hoe meer keus, hoe beter? », in M.W. HESSELINK *e.a.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, pp. 96-97.

<sup>142</sup> M.W. HESSELINK, « An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade? », *op. cit.*, p. 22.

<sup>143</sup> M. LOOS, « Naar een optioneel instrument », *op. cit.*, pp. 159-160.

**CATCH-22** – LOOS and RUTGERS argue that, because an optional instrument would be proportionate, it would also very likely endanger the application of art. 114 TFEU *in se*, since it would only be applied when parties opt for it. It would not entail ‘true’ harmonisation and would lose its effectiveness (thus not truly affecting the internal market).<sup>144</sup> Of course, the EU has introduced other optional measures based on art. 114 TFEU,<sup>145</sup> but TERRYIN correctly states that “...an optional instrument that does not affect national laws does not seem to qualify as an approximating measure.”<sup>146</sup> It appears an optional instrument based on art. 114 results in a (near) catch-22. This leaves art. 352 TFEU, which seems to be the preferred legal basis.<sup>147</sup> It is important to mention that the *flexibility clause* requires unanimity. Yet, unlike with a mandatory Code, this is not entirely unattainable. The question is, is it useful to introduce another instrument, next to the current non-State rules?

#### **§4. Something to consider**

I believe that further rapprochement concerning general contract law is a worthwhile investment. The arguments why have been discussed and appraised at length above, but I would like to point out one of the major counterarguments, that demands additional scrutiny, and that is the *identity argument*. I don’t think that further harmonisation would erase national traditions as is feared, but it is not difficult to imagine the opposition a *European contract code* would meet. The Union is under pressure, not only because of the immigrant crisis, but also due to the Brexit, the rise of (far-)right movements and the many Member States that think the EU is inactive in some areas, yet too eager in others.<sup>148</sup> In the current climate, the call for further unification is not very likely to be answered enthusiastically. Considering all of the above, Europe should perhaps bank on bottom-up harmonisation. What the EU will and should do, will be the focus of my qualitative research (see *supra*, pp. 24 et seq.).

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<sup>144</sup> M.W. HESSELINK and *al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, pp. 160-161.

<sup>145</sup> E. TERRYIN, *The Common Frame of Reference*, *op. cit.*, p. 18.

<sup>146</sup> *Ibid.*

<sup>147</sup> M. LOOS, « Naar een optioneel instrument », *op. cit.*, p. 161; E. TERRYIN, *The Common Frame of Reference*, *op. cit.*, p. 17.

<sup>148</sup> J. SMITS, « Over de ongekende legitimiteit van een optionele code », *op. cit.*, p. 27.

## SECTION II. SOFT LAW AND HARMONISATION

**TWO QUESTIONS** – Harmonisation can be approached from the top down (i.e. imposing a mandatory European contract code) or from the bottom up (e.g. allowing parties to opt for neutral, non-State rules as the applicable contract law in their contracts). Top-down harmonisation appears unfeasible from a political but also an EU-constitutional perspective. Bottom-up harmonisation gives rise to two questions. First of all, is it legally possible to designate non-State rules as the applicable law in contracts? And secondly, which non-State rules would best enable further bottom-up harmonisation? These are the subjects of the first and the second paragraph of this section.

### §1. Conflict of law: non-State rules as *lex causae*

#### A. Current private international law legislation

**ROME I REGULATION** – The applicable law in contracts is governed by the rules of private international law.<sup>149</sup> Within the European Union, the relevant legislation is the *Rome I Regulation*.<sup>150</sup> Art. 3 (1) Rome I comprises the basic principle of *freedom of choice*: “A contract shall be governed by the law chosen by the parties...”.

**WHAT IS LAW?** – The next issue concerns the interpretation of the word ‘law’. Whilst drafting the *Treaty of Rome*<sup>151</sup>, the authors had the same discussion. Most of the authors were convinced that only the rules of a State could be regarded as ‘law’,<sup>152</sup> thus excluding non-State rules and *soft law* such as the PECL and the UNIDROIT Principles.<sup>153</sup> When Rome I was being outlined, the topic once again divided the drafters. The European Commission proposed an amendment of art. 3, with which non-State rules would be included in the choice of law of the parties.<sup>154</sup>

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<sup>149</sup> G. VAN CALSTER, *European private international law*, Oxford, Portland, Oregon, Hart Publishing, 2016, pp. 1-2.

<sup>150</sup> « Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) », 4 July 2008, available on <https://eur-lex.europa.eu/eli/reg/2008/593/oj> (Consulted on 30 March 2019).

Rome I concerns contracts concluded after 17 December 2009. Contracts concluded before this date, are governed by the Rome Convention on the law applicable to contractual obligations of 19 June 1980 (known as the Treaty of Rome). For more on this, see: art. 28 Rome I Regulation; G. VAN CALSTER, *European private international law*, Oxford, Portland, Oregon, Hart Publishing, 2016, p. 203; M. WALLART and T.H.M. van WECHER, « Artikel: Rome I: nieuw IPR voor de contractenrechtpraktijk », *Contracteren*, 2008, vol. 4, p. 81.

<sup>151</sup> The predecessor of the Rome I Regulation.

<sup>152</sup> R. MICHAELS, « The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism Symposium », *Wayne Law Review*, 2005, vol. 51, p. 1211.

<sup>153</sup> A. BRIGGS, *The Conflict of Laws*, Clarendon Law Series, Oxford, New York, Oxford University Press, 25 April 2013, p. 159.

<sup>154</sup> C. KESSEDIAN, « Party Autonomy and Characteristic Performance in the Rome Convention and the Rome I Proposal », in J. BASEDOW *e.a.* (eds.), *Japanese and European Private International Law in Comparative Perspective*, Heidelberg, Mohr Siebeck, 2008, p. 115; F. MARRELLA, « Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts », *Vanderbilt Journal of Transnational Law*, 2003, vol. 36, p. 1142.

**INCORPORATION** – In the end, the article was not revised and as such, Rome I does not permit contractual parties to elect a non-State body of rules as the applicable law.<sup>155</sup> Yet, the Commission succeeded in intercalating Recital 13 in the Rome I Regulation, which states: “This Regulation does not preclude parties from incorporating by reference into their contract a non-State instrument or an international convention.” In other words, the applicable law remains administered by the choice of law of the parties or by Rome I.<sup>156</sup> But non-State rules may be incorporated,<sup>157</sup> as far as those non-State rules do not preclude mandatory (State) rules. An example may clarify this: parties denote the PECL as the applicable law, but according to Rome I, Swiss law (e.g.) is the applicable law, meaning that all suppletive, Swiss rules are replaced by their PECL counterparts, whereas mandatory, Swiss rules remain in force.

**CISG** – When it comes to international commercial contracts, one might ask how this choice of applicable law correlates with the CISG. The Vienna Treaty automatically applies in sales contracts in a B2B context when both parties are based in Contracting Parties, or when the conflict of law rules designate the law of a Contracting Party as the applicable law.<sup>158</sup> Nonetheless, the CISG maintains an opt-out system.<sup>159</sup> Parties can easily exclude the application of the CISG and, subsequently, opt for the incorporation of non-State rules.<sup>160</sup>

**ARBITRATION** – In arbitration, the choice of law is disconnected from the private international law-rules of the seat of arbitration, the *lex situs arbitri*. Therefore, it is possible to designate non-State rules as the applicable law, without the support of another domestic law.<sup>161</sup> Art. 28 (1) of the UNCITRAL Model Law on International Commercial Arbitration clearly asserts that “the arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute”. Considering that the Model Law was the basis for the lion share of domestic arbitration laws, similar provisions can be found all over the world.<sup>162</sup> Commentary 4.a of the UNIDROIT Principles declares the same. MARELLA holds that the UNIDROIT Principles are frequently used in arbitration contracts, due to their neutrality.<sup>163</sup>

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<sup>155</sup> M.J. BONELL, « The law governing international commercial contracts and the actual role of the Unidroit Principles », *Uniform Law Review*, March 2018, vol. 23, n° 1, p. 26; E. TERRY, *The Common Frame of Reference*, *op. cit.*, p. 10.

<sup>156</sup> *Ibid.*, pp. 432-433.

<sup>157</sup> *Ibid.*, p. 432.

<sup>158</sup> Art. 1 CISG.

<sup>159</sup> M.W. HESSELINK, « An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade? », *op. cit.*, p. 22.

<sup>160</sup> Art. 6 CISG.

<sup>161</sup> F. MARRELLA, « Choice of Law in Third-Millennium Arbitrations », *op. cit.*, p. 1147.

<sup>162</sup> M.J. BONELL, « The law governing international commercial contracts and the actual role of the Unidroit Principles », *op. cit.*, p. 25.

<sup>163</sup> F. MARRELLA, « Choice of Law in Third-Millennium Arbitrations », *op. cit.*, p. 1157.

## ***B. The optional instrument and Rome I***

**THE OPTIONAL INSTRUMENT?** – Above, the possibility of a separate legal regime in the EU has been discussed. Recital 14 of the Rome I Regulation states: “Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such an instrument may provide that the parties may choose to apply such rules.” This entails that – if the European Union were to approve an optional instrument – parties could opt for that instrument as the applicable law.

**STANDARD OF PROTECTION** – It seems illogical that non-State rules cannot be chosen as the applicable law under art. 3 (1) Rome I, yet a European instrument – which would be a quasi-copy-paste – could, following Recital 14. This probably stems from the idea that national and international<sup>164</sup> mandatory provisions offer a higher standard of protection.<sup>165</sup> TERRYIN recommends the introduction of *semi-mandatory rules* in the optional instrument.<sup>166</sup> Regarding mandatory rules within non-State bodies, I would like to point out that the better part of consumer protection (as it is a form of harmonisation) is regulated via directives within the Union.<sup>167</sup> If an optional instrument were to implement those directives, it would offer the minimum protection<sup>168</sup> that the European Union demands.

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<sup>164</sup> See the restrictions regarding the choice of law in consumer contracts (art. 6 (2) of Rome I), insurance contracts (art 7 Rome I) and labour contracts (art 8 Rome I).

<sup>165</sup> E. TERRYIN, *The Common Frame of Reference*, *op. cit.*, p. 11.

<sup>166</sup> *Ibid.*

<sup>167</sup> G. HOWELLS and S. WEATHERILL, *Consumer Protection Law*, England, Ashgate, 2017, pp. 29, 31, 32, 39; H. UNBERATH and A. JOHNSTON, « The double-headed approach of the ECJ concerning consumer protection », *Common Market Law Review*, October 2007, vol. 44, n° 5, pp. 1238-1239.

<sup>168</sup> M.W. HESSELINK, « An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade? », *op. cit.*, p. 20; H. UNBERATH and A. JOHNSTON, « The double-headed approach of the ECJ concerning consumer protection », *op. cit.*, p. 1243.

## §2. The goals of the PECL, the UNIDROIT Principles and the DCFR

**PECL** – In the Preamble of the PECL, the Lando-Commission signifies that it was inspired by the *Uniform Commercial Code* (hereinafter: UCC).<sup>169</sup> However, the main source appears to be the aforementioned Restatements of the ALI (see *supra*, p. 16),<sup>170</sup> considering the structure and contents are virtually analogous.<sup>171</sup> From the Preamble of the PECL, we can infer the following goals:

- (a) Foundation for European legislation;
- (b) Applicable choice of law in day-to-day contracts (see art. 1.101 PECL);
- (c) (Re)formulation of the *lex mercatoria*;
- (d) Model for legal and legislation development of contract law;
- (e) Basis for harmonisation.<sup>172</sup>

**UNIDROIT PRINCIPLES** – Like the PECL, the UNIDROIT Principles are *soft law*. However, the UNIDROIT Principles have a narrower, and at the same time, broader scope of application than the PECL. The former aims at application worldwide, whilst the PECL are clearly focused on Europe. However, the UNIDROIT Principles merely concern commercial/sales contracts,<sup>173</sup> whereas the PECL can be applied in civil contracts, too. Of course, the UNIDROIT Principles do not have the object of forming the basis for codification. Nevertheless, the contents of both instruments are nearly identical. The purpose of the UNIDROIT Principles is mainly the optional application, as can be read in the Preamble,<sup>174</sup> the content and wording of which is equal to art 1.101 PECL.

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<sup>169</sup> The UCC is – unlike both the Restatements and the PECL – mandatory law ever since it has been implemented by all States of the USA.

For more on this, see: W.A. SCHNADER, « A Short History of the Preparation and Enactment of the Uniform Commercial Code », *University of Miami Law Review*, 1968 1967, vol. 22, pp. 1-12.

The UCC is the result of the labours of the National Conference of Commissioners on Uniform State Laws, ALI and professor Karl Llewellyn.

<sup>170</sup> COMMISSION ON EUROPEAN CONTRACT LAW, *Principles of European Contract Law: Parts I and II*, The Hague, Kluwer Law International, 2000, p. xxvi.

<sup>171</sup> M.W. HESSELINK and G.J.P. DE VRIES, *Principles of European contract law*, *op. cit.*, p. 12.

<sup>172</sup> F. BLASE, « Leaving the Shadow for the Test of Practice-On the Future of the Principles of European Contract Law », *op. cit.*, p. 7; COMMISSION ON EUROPEAN CONTRACT LAW, *Principles of European Contract Law*, *op. cit.*, pp. xxiii-xxiv; A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, *op. cit.*, p. 30.

<sup>173</sup> F. BLASE, « Leaving the Shadow for the Test of Practice-On the Future of the Principles of European Contract Law », *op. cit.*, p. 8.

<sup>174</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, *op. cit.*, p. 30.

**DCFR** – It is very clear that the authors of the DCFR were chiefly influenced by the PECL and the UNIDROIT Principles, which led to not only similar contents but also a similar scope of application.<sup>175</sup> However, the primary purpose of the DCFR remains the forming of an outline for drafting a ‘political’ Common Frame of Reference.<sup>176</sup> It also aims at promoting knowledge of private law in the EU. It may increase mutual awareness and consideration in Europe.<sup>177</sup> Lastly, the DCFR hopes that the text inspires practitioners searching for solutions for private law questions, which in result “...may contribute to a harmonious and informal Europeanisation of private law.”<sup>178</sup> This suggests application in contracts, due to the choice of law by the contractual parties, but also the use of the DCFR as an instrument for interpretation or referral.<sup>179</sup> Read: bottom-up harmonisation.

**SOURCES OF APPLICABLE LAW** – Evidently, the aforementioned instruments aim at application in contracts in one way or another, even though each of them is (for the moment) *soft law*. It can be deduced that either of these texts can be used in the following three situations:

- (a) When the parties have designated the instrument as the applicable law (or incorporated it, pursuant Recital 13);
- (b) When the parties have agreed that the ‘*general principles of law*’ or the ‘*lex mercatoria*’ are applicable;
- (c) When the parties have not identified a legal system or a set of rules as the applicable law in their contract.

While option (c) is mentioned, this is merely theory. Should (European) contractual parties forget to select the applicable law, art. 4 of the Rome I Regulation would determine the applicable law in the absence of a choice.<sup>180</sup>

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<sup>175</sup> C. von BAR and al. (eds.), *Principles, definitions and model rules of European private law: draft common frame of reference (DCFR)*, Munich, Sellier, European Law Publishers, 2009, p. 30.

<sup>176</sup> A.N. KARADAYI, *The interpretation and gap filling in international commercial contracts in the light of the CISG, Unidroit Principles, PECL, DCFR and related case-law*, op. cit., p. 32.

<sup>177</sup> C. von BAR and al. (eds.), *Principles, definitions and model rules of European private law*, op. cit., p. 7.

<sup>178</sup> *Ibid.*, pp. 8-9.

<sup>179</sup> This has happened before. For more, see: L. RICHARDSON, « The DCFR, anyone? », op. cit.

<sup>180</sup> G. VAN CALSTER, *European private international law*, op. cit., p. 217 and seq.

## CHAPTER 2. NON-STATE RULES IN PRACTICE: A QUALITATIVE RESEARCH

### SECTION I. RESEARCH DOMAIN AND RELEVANCE

**HINDRANCES** – From the above, we can conclude that cross-border trade and the provision of services might be hampered by the legion of different national regimes in the Union, but also the lack of familiarity with other languages and (legal) cultures, possible mandatory rules<sup>181</sup>... Harmonisation can alleviate several of these obstacles.

**FORK IN THE ROAD** – The Union has – *grosso modo* – two ways forward. Top-down harmonisation would quickly yield far-reaching results, yet it appears to be impossible considering the political climate and the lack of competences of the EU. Bottom-up harmonisation in contrast is more feasible. The Union might even succeed in adopting an *Optional Code* in the future, though there are questions regarding the legal competences to do so.

**RELEVANCE OF THE RESEARCH** – However, for the time being, the *Optional Code* is not at issue. But contractual parties have the right, following Recital 13 of the Rome I Regulation, to implement non-State rules in their contracts and the last of those major instruments, the DCFR, is nearly a decade old. So, to what extent is (has) contract law being (been) harmonised from the bottom up? Do contractual parties ever agree to apply e.g. the UNIDROIT Principles in their contracts? On one hand, that seems obvious. VOGENAUR conducted a quantitative study throughout the European Union, questioning 100 businesses regarding their choice of forum and law in international contracts.<sup>182</sup> While many opted for the law of their own State, Swiss law was decidedly popular,<sup>183</sup> mainly because of its neutrality.<sup>184</sup> Following that mindset, a neutral, international body of rules such as the PECL or the DCFR ought to be favoured, too.<sup>185</sup> Yet, this is a topic that has essentially been neglected by the legal world. Many texts have been written on non-State rules and harmonisation of European contract law, but that is mere theory. To what extent is *law in the books* congruent with *law in action*?

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<sup>181</sup> See e.g. art. 9 Rome I for *overriding mandatory law*.

<sup>182</sup> J. RUTGERS, « Het (a)sociale gezicht van Europa: kanttekeningen bij het optioneel instrument », in M.W. HESSELINK and al. (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, p. 130.

<sup>183</sup> *Ibid.*, p. 131.

<sup>184</sup> *Ibid.*, p. 132.

<sup>185</sup> This is of course an oversimplification of the issue. Many other factors come into focus when selecting the applicable law in a contract, but it is certainly a subject worth scrutinising.

**THE IMPORTANCE OF BEING EARNEST** – Obviously, one of the main incentives behind this research is pure, scientific curiosity. On the other hand, this results of the research might very well dictate the future of contract law in Europe. For example, it might show which instruments are preferred. On the other hand, the knowledge of the existence of non-State rules may be so non-existent, that their applicability in contracts is a non-event, which means that an *Optional Code*, would likely suffer the same fate. Mayhap the disuse of those non-State rules will encourage the Union to introduce new, venturesome initiatives.

## SECTION II. RESEARCHABILITY, OBJECTIVES AND TARGET AUDIENCE

**IN GENERAL** – The research in itself is not an impossible task. The subject is broad and may have such comprehensive consequences, so it requires an extensive, profound research, preferably a study done over many years in several European countries, researching not only the choice of law in international contracts, but also the incentives behind that choice (such as language, acquaintance with the contractual party and the legal culture...). This explorative and explanatory research is both empirically and ethically feasible.

**IN CONCRETO** – Still, in the context of a master's thesis that study is less realistic. Bearing in mind limited means and (especially) time, this dissertation will be restricted to a small-scale, qualitative research in an hand-full of European countries. The goal remains to explore and to explain, though the answers and results will likely be a lot more modest.

**TARGET AUDIENCE** – Since this is a dissertation, the primary target audience is the promotor and the jury. Nonetheless, the results could also guide practitioners in their own choice of law-clauses. Perhaps, others may see the importance of the issue and hopefully, a full-scale research will be conducted in the future. In turn, this could influence the actions of policy makers on the EU level. Last but not least, the scientific community (i.e. scholars and students) might find the subject matter as intriguing as I do.

### SECTION III. RESEARCH QUESTIONS

**MAIN RESEARCH QUESTIONS** – The issue concerning the future of (bottom-up) harmonisation of contract law in the Union, can be expressed in these main research questions:

- (a) How often do lawyers encounter non-State rules in their practice?
  - a. What are the reasons for this?
  - b. Is there a preference of one type of non-State rules over the others?
  - c. Is this linked to arbitration?
- (b) How does this influence harmonisation of contract law in the EU?

### SECTION IV. RESEARCH METHOD

**RESEARCH METHOD** – The research was a *non-real time* (asynchronous) *online survey*<sup>186</sup>, meaning that the participants individually received a questionnaire sent via email, with one exception where the participant preferred an interview via the telephone. Based on the data I received, I asked follow-up questions if necessary and prudent. All the information was coded for the dissertation and an overview of the nodes can be found at the end of this thesis. The survey consisted of some multiple choice questions but mostly open ended questions.

**PICKING SUBJECTS** – The subjects of the research were mainly chosen via *purposive sampling*,<sup>187</sup> *convenience sampling*<sup>188</sup> and *snowball sampling*. At first, I sent emails to people coming from two sub-groups, namely lawyers of large law firms<sup>189</sup> and in-house-counsels of well-known companies, asking for their cooperation. I contacted only these people because the knowledge about non-State rules is fairly inadequate even in the legal environment. The response to this first round of emails was limited at best, so I was forced to change my approach. I asked my professors and my instructor to refer me to other professors in different Member States of the Union. Thanks to the willingness of these contacts, I was put in touch with lawyers, advisors, other academics in the field etc. with experience in international contracting and private international law. Certain of these participants

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<sup>186</sup> T. DECORTE and D. ZAITCH, *Kwalitatieve methoden en technieken in de criminologie*, Leuven/The Hague, Acco, 2010, p. 421.

<sup>187</sup> « Purposive Sampling », in *The SAGE Dictionary of Social Research Methods*, London, SAGE Publications, 2006, pp. 244-245, available on <http://methods.sagepub.com/reference/the-sage-dictionary-of-social-research-methods/n162.xml> (Consulted on 30 March 2019).

<sup>188</sup> R.W. EMERSON, « Convenience Sampling, Random Sampling, and Snowball Sampling: How Does Sampling Affect the Validity of Research? », *Journal of Visual Impairment & Blindness Huntington*, April 2015, vol. 109, n° 2, p. 164.

<sup>189</sup> Firms with more than 50 employees.

could direct me towards other sources, such as articles or case law, that furthered this research. Clearly, the pool of participants is not a representative sample of the legal practice. However, considering that this is a qualitative research and not a quantitative one, the generalisability is not the true aim (though this is of course directly linked to the external validity, see *infra*, p. 28).<sup>190</sup>

**PICKING NON-STATE RULES** – The original idea for the dissertation was a study into the use of the PECL in practice, given that reading art. 1.101 of those Principles sparked this research. In the end, I included the UNIDROIT Principles and the DCFR because their contents are very similar and I was thus advised by professors and participants. Not counting the CISG, these three instruments are also the most obvious choices, should the EU decide to approve an (optional) Code (see *supra*, p. 20).

**SAMPLE SIZE** – Evidently, a research should go as far as needed to reach *theoretical saturation*, which is the moment that no new relevant data can be found or a specific category has been completely analysed.<sup>191</sup> In this specific research, the sample size was limited to a seven participants, coming from various Member States of the European Union. My original intention was to find participants in Belgium, Germany, Poland, Hungary and Spain. I decided to start with Belgium, because it is convenient for me. Germany was added to the list because a professor had mentioned a German colleague that applied the UNIDROIT Principles in his practice. That same professor recommended searching for participants in Eastern Europe. On the advice of a friend, I added Spain as well, so that I might have participants from all corners of the Union. Based on that notion, I wished to question lawyers in the United Kingdom and Scandinavia as well, though I have not been successful in finding participants in those countries. In the end, my contacts referred me to participants in many other countries, the result of which is that currently, the participants of this research work in the following countries: Belgium, Germany, Switzerland, Hungary, Croatia, the Czech Republic and the United Kingdom. The participants are lawyers, sometimes with also an academic and/or arbitration background, meaning that ultimately, no in-house-counsels were questioned for this research.

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<sup>190</sup> L. LEUNG, « Validity, reliability, and generalizability in qualitative research », *Journal of Family Medicine and Primary Care*, 2015, vol. 4, n° 3, p. 327.

<sup>191</sup> « Theoretical Saturation », in *The SAGE Encyclopedia of Qualitative Research Methods*, California, SAGE Publications, 2008, pp. 875-876, available on <http://sk.sagepub.com/reference/research/n456.xml> (Consulted on 30 March 2019).

**OVERVIEW OF THE PARTICIPANTS** – This schedule gives a brief summary of all seven participants, the country from which they work and in what area they are specialised. All are lawyers, though some also work in arbitration and one participant is academically active. Please note that the caption in italics is the main occupation of the participant. I would also like to add that two lawyers worked together on a questionnaire, their answers were transposed as those for participant 5.

<i>Nr.</i>	<i>Country</i>	<i>Lawyer</i>	<i>Academic</i>	<i>Arbitration</i>
<i>P1</i>	Croatia	Advisor, private international law & international commercial law	Law professor	<i>Commercial arbitrator</i>
<i>P2</i>	Hungary	<i>Lawyer, dispute resolution</i>	N.A.	N.A.
<i>P3</i>	Germany	<i>Lawyer</i>	N.A.	Lawyer in arbitration
<i>P4</i>	Switzerland	<i>Lawyer, international dispute resolution</i>	N.A.	Lawyer in arbitration
<i>P5</i>	UK	Lawyer, international arbitration	N.A.	<i>International arbitrator and advisor</i>
		<i>Lawyer, complex commercial litigation</i>	N.A.	N.A.
<i>P6</i>	Belgium	<i>Lawyer, private international law</i>	N.A.	N.A.
<i>P7</i>	Czech Republic	<i>Lawyer, dispute resolution</i>	N.A.	N.A.

## SECTION V. LIMITS OF THE RESEARCH METHOD

**QUALITY CRITERIA** – The method of data finding, the sample size, the included variables and method of data assimilation influence not only the results, but also the legitimacy and dependability of the research. This section will dig deeper into those criteria.

**INTERNAL VALIDITY** – This notion refers to the believability and trustworthiness of the findings.<sup>192</sup> This research does not generate general, causal relations, but it does examine the incentives of specific people in their particular circumstances, with singular, non-suggestive and open questions.<sup>193</sup> This provides useful and genuine insight into the causal connection made by the participants following their particular thinking.

<sup>192</sup> T. DECORTE and D. ZAITCH, *Kwalitatieve methoden en technieken in de criminologie*, Leuven/The Hague, Acco, 2010, p. 127; K. MALTERUD, « Qualitative research: standards, challenges, and guidelines », *The Lancet*, August 2001, vol. 358, n° 9280, p. 486.

<sup>193</sup> B. BAARDA, M. van der HULST and M.P.M. de GOEDE, *Basisboek interviewen: handleiding voor het voorbereiden en afnemen van interviews*, Groningen/Houten, Noordhoff Uitgevers, 2015, pp. 68-71.

**EXTERNAL VALIDITY** – This concept deals with the generalisability of the results of the research.<sup>194</sup> This study is a qualitative research, an in-depth enquiry conducted among a limited amount of participants, instead of the result of an analysis of measurable data. Since the participants of this research were not selected via *random sampling*,<sup>195</sup> this research does not produce patterns or general causalities. Yet, there are two forms of generalisability in qualitative research, the first of which is known as the *case-to-case* transfer<sup>196</sup>. If a case is examined thoroughly enough, the conclusions may be applicable to other cases that have great similarity. Secondly, *theoretical generalisability* holds that qualitative research may help develop ideas and hypotheses for later quantitative research.<sup>197</sup> I believe that this research has theoretical albeit humble generalisability.

**INTERNAL RELIABILITY** – The internal reliability is the stability or consistency of the conclusions, if other researchers would analyse the same data.<sup>198</sup> The involvement of other researchers would strengthen the internal reliability of a study, but because this is a dissertation – the work of only one woman – this cannot be verified by others as of yet. Even so, I have refrained from suggesting causalities, and have remained as neutral as I possibly could.

**EXTERNAL RELIABILITY** – This notion relates to the consistency with which the research could be repeated, resulting in similar findings.<sup>199</sup> The external reliability is rather problematic when it comes to a qualitative research,<sup>200</sup> because the same questions asked to different people (perhaps even in different countries, though I did not find broad distinctions in the answers based on the country of origin), might yield different outcomes. I have emphasised before that this study is focused on exploring and possibly explaining certain points of view on the choice of non-State rules as the applicable law in contracts. It is an explorative and (to a limited extent) explanatory research, not a study focused on causal relations based on large amounts of data.

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<sup>194</sup> M. CARCARY, « The Research Audit Trial - Enhancing Trustworthiness in Qualitative Inquiry », *Electronic Journal of Business Research Methods*, 2009, vol. 7, n° 1, p. 14.

<sup>195</sup> V.W. BERGER and J. ZHANG, « Simple Random Sampling », in B.S. EVERITT and D.C. HOWELL (eds.), *Encyclopedia of Statistics in Behavioral Science*, Chichester, UK, John Wiley & Sons, 2005, available on <http://doi.wiley.com/10.1002/0470013192.bsa619> (Consulted on 30 March 2019).

<sup>196</sup> W.A. FIRESTONE, « Alternative Arguments for Generalizing from Data as Applied to Qualitative Research », *Educational Researcher*, 1993, vol. 22, n° 4, pp. 17-18.

<sup>197</sup> T. DECORTE and D. ZAITCH, *Kwalitatieve methoden en technieken in de criminologie*, Leuven/The Hague, Acco, 2010, p. 130.

<sup>198</sup> *Ibid.*, p. 131.

<sup>199</sup> L. LEUNG, « Validity, reliability, and generalizability in qualitative research », *op. cit.*, p. 326.

<sup>200</sup> T. DECORTE and D. ZAITCH, *Kwalitatieve methoden en technieken in de criminologie*, Leuven/The Hague, Acco, 2010, p. 133.

## SECTION VI. DISCUSSION OF THE RESULTS

### §1. Use of non-State rules

#### A. Frequency (*as lex causae*)

**HOW OFTEN?** - The first question of the questionnaire queried the frequency at which the participants either drew up contracts<sup>201</sup> with non-State rules as the applicable law, or encountered non-State rules in their practice in general. Out of the seven participants, four indicated they *never or almost never* came across non-State rules. Two answered with *rarely*, whilst one other responded that he *occasionally* encountered or used non-State rules in his practice.

#### B. Explanation

**WHY?** – The next two questions probed into the reasoning of the lawyers, as they were asked to explain why non-State rules were (not) chosen as the applicable law. What influences parties to designate or disregard non-State rules as the applicable law? I had some explanations in mind and offered these as options, yet many of the participants added other clarifications. Based on this, I have distinguished *push* and *pull factors*, the first explaining why non-State *were not* chosen as the applicable law, and the latter being reasons why non-State rules *were* chosen as the applicable law.

##### 1. Push factors

**NON-AWARENESS** – Five out of seven participants indicated that most parties are not aware that this option exists. Many contracts are drafted by laymen, without any legal background, but even lawyers seldomly know that soft law instruments are an option. While academic education tends to include non-State rules more frequently, they are usually not covered thoroughly, resulting in an mere “*marginal awareness of non-State rules*”, as one of the participants indicated.

**RISK AVERSION** – This brings us immediately to another push factor, which is that even when lawyers are aware that non-State rules exist, they are not familiar with the content and application of those rules. Naturally, if lawyers do not know what a convention or body of rules contains and what affect this would have, they would hesitate to incorporate them into their contracts. This is e.g. the reason that some opt out of the CISG. As a result, lawyers will prefer the more foreseeable State laws, as this is “*the devil that you know*”, said one participant, even when a soft law instrument is more advantageous. This seems irrational but remains a reality nonetheless. (The impression of) legal certainty prevails over (arguably) more neutral, fair and beneficial rules.

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<sup>201</sup> Contracts on both civil and commercial matters.

**NOT A DEAL-BREAKER** – It is also important to note that the choice of law is often only decided upon at the end of the contract, when the most ‘significant’ aspects have been concluded. At that moment, the applicable law is not an aspect that seems vital, so one party will convince the other to opt for the first’s State law or perhaps a neutral law, such as English or Swiss law. The applicable law does not appear significant enough to create a dispute about or to incur the extra costs of negotiations for. This is especially the case when there is no legal counsel involved. The parties will simply cross their fingers and hope that they do not meet again in court.

**PREFERENCES** – Several participants specified that there are, depending on the contract type, State laws that are preferred over others. For example, “*English law is very popular in maritime, insurance and financial law.*” These laws have the reputation of being neutral, and therefore a good option. The participant from Switzerland supplied that this is not necessarily the result of the presence of advantageous rules in English/Swiss law, but due to the fact that they are well-known, well-developed and have reputable jurisprudence. If parties want specific advantageous rules, they can simply include them in the contract themselves. A study by Clifford Chance of 2005 supplied that English law is the most used law in cross-border contracts (besides the domestic law), as well.<sup>202</sup>

**CONTRACT MODELS** – Furthermore, depending on the sector, there are sophisticated contract models. The participant from Switzerland called my attention to FIDIC, the International Federation of Consulting Engineers, which has created several models to be used in the construction industry.<sup>203</sup> These projects are usually only backed by the World Bank and other development banks if the tenders rely on FIDIC models.

**DEPENDENCY** – A participant also reported that when lawyers advise their clients on the choice of law, they will more often than not propose to use their own State law, because this will create a situation where the client might return to the lawyer in the future. If a dispute arises, the lawyer in question is qualified to represent the client.

**ACADEMIC IMAGE** – In general, most contracts are drafted by non-lawyers. A participant pointed out that, even if these laymen are aware that non-State rules exist, they often don’t even consider them as a possibility, given how academic they appear. An academic image implies that the rules are mostly theory, and not meant for practical application, which deters parties from designating soft law instruments as the applicable law.

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<sup>202</sup> S. VOGENAUER and S. WEATHERILL, « The European Community’s Competence for a Comprehensive Harmonisation of Contract Law - An Empirical Analysis », *European Law Review*, December 2005, vol. 30, n° 6, pp. 821-837.

<sup>203</sup> For more on this, see: [www.fidic.org](http://www.fidic.org)

**SUPERIOR BARGAINING POWER** – Logically, when there is a dispute about the applicable law, the party with a superior bargaining power will weigh on the other. That party would cede and the national law of the other contracting party would be chosen as the applicable law.

**UNDERESTIMATION** – Another explanation that a participant supplied, is that lawyers often underestimate the richness of the literature and case law and efforts on the EU level. Many lawyers will not consider non-State rules as a possible applicable law, because they (incorrectly) regard them as a barebone (academic) text with no supporting case law or doctrine, resulting in legal uncertainty. Another participant indicated that he “*would never advise parties to choose non-State rules as there is no legal certainty whatsoever.*”

## 2. Pull factors

**COMPROMISE** – In a negotiation where both parties wish to use their national law as the applicable law and refuse the State law of the other party, it would be beneficial to opt for a neutral third option. Two participants confirmed that this may be the case, as non-State rules cover all the bases and have the reputation of being impartial, fair and comprehensible. Additionally, if the parties opt for a State law, there is always one party at a disadvantage as the party is not acquainted with that State law. The party risks being surprised by particularities of domestic provisions or case law that the party perhaps cannot even access because of structural or linguistic difficulties. A soft law instrument on the other hand, is (usually) unfamiliar to both parties and leaves them on an equal footing, whilst the content, case law and doctrine are easily accessible. It is a lot easier to research a body of non-State rules such as the UNIDROIT Principles, than a foreign State law.

**IGNORANCE** – As stated above, many contracts are drawn up by non-lawyers. In an attempt to give such a contract a learned and legally-correct appearance, laymen sometimes include words such as ‘*the general principles of the law*’. This is not really an intentional choice for non-State rules as the applicable law, but “*but more of an imperfect choice of law clause.*”

**DIFFERENCES IN LEGISLATION** – Three participants indicated that the many differences in legislation might play a role, too. One participant in particular, that uses non-State rules in his practice occasionally, asserted that there are types of contracts (see *infra*, p. 33) with an abundance of parties, jurisdictions and laws. It is better to rely on rules which are easy to adopt, without any cross-reference to various local laws.

**TYPES OF CONTRACTS** – The same participant indicated that there are types of contract for which his firm would use non-State rules. He enumerated the following:

- (a) Supply contracts for large marine building projects;
- (b) International co-operation agreements for scientific research and its commercial application;
- (c) Supply chain management in the automotive sector.

In these kind of contracts, the participant said, it is the logical solution to use non-State rules, as there are many different jurisdictions and laws involved. None of the other participants specified that the type of contract or the sector would be a reason to favour non-State rules over State laws.

**INSTRUCTION OF THE ADVISOR** – Out of all the participants, there is one that actively works with non-State rules and sometimes advises clients to use them as the applicable law. The reason for this is that the participant considers non-State rules neutral, fair, international etc. and does not disregard non-State rules as a possible choice of law for the reasons stated above. He would e.g. recommend soft law instruments in the types of contracts mentioned above.

**INSIGNIFICANT FACTORS** – In the questionnaire, I suggested some possible aspects that might influence the choice of law, such as the language of the co-contractor and whether the parties have already contracted with each other before. However, none of the participants really indicated that this weighs on the choice of law. If these factors are influential, their impact is fairly limited. Other aspects are more noteworthy, as one participant stated: *“Not being completely familiar with the contractor is less problematic [than not having an elementary knowledge of their legislation].”*

**CONCLUSION** – From the above, I conclude that the participants encounter three types of ‘non-State rules as applicable law’ situations. The first is that of the compromise. The second would be the imperfect choice of law clause. The last possibility is the application of non-State rules as result of the advice of the lawyer. Though this does not happen all too often either, one participant clearly indicated that they see many advantages in the use of such non-State rules. When they propose non-State rules as the applicable law, this depends on many factors such as the type of contract, the multitude of contractual parties and the resulting abundance of possible applicable laws.

**WHAT ELSE?** – If non-State rules are only sporadically designated as the applicable law, this begs the question what other purpose they serve. As is the case with arbitration (see *infra*, p. 36), soft law instruments can play a role in the interpretation of national laws. A quick search in the UNILEX database, which holds records of (almost) all cases making note of the UNIDROIT Principles, counts 267 cases that mention those non-State rules. The States that most often fall back on them are Russia, Spain, Ukraine, Paraguay.<sup>204</sup> The highest number of cases worldwide (both arbitral and not) making reference to the UNIDROIT Principles per year, was 34 in 2009. Ever since, the use has gradually decreased until there were only 2 mentions in 2018, one by the Supreme Court of the UK and one by an Swiss arbitral tribunal.<sup>205</sup>

### ***C. Preference among non-State rules***

**MOHAMMED ALI AMONG NON-STATE RULES** – The next section of questions tried to establish which instrument is preferred over others, both in practice as in the personal point of view of the participants. Two participants stated that they didn't encounter non-State rules and that therefore, there was no distinct favourite. The five remaining participants, on the other hand, were very clear as four participants singled out the UNIDROIT Principles. The DCFR was not indicated as being present in the practices of the participants and neither was the PECL. Of course, as discussed above, there are imperfect choices of law or compromise-clauses drafted by laymen that refer to *general principles of law* or clauses with similar words. Based on the scopes of application of the soft law instruments themselves, they could be applied. However, it has to be said, that such clauses are not recommended, as they leave too much room for doubt. One participant said that the clause is sometimes even ignored and the choice of law established based on Rome I or other conflict of law rules.

**PERSONAL FAVOURITES** – When it comes to the personal preference of the participants, the results are a bit more diverse. The two same participants that saw no favourite in their practice, didn't have a personal preference either. Among the other participants though, the UNIDROIT Principles was chosen by three out of five. One participant selected both the UNIDROIT Principles and the DCFR and another opted for the DCFR alone. None of the participants selected the PECL.

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<sup>204</sup> UNILEX, « UNILEX Database by Court », <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13620> (Consulted on 30 March 2019).

Paraguay has had 14 (!) cases referencing the UNIDROIT Principles in 2016 and 2017 alone. This would be the result of a new Act of 2015 that explicitly allows parties to opt for international instruments as the choice of law *as such*. The law can be found here: [https://assets.hcch.net/upload/contractslaw\\_py.pdf](https://assets.hcch.net/upload/contractslaw_py.pdf) (Consulted on 30 March 2019).

<sup>205</sup> UNILEX, « UNILEX Database by Date », <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618> (Consulted on 30 March 2019).

**THE EARLY BIRD...** – When asked to explain their reasoning, the participants referred to the quality of the publications, the commentaries, the designation for worldwide use.... The UNIDROIT Principles cover all sorts of subjects of contract law, ranging from the formation, validity, interpretation, performance of contracts to the authority of agents. Nevertheless, the PECL and the DCFR have all these characteristics as well.<sup>206</sup> I believe there are two aspects that distinguishes the UNIDROIT Principles. Firstly, it is the extent of the case law. As the PECL and the DCFR are younger, international courts and arbitral tribunals would not have switched to another instrument for interpretation, when a well-known and commented one was available already. Another asset of the UNIDROIT Principles is that it is updated regularly, which cannot be said for the other instruments.

#### ***D. Link with arbitration***

**NON-STATE RULES IN ARBITRATION** – Arbitrators and tribunals are not bound by a domestic law and thus they can choose to apply a soft law instrument *an sich*. It is intriguing to know whether this has an impact on the choice of law in arbitration matters. Consequently, the participants were also asked to explain the link between arbitration and soft law instruments. Two of the participants in particular provided their insight on the matter, as they work in arbitration. The results show that there are once again two main uses for non-State rules; as an applicable law and as a tool for interpretation purposes.

##### *1. Non-State rules as applicable law*

**PARTIES' CHOICE** – Both participants clearly indicated that the number of cases in arbitration where non-State rules were stipulated as the applicable law – or thus applied by the arbitral tribunal – more frequent but still very limited. The same reasons apply as above. Lawyers who draw up contracts with an arbitration clause “*usually consider choosing a legal system well-known to the parties or a well-established legal system - English law is a very popular choice of law for international contracts due to its reputation. Thus, these drafters are more likely to opt for such tested national legal systems with a large body of precedents.*” Furthermore, in arbitration as well – though to a lesser degree – there are problems of unawareness and unfamiliarity. However, should parties wish that the tribunal applies a soft law instrument in case of a dispute, that is a possibility. It is recommended that they use an arbitration clause and that they clearly express the intention to exclude any domestic law that would be otherwise applicable.

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<sup>206</sup> The main body of the PECL (part I and II) comprises more than 600 pages. The same can be said about the DCFR.

**EX OFFICIO** – Arbitrators are more familiar with non-State rules than the average lawyer or State judge, as they might come across them during arbitration events or due to parties’ counsels referring to them when arguing on the interpretation of a contract. Therefore, arbitral tribunals may still consider non-State rules on their own initiative, when there is no choice of law. In contracts where the parties only stipulated the arbitration rules and failed to elect an applicable law, “*the arbitrators would review these rules to see whether they give any further guidance on what the applicable law is that should be used.*” There are cases where the International Chamber of Commerce (hereinafter: ICC) has chosen non-State rules as the governing law,<sup>207</sup> which has influenced others arbitral tribunals to do the same.<sup>208</sup> MARRELLA for examples states that between May 1994 and December 31 of 2000, there were at least 12 cases where the ICC applied the UNIDROIT Principles as *lex causae*.<sup>209</sup> The participants do point out that they had no personal experience with such *ex officio* choices of law. In this context as well, the UNIDROIT Principles are generally preferred.<sup>210</sup>

## 2. Non-State rules for interpretation

**A TOOL FOR UNDERSTANDING NATIONAL LAW** – Whilst non-State rules as applicable law is not in the least a common occurrence, according to the participants, their material role is more in the application of State law. “*Not as a source of law themselves, but as a tool to understand national law.*” Arbitrators that have trouble interpreting a provision in a certain civil code, the wording of which is similar to non-State rules, will intermittently fall back on a general principle that can be found there, when drafting final awards. Moreover, parties will support their argument by invoking non-State rules. The participants added that out of the three soft law instruments, the UNIDROIT Principles are most known. This is supported by the UNILEX database, that counts 193 cases with reference to the UNIDROIT Principles from 1990 up until 2013 for arbitral cases alone.<sup>211</sup>

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<sup>207</sup> E.g: ICC International Court of Arbitration 26 October 1979, No. 3131, [https://www.trans-lex.org/203131/\\_icc-award-no-3131-rev-d-arb-1983-at-525-et-seq/](https://www.trans-lex.org/203131/_icc-award-no-3131-rev-d-arb-1983-at-525-et-seq/); ICC International Court of Arbitration 3 October 1980, No. 3540, [https://www.trans-lex.org/203540/\\_icc-award-no-3540-yca-1982-at-124-et-seq-/](https://www.trans-lex.org/203540/_icc-award-no-3540-yca-1982-at-124-et-seq-/); ICC International Court of Arbitration 1982, No. 3572; ICC International Court of Arbitration 5 June 1996, No. 7375, <http://www.unilex.info/case.cfm?id=625>; ICC International Court of Arbitration 2000, No. 10422, <http://www.unilex.info/case.cfm?id=957>.

<sup>208</sup> A case before the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce applied a combination of Serbian law, the PECL and the UNIDROIT Principles. The tribunal explicitly refers to the use by the ICC of non-State rules as a reason to actively apply *lex mercatoria* in the case.

The case can be found here: Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce 23 January, T-9/07, ‘Crystal white sugar case’, <http://cisgw3.law.pace.edu/cases/080123sb.html>.

Other case law: Arbitration Court of the Lausanne Chamber of Commerce and Industry 31 January 2003, available on <http://www.unilex.info/case.cfm?id=862>; Arbitration Institute of the Stockholm Chamber of Commerce 2001, No. 117/1999, <http://www.unilex.info/principles/case/793>.

<sup>209</sup> F. MARRELLA, « Choice of Law in Third-Millennium Arbitrations », *op. cit.*, p. 1158.

<sup>210</sup> *Ibid.*

<sup>211</sup> UNILEX, « UNILEX Database by Arbitral Tribunal », <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13620> (Consulted on 30 March 2019).

## §2. Harmonisation of EU contract law

### A. Participants' wishes

**PRO OR CONTRA?** – The second part of the survey contained questions concerning harmonisation of contract law on the level of the European Union. Six out of seven participants want contract law to be harmonised to a further extent, half of them preferring to achieve this from the top down and the other half choosing for the bottom-up approach. This is in line with the results of a research conducted by Clifford Chance in 2005, where more than 80% of the participants approved of additional harmonisation of European contract law.<sup>212</sup> One participant was against further harmonisation but supplied that he didn't see a disadvantage in unifying contract law either. The participant in question regarded additional harmonisation as unnecessary, because parties and business can help themselves with model contracts or by drafting contracts carefully themselves. He regards further (top-down) harmonisation, unfeasible in the current political climate (see *infra*, p. 38).

**AN OBLIGATORY EUROPEAN CONTRACT CODE?** – All of the participants in favour of harmonisation see the benefit in achieving this from the top down. A comprehensive Contract Code in the EU would be advantageous for many reasons. Especially smaller Member States would benefit from this, declared a participant, as they often lack an established rule of law and have inconsistent case law. A harmonised legal environment is even unavoidable, stated another participant, in order to complete the single market thesis. An obligatory code would also reduce costs, as parties do not have to seek external legal advice for intra-EU deals. *"I remains difficult to proceed within the Rome I/Brussel Ibis-framework, in the absence of a contract,"* declared another participant. Without (complete and correctly drafted) terms and conditions, recourse to Rome I and Brussel Ibis is necessary. All too often, the law of the State of the seller will be applied, while the courts of the State of the buyer are competent. Not only are such procedures expensive, they are difficult and courts are not too keen on these cases either. A mandatory code based on a well-established set of principles would be stable, predictable, easy in application...

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<sup>212</sup> S. VOGENAUER and S. WEATHERILL, « The European Community's Competence for a Comprehensive Harmonisation of Contract Law - An Empirical Analysis », *European Law Review*, December 2005, vol. 30, n° 6, pp. 821-837.

I would like to point out that these results also include those in favour of more uniform implementation and interpretation of Directives, as opposed to the research conducted in this thesis.

**IT IS A LONG ROAD TO TIPPERARY** – Bottom-up harmonisation was preferred by three out of seven participants. Once again, this would have positive influence on international commerce and create more predictability of decisions and (arbitral) awards. Also, it is a more natural evolution, more in tune with the wishes of the public, “as it could slowly create a body of judgements and precedents which might be tested over the course of time.” As stated before, sometimes national judges refer to the DCFR or the UNIDROIT Principles on their own motion or are non-State rules used as a point of reference whilst updating national contract laws.

### ***B. Participants’ expectations***

**SOBERING UP** – The last question of the questionnaire inquired into the thoughts of the participants concerning contract law in the EU in the coming decades. After all, it is not because most participants were in favour of harmonisation, that they expect a paradigm shift. Four out of seven stated that they do not see any big changes coming our way anytime soon.

**POLITICALLY UNREALISTIC** – According to most participants, the top-down approach is politically unachievable. “*With emerging nationalism, harmonised obligatory bodies of law will be difficult to implement,*” commented a participant. Besides, the legal systems across the EU have been evolving for centuries and have an extensive body of case law and precedents, providing stability and predictability. An obligatory code would wipe out said clarity and it would take time to recreate the supporting body of case law. Some EU Member States believe that a variety of different, well-established and developed legal systems is an advantageous as it gives parties a freedom of choice. Another participant agreed that complete unification would go against the principle of contractual freedom of parties. Besides opposition from the Member States, the issue regarding the legal basis has been raised as well (see *supra*, pp. 13-14 and 15-16) and the fact that the EU has other, more pressing concerns right now (read: migration, Brexit, the Copyright Directive and – apparently – the abolition of summer/wintertime).

**STATUS QUO** – Whilst three participants favoured bottom-up harmonisation, the results of this research clearly indicate that there hasn’t been a giant upsurge of non-State rules-uses as some doubtlessly hoped. There has been practically no bottom-up harmonisation over the past few years. Consequently, the participants are not very optimistic regarding this method of harmonisation, either. It does not appear to be an appropriate approach that can yield real results.

**GREAT EXPECTATIONS?** – Three participants foresee or are hopeful that the EU will – in spite of the aforementioned reasons – persevere in its efforts of harmonisation. The European Commission might continue to monitor the mood and the stance of the Member States, collect feedback and address the raised issues. Exerting political pressure at the right moment, these participants declare, may persuade the Member States in favour of further measures.

### **CHAPTER 3. A SUGGESTION FOR THE FUTURE**

**UNION’S CHOICE** – The first chapter spelled out the arguments in favour of and against further harmonisation, and concluded that the last are outweighed by the former. As there are many issues regarding top-down harmonisation, bottom-up harmonisation may be a better choice. However, from the research conducted in the second chapter, we can conclude that bottom-up harmonisation is possibly not the appropriate way forward. Yet, most participants were in favour of further harmonisation. Consequently, the subject of this last chapter is this: what is the most prudent way forward regarding harmonisation of contract law? I believe that the EU has to opt for one way forward and act consistently from there on. After all, a man that chases two rabbits, catches neither.<sup>213</sup> The following ‘stages’ describe what I believe the EU should do.

#### **STAGE I. EDUCATION AND PROMOTION**

**GAZING INTO THE ABYSS** – As the research above pointed out, the lack of knowledge and familiarity regarding soft law instruments are the main contributors to their non-use. After all, people fear what they do not know.<sup>214</sup> Consequently, a first step requires universities to include non-State rules in their curricula. It is vital to introduce soft law instruments while the future lawyers are still studying, when they are laying the foundation for their future work ethics and habits. Furthermore, I believe it would be most prudent if law students learn about the soft law instruments, at the same time that they are submerged in their own contract law. Whilst comparing the contract laws, they would be able to distinguish either’s benefits and drawbacks, and will be able to correctly interpret a specific situation, understanding whether the situation calls for the use of non-State rules or State law. The lawyers of the future will be capable of basing their arguments on non-State rules in front of the courts as well, thereby strengthening their claims. Another way to introduce soft law instruments in the mind of present lawyers, is via study days or workshops, though it is more difficult to diverge from a way of thinking that has been cemented over the years than to learn something *ab initio*.

**IN CONCRETO APPLICATION** – Naturally, the same counts for law students who become judges and arbitrators. With knowledge of non-State rules, the future judges could strengthen the reasoning of the courts and tribunals of the EU. Both current lawyers as well as citizens would come into contact with non-State rules, dispersing the information on soft law instruments. Lastly, a diffuse insight into such instruments is a preeminent foundation for possible, future reforms (see *infra*).

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<sup>213</sup> Chinese proverb.

<sup>214</sup> One of the main reasons that traders exclude the CISG as the applicable law, is the fact that they are not familiar with the Vienna Convention.

## STAGE II. CHANGING ARTICLE 3 (1) ROME I

**STAGE TWO** – Once lawyers and courts are familiar with the concepts and functioning of non-State rules, the European Union should consider amending art. 3 (1) as the European Commission had foreseen in the begin of the millennium. Of course, there would be no mandatory national rules to back up the soft law instruments. Opponents of the revised art. 3 (1) might argue that vulnerable parties would lose additional protection that they enjoy under national law. I would like to point out that most of the obligatory domestic rules, are founded on EU regulations and directives. The simultaneous, direct application of those EU instruments together with non-State rules, would offer satisfactory protection for ‘susceptible parties’. For those who are not convinced, it relevant to note that there are no such ‘national mandatory rules’ before arbitral tribunals, yet, it cannot be said that vulnerable parties are disadvantaged when the case is handled in arbitration.

## STAGE III. THE EUROPEAN CONTRACT CODE?

**RECAPITULATION** - If the EU were to take the above steps, it would encourage bottom-up harmonisation. Nonetheless, in my humble opinion, the Union should not stop there and should consider the intermediary solution of the *Optional European contract code*, as HESSELINK<sup>215</sup> and TERRYN<sup>216</sup> have suggested (see *supra*, p. 16-17). The optional instrument would be a separate regime in the European Union, a law besides the current domestic laws.<sup>217</sup> The issue with the optional instrument, as discussed above, lies with the legal competence on which the EU could base the measure. Due to its optional nature, it would not be a disproportionate measure, but for the exact same reason, it might not effectively influence the current internal market situation. It endangers the application of art. 114 TFEU.

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<sup>215</sup> M.W. HESSELINK, « An optional instrument on EU contract law: can it increase legal certainty and foster cross-border trade? », in M.W. HESSELINK and *al.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, pp. 9-24.

<sup>216</sup> E. TERRYN, *The Common Frame of Reference: an optional instrument?*, Brussels, The European Parliament, 2010, p. 20, available on <http://dare.uva.nl/search?metis.record.id=337758> (Consulted on 30 March 2019).

<sup>217</sup> V. MAK, « Hoe meer keus, hoe beter? », in M.W. HESSELINK *e.a.* (eds.), *Het groenboek Europees contractenrecht, naar een optioneel instrument?*, The Hague, Boom Juridische Uitgevers, 2011, pp. 96-97.

**COEXISTENCE** – However, KADNER recently offered an alternative that I deem feasible and practicable. The professor calls for *coexistence* of the national laws and the European, 28<sup>th</sup> regime,<sup>218</sup> similar to what HESSELINK and TERRYIN proposed. KADNER, on the other hand, suggests that such a Code not only regulates the substantive law, but also the *scope of application*, which KADNER would base on art. 1 (1) of the CISG.<sup>219</sup> In purely domestic situations, the national or chosen law would apply.<sup>220</sup> In intra-EU disputes on the other hand, where both parties are from different Members States of the Union, the European contract code would apply, unless parties opt-out of it. When the conflict of law rules determine that the law of a Member State applies, the European contract code would apply, too.<sup>221</sup>

**THE STRENGTHS OF THE PROPOSAL** – KADNER’s proposal for coexistence has many advantages. Art. 114 TFEU would be a possible legal ground, as it would truly influence the internal market due to its default application, whilst remaining proportionate.<sup>222</sup> An optional code would leave national regimes be, maintaining the legal diversity of the Union. The harmonised Code would reduce most legal barriers that hinder intra-EU trade. The incorporation of EU regulations and directives in the Code, with a separate chapter on consumer protection, would offer sufficient security for vulnerable parties. If the Code is based on one of the three soft law instruments that were dealt with in this paper, the law would be clear and predictable and have a broad commentary in case of any interpretation problem.<sup>223</sup> Courts and tribunals could fall back on existing case law of the UNIDROIT Principles for guidance, if necessary. Trading in the European Union would be characterised by predictability, stability and fair dealing, whilst still offering the high standard of protection that the Union is known for. If the European Union truly wishes to change the contractual legal landscape, I believe that this is the way forward.

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<sup>218</sup> T. KADNER GRAZIANO, « Does Europe Need a Contract Code? - A Case for Coexistence », *op. cit.*, p. 582.

<sup>219</sup> *Ibid.*, p. 583.

<sup>220</sup> This could be either another State law or the European Code.

<sup>221</sup> KADNER states that the European Code should define its own scope of application. Consequently, there would be no need for Private International Law rules to get involved, unless the European Code does not apply or is excluded. For more on this, see: T. KADNER GRAZIANO, « Does Europe Need a Contract Code? - A Case for Coexistence », *op. cit.*, pp. 583-584.

<sup>222</sup> *Ibid.*, pp. 588-589.

<sup>223</sup> KADNER does point out that for certain contracts additional studies are required. *Ibid.*, p. 590.

## CONCLUSION

The key aim of this dissertation was to clarify the present status of harmonisation of contract law in the European Union. Furthermore I wished to understand how this would evolve in the coming decades and what the EU might do to achieve harmonisation.

Several prominent authors are against further harmonisation, such as LEGRAND, WIER, GOODE and MARKENISIS. They believe that uniformity will eradicate the legal variety of the EU, whilst the differences in legislation ought to be seen as a richness. Furthermore, given the discrepancies in substantive laws and the different mindset behind those legal provisions, uniformity is not as easily achievable as is often proclaimed, never mind the conflicting interest of all stakeholders. Even if harmonisation of contract law were feasible, it might not be for the European Union to act. Finally, the existence of the CISG makes a new European contract law redundant.

Renown authors in favour of harmonisation, like BOWKER, HARTKAMP, GANDOLFI, LANDO, KADNER and BERGER, declare that harmonisation would be extremely beneficial for international trade and the economic welfare. Uniformity would eliminate hindrances such as unfamiliarity, discrepancies and surprises of foreign laws. More international trade is a win-win-situation. It would also reinforce the European identity. Moreover, legal systems are more similar than they appear and a European contract code is really not an impossible feat. Last but not least, there are types of harmonisation that do not undermine the traditions of the Member States and respect the legal diversity of the EU.

The next issue concerns how the EU can harmonise contract law. A top-down harmonisation would introduce an obligatory European code, thus replacing national contract laws and wiping out the aforementioned legal diversity. From an EU constitutional perspective, there is no competence for the EU to adopt such an instrument, either because the measure is disproportionate or because it would require unanimity, which is politically impossible.

Bottom-up harmonisation, i.e. the use of non-State rules such as the UNIDROIT Principles, the PECL or the DCFR as the applicable law, appears to be a better approach. It is dynamic, lenient and optional, leaving the parties their contractual freedom. The problem with this lies with the Rome I Regulation, which contains the conflict of law rules for international contracts. While parties can freely choose the applicable law, art. 3 (1) declares that this must be a State law and not a soft law instrument. However, Recital 13 does leave the parties the option to incorporate those rules in their contracts, as long as they are supplemented by a State law. There is also the possibility of a separate optional

European instrument, that – if it were adopted – could be the sole applicable law, under Recital 14. Art. 114 TFEU appears a possible legal ground. Because this would be an optional instrument, it is questionable whether it would really influence the internal market, thereby excluding art. 114 again as a possible legal ground.

The qualitative research conducted in the second chapter inquired into the practice of lawyers across the EU. From the results, I can conclude that Recital 13 is seldomly applied, mostly because lawyers as well as contractual parties are unaware of or unfamiliar with soft law instruments. Additionally, the applicable law is not a deal-breaker. Parties allow themselves to be convinced and choose the other party's State law. Neither will lawyers advise their clients to opt for soft law instruments, as State law creates a dependency between the lawyer and the client. Depending on the sector and types of contracts, there are also clear preferences or contract models.

All things considered, the research produced three situations where soft law instruments are chosen as the applicable law. Firstly, it might concern a compromise between the parties. Secondly, laymen sometimes draw up an imperfect choice of law clause, referring to e.g. 'general principles of law' or something alike, not exactly knowing what they are stipulating. Lastly, some lawyers who understand the advantages of non-State rules, will recommend them to clients when the situation calls for it.

In the second part of the research, the survey queried the participants' preference for a specific set of non-State rules. The UNIDROIT Principles were clearly favoured, because they are frequently updated, have an extensive case law and are clear, fair and well-commented.

In the world of arbitration, non-State rules are better known than in State courts. A major factor here is that, in arbitration, soft law instruments can be designated as the sole applicable law, unlike under art. 3 (1) Rome I. There exist rare choice of law-clauses for the non-State rules, but the instruments are most often used as an interpretation or argumentative tool. In this context as well, are the UNIDROIT Principles clearly preferred.

When it comes to harmonisation, all participants were in favour, except one. Half of those preferred top-down harmonisation, and the other half bottom-up harmonisation. The participants stated that the main problem with top-down harmonisation is that it is politically unachievable. Bottom-up harmonisation on the other hand does not suffice to truly harmonise contract law, especially not under the current regime of Rome I.

If the EU truly wishes to harmonise, they ought to elect one specific approach and take small but decisive steps forward. I personally believe that the inclusion of non-State rules, next to domestic contract law, in the legal education is an absolute prerequisite. A lawyer that understands the advantages and disadvantages of both his domestic contract law as well as those of the soft law instruments, will know when to recommend them to clients. Courts and tribunals should support their opinions on the general principles of the non-State rules and refer to them, too. This strengthens their motivation and disperses the knowledge on soft law instruments. A second phase should see the amendment of art. 3 (1), so contractual parties can choose non-State rules as the sole applicable law, as is the case in arbitration. A reasonable third step would be the adoption and implementation of a separate, 28<sup>th</sup> regime, the European Contract Law like KADNER envisions. Domestic law would be applicable in purely domestic situations, while the European Contract Law would automatically apply in intra-EU contracts or when the conflict of law rules designate the State law of a Member State. Nevertheless, the parties could opt out of the European Contract Law, if they wish. I believe this proposal caters to all the arguments against harmonisation but also to possible problems concerning competence. It is a viable, beneficial prospect for the future of contract law. If the European Union truly wishes to change the contractual legal landscape, I believe that this is the way forward.

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## ATTACHEMENTS

### Overview of the nodes

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  - Frequency
    - Almost never
    - Rarely
    - Occasionally
  - Reasoning
    - Push factors
      - Non-awareness
      - Non-familiarity
      - No deal-breaker
      - Preferences in the sector/contract type
      - Academic image
      - Dependency
      - Superior bargaining power
      - Underestimation
    - Pull factors
      - Compromise
      - Lack of better knowledge of layman
      - Type of contract
      - Differences in legislation
      - Instruction of the lawyer
  - Preference
    - Professional: UNIDROIT
    - Personal
      - UNIDROIT
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  - Arbitration
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- Harmonisation EU contract law
  - Personal position
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