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The State of Development of Uniform Law in the Fields of European and International Civil and Commercial Law

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The State of Development of Uniform Law in the Fields of European and International Civil and Commercial Law

Matthias Lehmann *

I. Introduction

Florence provides the perfect setting for a conference on uniform law. Since the time of the renaissance, Florence has been a city in which the most groundbreaking and fruitful ideas to improve the condition of humanity have been developed. Uniform law is such an idea. It mitigates the harmful effects of the world’s split into different legal systems. It achieves legal standards that are the same for everybody all over the world, thereby securing legal certainty for businesses and equal rights for private persons. Although it does not lead to the creation of a World State, it creates the impression as if a global legal system would exist.

There is another reason why Florence is a fitting place for this conference: It is part of the European Community. Within the last two decades, the EC has become a major actor in the field of uniform law. It has adopted numerous Directives and Regulations that aim at harmonizing the rules of private law within the Community. Since the EC is a Community of independent states, its acts create uniform law, albeit a regional one.

This kind of “regional uniform law” is certainly very useful when seen from inside the Community. However, with the adoption of uniform rules, the EC has entered a competition with already well-established international forums of uniform law, such as the Hague Conference, UNIDROIT or UNCITRAL. In fact, there is some reason to fear that regional uniform law can prove to be an obstacle on the way to worldwide harmonization of law. It is clear, its provisions understandable. One can find many printed commentaries and web-pages dedicated to it. It has effectively superseded two older conventions that also contained uniform rules for sales contracts, the Hague Sales Convention, concluded in The Hague, 1 July 1964. Overall, the CISG can be considered a success. Its structure and web-pages dedicated to it. It has

II. Sale of Goods

A well-known area dominated by international uniform law is the sale of goods. With the United Nations Convention on the International Sale of Goods of 1980 (CISG), we dispose of an important text that governs a large number of cross-border sales contracts. The CISG has been signed by about 70 States, with some notable exceptions, like the United Kingdom. It has effectively superseded two older conventions that also contain uniform rules for sales contracts, the Hague Formation Convention and the Hague Sales Convention, both dating back to 1964. It is supplemented by a convention on agency – which has yet to enter into force – and another dealing with the limitation period.

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1 See the subject of the UNIDROIT 75th Anniversary Congress, contributions reprinted in Unif. L. Rev. 1 et seq. (2003).
become the single most important text of uniform law.

Yet the effectiveness of the CISG has to some extent been hindered by the fact that its rules can be excluded by the parties. Moreover, the CISG does not apply to the sale of goods bought for personal, family or household use. The biggest problem of the CISG, though, is its incompleteness. On major points, the Convention does not contain any provision, as on the question of the amount of interest owed in case of late payment under Article 78 CISG. In such cases, there are often also no general principles of the convention to which one could refer. Hence, there is no other option than to apply the rules of conflict of laws and of national laws in order to close the gap.

Within the last years, powerful competitors to the CISG have appeared on the scene. Among them are soft law texts, such as the UNIDROIT Principles of International Commercial Contracts, which have been revised as lately as 2004. Furthermore, many of the Directives adopted by the EC interfere with the scope of application of the CISG, e.g. the Directive on product liability or the Directive on late payment. The relationship between these rules and the CISG is far from clear. Although Article 90 of the CISG leaves open the possibility of international agreements on the same subject that might be entered into in the future, one may doubt that the rules of secondary EC law fall under this article, because they are not “international agreements” in the technical sense. On the other hand, Article 94 provides a procedure by which two or more Contracting States may declare that their regional uniform law should prevail over the CISG. So far, only the Scandinavian countries have made use of this clause. For the rest of the intra-Community trade, the CISG still applies. One can only guess how a conflict between the CISG and secondary Community law would have to be solved.

Article 94 of the CISG could however become relevant in the future in another context, namely if the European Community continues its plan to adopt an instrument on contract law. The European Community law would have to be solved. One can only guess how a conflict between the CISG and second-

III. Transport

With this remark, I am leaving the area of sales law and come to another topic, perhaps the one in which uniform law is most important: transport. Many of the uniform law conventions that have been concluded concern this particular area. This may seem natural, given the fact that transport is often transnational and therefore needs a regulation that is valid across borders.

The international uniform texts cover all means of transport. For instance, the transport of goods by road is governed by the CMR; transport of goods and persons by rail is regulated by two sets of uniform rules annexed to the COTIF; the so-called CIV and CIM; and to the transport by air the Montreal Convention applies. The transport by sea is a little exceptional. Since the 1970s we are witnessing a process of de-unification in this area, which has resulted in the thriving of different texts. Among them, the Hague-Visby Rules and the

of Reference (CFR), has published the first part of its Principles of the Existing EC Contract Law. The Study Group, the second group charged by the Commission, will probably follow soon. At the end of 2007, both groups have submitted a Draft Common Frame of Reference (DCFR) to the Commission. It is not clear yet whether the project will indeed result in contractual rules that can be applied to solve individual cases. However, the first impression one gets from reading the DCFR is that its provisions could indeed apply as contract law. We would then end up with another competitor of the CISG in the European Union. In that case, the Member States would have the option of either adopting it as a Convention, which would prevail over the CISG according to its Article 90, or to make a declaration under Article 94 that the CISG no longer applies to intra-Community sales contracts. From the perspective of international uniform law, one cannot fully rejoice either of those options, since the once international uniform law will be superseded by regional uniform law. On the other hand, the damage for international uniformity may be limited, because sales within the Community are already regulated by the EC to an extent that they resemble intra-national contracts more than international contracts.
competing Hamburg rules stand out, although the latter have not been signed by the major commercial and maritime powers. An international convention on multimodal transport elaborated under the auspices of UNCTAD has not yet entered into force.

In light of the abundance of international agreements on transport, the EC so far has seen little need to adopt laws in this area, with one notable exception: air transport. After a regulation of 1991 that aimed at establishing a compensation system for denied boarding, the EC replaced it in 2004 with a broader Regulation that provides for the compensation and assistance to passengers. This new Regulation applies not only to denied boarding, but as well in the event of cancellation or long delay of flights. The rules of the Regulation overlap with many of the rules of the Montreal Convention, so much so that its validity was challenged before the European Court of Justice for being inconsistent with the Montreal Convention. The Court held that it is not. It suggested the Montreal Convention would govern only the conditions under which a passenger may seek redress on an individual basis, whereas the Regulation would give a right to damages in a standardized and immediate manner. This distinction can be easily criticized as being artificial, for both the Montreal Convention and the Regulation provide the passenger with a remedy against the carrier that results in the payment of cash.

The least thing that can be said is that in the area of air transport, the Community has come extremely close to interfering with the established international uniform regime. This is all the more remarkable in light of the fact that the EC is itself a signatory to the Montreal Convention.

IV. Electronic Commerce

Much of today’s commerce is done by using a special medium: the internet. One can hardly exaggerate the web’s significance for international trade. Many aspects of e-commerce are governed by the CISG and other conventions, but a number of specific issues are not. Uniform law has only started to cope with them. An UNCITRAL model law of 1996 requires mainly that information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. Another UNCITRAL Model Law of 2001 governs the use of electronic signatures. A UN Convention on the Use of Electronic Communications in International Contracts concluded in 2005 has not yet been ratified by any of the signatories.

The European Community has gone much further than international uniform law with the E-Commerce Directive of 2000. This Directive deals not only with the sale of goods over the internet, but also with many other aspects, such as online information or commercial communications, or tools allowing for search, access and retrieval of data. In fact, the E-Commerce Directive must be understood as establishing a new fundamental freedom within the Community, the freedom to provide services of the information society. Nevertheless, the directive treats as well classic questions that are covered by international uniform law. For instance, its Article 9(1) requires the Member States to ensure that their legal system allows contracts to be concluded by electronic means. This requirement is in conformity with the international texts. Hence, we do not find a conflict between international and European e-commerce law.

V. Finance

Since its inception, uniform law is especially important for finance. Just recall that the Geneva conventions concerning bills of exchange and promissory notes and the Geneva conventions on cheques created two of the first comprehensive uniform law regimes. Both have been a remarkable success, in spite of the common law countries’ refusal to sign them. In almost all other countries of the world, the law of bills of exchange, promissory notes and cheques is nowadays uniform, at least as far as the written text is concerned.

Unfortunately, bills of exchange and cheques are no longer of crucial interest in international commerce. Other, intangible means of payment have taken their place, such as credit cards and online bank transfers. Uniform law on these instruments is sparse.

More important progress has been made with regard to “securities”, like shares or bonds. Particularly noteworthy is the


28 Id., Nos. 44-46.


34 Convention providing for a uniform law for bills of exchange and promissory notes, Convention for the settlement of certain conflicts of laws in connection with bills of exchange and promissory notes, Convention on the stamp laws in connection with bills of exchange and promissory notes, all three concluded in Geneva, 7 June 1930.

35 Convention providing for a uniform law for cheques, Convention for the settlement of certain conflicts of laws in connection with cheques, Convention on the stamp laws in connection with cheques, all three concluded in Geneva, 19 March 1931.
Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary of 2006. Although it has not yet entered into force, it shows how alive and important the uniform law approach is today. The Convention aims at unifying the conflict of laws rules in different countries regarding the question how securities are held and transferred. Nevertheless, the Convention’s efficiency might be hurt by two already existing directives of the European Community, the Settlement Finality Directive and the Collateral Directive. Both require the Member State to apply the law of the place where the relevant account is maintained. The Hague Convention, on the other hand, explicitly obliges the Contracting Parties to disregard the place where the register is maintained. Thus, there is an apparent conflict between the already existing EC law and the Hague Convention. Might this be the reason why so far neither the EC nor any of its Member States have signed the Hague Convention?

Other conventions related to financial issues have already entered into force. One of them, elaborated by UNIDROIT and adopted at Ottawa in May 1988, concerns leasing. The Convention provides a uniform regime for international contracts of this type, safe for those on objects that are destined for household use. It contains provisions on crucial substantive law questions which are a precondition for the functioning of the leasing-arrangement. Another convention, also prepared by UNIDROIT and adopted at the same conference in Ottawa, deals with factoring. Its goal is to facilitate the cross-border use of this finance technique by giving rules mainly on the assignment of receivables. Both conventions have been ratified so far mostly by European and a few African states. Their universal aspiration thus has not been fulfilled.

Many legal conflicts arise from the fact that interests of a creditor with regard to a certain object are not recognized in another state. A convention adopted in Cape Town in 2001 tries to solve this problem for a very limited number of assets: interests in certain parts of airplanes, like engines, and in helicopters, railway rolling stock, and space assets. The short list of items seems to be random. But it is not, if one steps back and looks at the big picture. The assets covered by the Cape Town Convention are the most mobile on the international level. They run a constant risk of being attached in other countries. Given their importance for travel and trade, their attachment could effectively stall trans-boundary exchange. Maybe that is the reason why the Cape Town Convention has been met with great enthusiasm: It has been signed by a number of states coming from very different legal traditions.

Finally, a Convention on the Assignment of Receivables in International Trade has been elaborated by UNCITRAL and adopted by the United Nations General Assembly in 2001. The Convention gives a legal framework for the transfer of non-physical objects, such as monetary claims. It has yet to enter into force.

VI. Dispute Resolution

I have arrived at the final point of my overview, which is dispute resolution. The notion should not be understood too narrowly as encompassing only the adjudication by State courts. Private methods of dispute resolution, such as arbitration or mediation, play a prominent role in transnational commercial law. As far as the recognition of arbitration agreements and arbitral awards is concerned, it has been greatly facilitated by the New York Convention of 1958 and the Geneva Convention of 1961. The UNCITRAL Model law on International Commercial Arbitration from 1985 has equally been a great success.

The unification of rules on the recognition and enforcement of judicial decisions has proven to be a much more thorny issue. After many years of negotiations, the Hague Conference’s ambitious project on jurisdiction and judgments has ultimately resulted in the birth of a dwarf. The Convention adopted in 2005 obliges the Contracting States to recognize or enforce the judgments of other State parties only insofar as the jurisdiction of the court is based on a choice of court agreement. Judicial decisions rendered without such a basis do not need to be recognized. The Convention has yet to enter into force; it has recently been signed by the first Contracting State, Mexico.

The difficulties in achieving internationally uniform rules on dispute resolution stand in marked contrast to the unification already achieved at European level. A milestone on this way is the Brussels Convention. It follows the model of a convention double, that means it regulates jurisdiction as well as recognition of judgments, and that with regard to almost all civil and commercial matters. In 2001, the Brussels Convention has been replaced with an instrument of Community law called the Brussels I Regulation. It can now be more easily amended within the institutional framework of the EC, without the need to get signatures and ratifications by all of the

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36 Concluded in the Hague, 5 July 2006.
38 See Art. 9(2) of Directive 98/26/EC and Art. 9(1) of Directive 2002/47/EC.
39 See Art. 6(c) of the Hague Convention.
47 I want to thank Dr. Andrea Schulz for pointing this out to me.
Member States. An exception applies with regard to Denmark, which chose to not participate in the judicial cooperation in civil matters, but concluded a Convention that the provisions of the Brussels I Regulation are applicable in its territory.50

The uniform regime established by the EC applies not only within the 27 Member States, but through the Lugano Convention,51 the little sister of the Brussels Convention which has recently been revised, it is extended to the relations with the EFTA states Switzerland, Iceland, Norway and the Principality of Liechtenstein. Furthermore, it is important to note that the Brussels Convention and Brussels I Regulation do not only govern jurisdiction and enforcement of judgments in internal disputes between inhabitants of the Contracting States. In the watershed case Owusu, the ECJ decided that they also apply with regard to situations that exclusively relate to a Member State and a third State.52 Although the Court’s reasoning may be questioned, there is no doubt that the European regime now also effectively governs the relations between Member States and Non-Member States.

Overall, the European law on civil procedure has been a big success story. Part of this story is the Court of Justice of the European Communities, which has given a uniform meaning to many of the provisions of the uniform texts. One lesson that can be learned from the Brussels Convention is that uniform law can be most efficient if it is interpreted by a single authority.

The EC has not stopped there. Within the last years, it has produced new instruments on dispute resolution at a pace that may at times seem breathtaking to an observer. I only want to mention the newest ones:

- the Regulation creating a European Enforcement Order for uncontested claims of 2005,53
- the Regulation creating a European order for payment procedure of 2006,54 and
- the Regulation establishing a European Small Claims Procedure of 2007.55

With these acts, the Community comes ever closer to a new type of civil procedure standing somewhere in the middle between national and international law.56 Whether the development will eventually lead to a full harmonization of procedural law within the EC, nobody knows.

What can be examined, though, is whether the European Regime is compatible with the international texts on dispute resolution. Many of the international conventions on uniform law contain side provisions on jurisdiction, such as the Montreal Convention.57 Their relation to the Brussels I Regulation is not totally clear.58 But in case of conflict, the Regulation yields to the international instrument.59

Equally interesting is the relationship between the Hague Convention on Choice of Court Agreements and the European texts. The Brussels I Regulation and the Lugano Convention contain provisions on choice of forum clauses60 and also cover the recognition of judgments rendered on the basis of such clauses. But they go even beyond the Hague Convention with regard to the judgments that must be recognized and enforced. Therefore, there seem to be few possibilities for conflict between the two sets of uniform rules if the Hague Convention will eventually enter into force.

VII. Conclusion

This little survey has shown two things: First, international uniform law is on the rise. It tackles new subjects, such as e-commerce or securities held by intermediaries. But second, the EC’s efforts have led to a much faster harmonization of the laws within the Member States. The edge that the EC has gained is particularly visible in procedural law, where international uniformization has failed so far. The acquis communautaire in this and other areas has become so important that it is unlikely it could be taken back in favor of a new international agreement on the same questions.

Therefore, any future effort to create uniform law cannot ignore the European regime, but must take it into account. Maybe it will even use it as a model. Would that be such a bad thing? In my opinion, not necessarily. The fact that other States such as Switzerland or Norway have voluntarily adhered to the European texts shows that the intra-European regime is sufficiently insulated from national interests and may therefore be attractive also for Non-Member States.

But it is clear that it will not always be acceptable to other parties to just take over the European rules. For that reason, the EC should be actively involved from the beginning in any negotiation over international uniform law. This is now the case within the framework of the Hague Conference, in which the Community acquired the status of a member. It can then try to convince the other Contracting States of the soundness of its internal uniform rules. If it fails to do so, it should in my opinion submit to a compromise in the interest of international uniformity. As a result, it may be obliged to reform its law, just as any nation-State.

58 See Art. 33 Montreal Convention.
59 See, e.g., Reuschle, Montrealer Übereinkommen, 2005, Art. 33 para. 11.
60 See Art. 71(1) of the Brussels I Regulation.
61 See Art. 23 of the Brussels I Regulation and Art. 17 of the Lugano Convention.