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complete the bold move it has already begun in this area.

In order to reconcile the major differences in the copyright regimes of the Member States concerning the transfer of film rights with the Internal Market, it would be advisable to complement the harmonisation of the notion of film authorship by introducing the legislative transfer rules known in some Member States at the Community level.[70] Statutory transfer presents itself as a compromise solution to avoid the difficulties for film production and exploitation arising from the application of the "creator" principle prevailing in most of the continental Member States. This is in the interest of all parties involved in the making of the film. Not only do they bundle the exploitation rights in the hand of the producers, but they also help to unify the legal relationships in the common exploitation market for cinematographic works in Europe – with the important advantage of legal certainty, which is indispensable for a functioning European film market. The Community-wide implementation of statutory transfer keeps EC lawmakers from having to decide between the two main regimes for copyright while compensating for the conceptual opposition between the copyright and *droit d'auteur* systems in an acceptable fashion. Such a harmonisation is also a particularly good idea in the context of the conflict of laws problem described above, as opposed to maintenance of the status quo – in any event as long as an approximation of copyright law remains in a holding pattern at the Community level.[71] In this sense, the announced review of the general legal framework in the Member States for the drawing up of contracts in the film sector will hopefully recognise the need for extensive harmonisation in the future and take this matter seriously into account.

[70] In this regard under German law, see *Obergfell* (*supra* note 10), at 189 et seq. To the same extent, see *Poll* (*supra* note 1), 300; *Reupert* (*supra* note 13), at 300 et seq.

[71] In this regard, the result of efforts toward an EC regulation on the law applicable to non-contractual obligations (see Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, "Rome II", of 22 July 2003, COM(2003) 427 final) remain to be seen.

INTERNATIONAL PRIVATE AND EUROPEAN HARMONISATION OF PRIVATE LAW

Eliminating borders of national private law – potentials analysis of EU private law, the CISG and the Principles

Hannes Rösler

In the following, the elimination of borders ("Entgrenzung") of national law will be subject to an evolutionary, methodical and causal comparative analysis by taking into account the approach of the 15th anniversary of Germany's ratification of UN Sales law and the presentation of the final sections of two principle works in the field of private law (one has already been lodged, whereas the other is forthcoming).

I. Introduction

There is increasing evidence of a separation of state and law which is geographically not limited to Europe and which reaches across institutions. The related realignment of private law can only be explained as part of the process of denationalisation, which has been bolstered by international law and economics.

II. European Union

1. Unprecedented transfer of sovereign powers

The EU is on its way to a common system of private law. In many areas, Europe's "legal union" is already a reality. Some 80 % of all German legislation in the field of commercial law is prescribed by Community law; almost 50 % of all German regulations find their origins in Community law.[1] This includes laws relating to sales, consumers, labour, public service, performance, insurance and credit.[2] The list of European legal rules has grown in such a way that, throughout the Union, well over 50 % of the gross national product – which encompasses domestic transactions – is already generated by *contracts governed in part by Community law*.[3] Never before has there been such peaceful and voluntary cohesion on this scale as has developed since the foundation of the European Economic Community (EEC)[4] in 1957. In contrast, earlier – and mostly temporary – integrations were usually based upon conquest, the politics of marriage or shared training of elites.[5]

The unique feature of the new cooperation lies in the volun-

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[1] As already mentioned by the BVerfG (Federal Constitutional Court, Germany) in its fundamental *Maastricht* decision of 12 October 1993, BVerfGE 89, at 155, 173.

[2] For an introduction to the European law of contract, see *Grundmann*, Europäisches Schuldrecht: Standort, Gestalt und Bezüge, [2001] JuS 946 et seq.; on the interpretation of Community law, *id./Riesenhuber*, Die Auslegung des Europäischen Privat- und Schuldvertragsrechts, [2001] JuS 529 et seq.; on the enforcement of EC directives, *Grundmann*, Einwirkung von EG-Richtlinien des Privat- und Wirtschaftsrechts auf nationales Recht, [2002] JuS 768 et seq.; on consumer law, in particular, *Rösler*, Europäisches Konsumentenvertragsrecht – Grundkonzeption, Prinzipien und Fortentwicklung, to appear in 2004.

[3] *Grundmann*, Europäisches Schuldvertragsrecht – Struktur und Bestand, [2000] NJW 14, 15.

[4] Since the entry into force of the Treaty on the European Union (Maastricht Treaty) on 1 November 1993, "EEC" has been replaced by the term "EC".

[5] *Kilian*, Europäisches Wirtschaftsrecht, Munich (D), 1996, at VII.

tary transfer of state *sovereignty*.[6] As was already the case with the European Coal and Steel Community (ECSC) dating from 1951, the European institutions have the power to make decisions, with their actions being reviewed, not by national courts, but instead by a single European court alone.[7] The transfer of sovereign rights also manifests itself in another way: Unlike international conventions or conflict of law rules, an EC directive cannot be disposed of once and for all by means of unilateral denunciations or domestic measures.[8] Conversely, the economic freedoms of the EC Treaty enjoy the status of *subjective rights*, the contents of which are often first clarified by way of a process of judicial discovery.[9]

2. Origin of a community of peace, freedom and welfare

The impetus for a self-imposed and broad unification by force of law was less a product of the élan of a European movement than a transformation in the *role of the nation* in view of the two world wars that originated there and the brutality of fascism. Taking a lesson from the ill-fated peace settlement of the Versailles Treaty, the former adversaries wanted to create a new community of democracies that would *prohibit discrimination* in order to achieve peace and increase welfare to everyone's benefit. On 25 March 1957, the original Member States "la[id] the foundations of an ever closer union among the peoples of Europe" with the signing of the Treaty of Rome,[10] which established the EEC.[11] This notion of cooperation had found expression in the so-called *Schuman Plan* of 9 May 1950, concerning the achievement of concrete and gradual political results through teamwork, which would in turn create an *incentive on all sides* to keep the peace.[12] However, the plan also stated that "[t]he pooling of coal and steel production should *immediately* provide for the setting up of common foundations for *economic development* as *a first step in the federation of Europe*".[13]

3. Transformations in the understanding of "Europe"

Those self professed Europeans of the first hour were stirred by their common suffering in the war. Fifty years ago, they saw purely a matter of war or peace in the creation of a Europe that brought peace and welfare on the continent that had arguably experienced the greatest violence. There has been a shift in the meantime. The first generation bore the imprint of European politicians who had lived through war and fascism (and who were partly animated by the vision of a new European state). The new generation, however, is for the most part convinced that new, shared problems[14] can only be resolved through joint effort. This understanding of the EU as a *special purpose association* predominates in the public mind as well. The individual states' loss of power is accepted to this extent in order to seek a new economic and politic meaning for the "old" continent in a transformed world of states. At present, the EU is often pigeonholed as a *union of sovereign states*, as Germany's Federal Constitutional Court stressed in its 1993 *Maastricht* decision.[15] However, the real (i.e. not just the desired) final result remains unclear (federation or confederation, or a mixture of both in a unique and innovative third entity, which – according to first indications – can only be understood on its own?).[16]

III. Other efforts outside the EU to eliminate borders

1. Other institutions

Outside the structures of the EU and its predecessors, countless inter- and supranational organisations were set up on the European continent. Currently, the oldest regional system in Europe is the Council of Europe in Strasbourg (F), which was founded on 5 May 1949 and which today has 44 Signatory States. The Council devised the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which has been looked after since 1959 by the European Court of Human Rights (ECHR).[17] As is the case with the ECJ, the rising number of complaints that have

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6 See Art. 24 of the GG (*Grundgesetz*, Basic Law for the Federal Republic of Germany).

7 Between 1952-1957, the ECSC had its own court of justice (the predecessor of the ECJ); see *Oppermann*, Europarecht, 2nd ed., Munich (D), 1999, para. 372.

8 See *Taschner*, Privatrechtsentwicklung durch die Europäische Gemeinschaft – Rechtsgrundlagen, Ziele, Sachgebiete, Verfahren, in: *Müller-Graff* (ed.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 2nd ed., Baden-Baden (D), 1999, at 225, 234; *Joerges/Brüggemeier*, in: *Müller-Graff*, l.c., at 301, 350 et seq.

9 See *Behrens*, Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht, [1992] EuR 145, 147; *Reich*, Bürgerrechte in der Europäischen Union, Baden-Baden (D), 1999, at 450 et seq.

10 In the hall of the Horatians and Curatians of the Palazzo dei Conservatori on the Capitoline Hill, i.e. the centre of ancient Rome.

11 A formulation similar to that in the preamble of the EEC or EC Treaty just cited from, and the same emphasis on "peoples" can, of late, also be found in the preamble of the Charter of Fundamental Rights: "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values".

12 See also the extensive publications of the European Community Liaison Committee of Historians: *Schwabe* (ed.), Die Anfänge des Schuman-Plans 1950/51, Baden-Baden (D), 1988.

13 Translation with emphasis added.

14 For instance by digitalisation; in this regard, see *Rikus/Rösler/Zagouras*, Transnationale zivil-, straf- und verfassungsrechtliche Problemlagen im Internet, [1999] AfP 473 et seq.

15 BVerfGE 89, at 155 (at 184 et seq. and 188 et seq.) – *Maastricht*: "Der EU-Vertrag begründet einen europäischen Staatenverbund, der von den Mitgliedstaaten getragen wird und deren nationale Identität achtet; er betrifft die Mitgliedschaft Deutschlands in supranationalen Organisationen, nicht eine Zugehörigkeit zu einem europäischen Staat" (the EU Treaty creates a union of sovereign European states, which is borne by the Member States and which respects their national integrity; it concerns Germany's membership in supranational organisations and not the affiliation to a European State); *Papier*, Die Entwicklung des Verfassungsrechts seit der Einigung und seit Maastricht, [1997] NJW 2841, 2844; for more on the consolidation of the union of states, see *Kirchhof*, in: *Isensee/Kirchhof* (eds), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume VII, Heidelberg (D), 1993, § 183 para. 50 et seq.; *Kirchhof*, in: *Isensee* (ed.), Europa als politische Idee und als rechtliche Form, 2nd ed., Berlin (D), 1994, at 63 et seq., 93.

16 See *Schmitz*, Integration in der Supranationalen Union – Das europäische Organisationsmodell einer prozeßhaften geo-regionalen Integration und seine rechtlichen und staatstheoretischen Implikationen, Baden-Baden (D), 2001, who does not view the EU as a unique and non-recurring institution, but rather as the first (and transitional) form of organisation which is similar to that of a state, i.e. between a supranational organisation, an association of sovereign states and a federal state.

17 In detail, *Oppermann* (*supra* note 7), para. 53 et seq., 76 et seq., 94 et seq.

been lodged[18] – particularly from the countries of Central and Eastern Europe[19] – is proof of the Convention's success. At the international level, it also bears witness to the efforts to *strengthen the judicial process in order to gain control over politics*. Other organisations include the Organisation for Economic Co-operation and Development (OECD), founded in 1961;[20] the Organization for Security and Co-operation in Europe;[21] the World Trade Organization (WTO),[22] born in 1994 as a successor to the General Agreement on Tariffs and Trade (GATT), itself established in 1947;[23] and the European Free Trade Area (EFTA), which Union expansion has rendered quite meaningless, and with it the European Economic Area (EEA) as a cooperation between the EC and EFTA.[24]

This network of multilateral organisations has also led to pivotal changes in classic *diplomacy*. Bilateral diplomatic relations have rapidly lost their significance since innumerable decisions are made at international conferences both inside and outside the EU. National governments plan these with reduced participation of embassies and arrange things directly with one another in the preliminary stages.[25] Furthermore, the above mentioned international organisations tackle diverse problems ranging from peace and disarmament, economic advancement and – particularly in the case of the Council of Europe and the ECHR – on the rule of law and respect for human rights and fundamental freedoms.

The idea of a union of states with the goal of free market cooperation goes beyond Europe, as evidenced by the North American Free Trade Agreement (NAFTA) and Mercosur. Also the new African Union (AU) explicitly adopts the EU as a paradigm. This cooperation between countries is a matter of institutional implementation of the globally ascertainable triumph of law and a reaction to market globalisation and the consequent restrictions on the options open to states.[26] Despite similar approaches using the EU as a role model, the European undertaking nevertheless remains wholly unique in terms of its cultural and historical roots in both its objectives and its demonstrable successes.

2. Private law initiated outside of the EC

a) Survey of economically relevant private law

Worthy of note are the obligations created by international conventions outside the framework of the EU or EC[27] – by no means a new phenomenon.[28] The revolutionisation of transport by through the introduction of and railroads in the 19th century ushered in further integration and the first signs of a global market. Industrial countries responded by concluding treaties such as the Paris Convention for the Protection of Industrial Property of 20 March 1883[29] and the Berne Convention on Railway Freight Traffic of 14 October 1890.[30] The *seeds of internationalism* can be found in this era of imperialism, which can therefore not be said to have commenced with the establishment of the League of Nations in 1919 or the United Nations in 1945.[31]

Under the auspices of UNIDROIT in Rome (founded in 1926 due to initiative of Italy),[32] an international group led by *Bonell* presented the "Principles of International Commercial Contracts"[33] in 1994. Its present 120 Art.s encompass general aspects of contract law in international commerce.[34] These

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18 On this, *Rösler*, Zur Zukunft des Gerichtssystems der EU – Entwicklungstendenzen des EuGH zum Supreme Court Europas, [2000] ZRP 52 et seq.

19 In 2002, approximately 60 000 complaints were pending, FAZ of 9 July 2002, at 4.

20 Previously OEEC, founded in 1948.

21 *Oppermann* (*supra* note 7), para. 121 et seq.

22 Since China's accession on 11 December 2001, there are 143 WTO Member States. See, with regard to the non-direct applicability of the WTO agreements in Community law, ECJ 23 November 1999 – C-149/96 – *Portugal* v *Rat* [1999] ECR I-8395 et seq.; on this, *Berrisch/Kamann*, WTO-Recht im Gemeinschaftsrecht, [2000] EWS 89 et seq.; *Meng*, Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG, in: Festschrift for *Bernhardt*, Berlin (D) et al., 1995, at 1063 et seq.; regarding the conflict on the EC banana market regulation, see *Heselhaus*, Die Welthandelsorganisation – Veränderungen des GATT und Grundprobleme der rechtlichen Geltung, [1999] JA 76, 81 et seq.; *Müller-Graff* (ed.), Die Europäische Gemeinschaft in der Welthandelsorganisation – Globalisierung und Weltmarktrecht als Herausforderung für Europa, Munich (D), 2000.

23 General agreement on customs and trade.

24 The EEA States have information and consultation rights, e.g. in the run-up to enactment of EC consumer directives; for a Swiss perspective, see *Brunner*, in: *R.H. Weber/Thürer/Zäch* (eds), Aktuelle Probleme des EG-Rechts nach dem EWR-Nein, Zurich (CH), 1993, at 91, 98, 118.

25 On the change in German diplomacy, see *Rösler*, Die Botschaftsdiplomatie: Ein Einblick, [1998] Jura 220.

26 On the driving force of global markets on international relations, see *Schirm*, Globale Märkte, nationale Politik und regionale Kooperationen – in Europa und den Amerikas, 2nd ed., Munich (D), 2001.

27 On this, with further examples, *Müller-Graff*, Gemeinsames Privatrecht in der Europäischen Gemeinschaft – Ansatzpunkte, Ausgangsfragen, Ausfaltungen, in: *id.* (*supra* note 8), at 9, 24 et seq.; *Basedow*, Das BGB im künftigen europäischen Privatrecht: Der hybride Kodex – Systemsuche zwischen nationaler Kodifikation und Rechtsvergleichung, [2000] 200 AcP 445, 454 et seq.

28 Such agreements should in this respect also be classified as part of European private law; see *Basedow* (*supra* note 27), [2000] 200 AcP 445, 456, 457.

29 RGBl. 1903, at 147 et seq.

30 RGBl. 1892, at 793 et seq.; apart from these agreements, there are e.g. the Warsaw Convention of 1929 on international carriage by air, the Berne Convention of 1961 regarding railroad transportation, the Athens Convention of 1974 relating to the carriage of passengers and their luggage by sea, and the Paris Convention of 1962 on the liability of hotel-keepers; on equality before the law on the ground of agreements under international law, *Philipps*, Erscheinungsformen und Methoden der Privatrechts-Vereinheitlichung – Ein Beitrag zur Methodenlehre der Privatrechts-Vereinheitlichung unter besonderer Berücksichtigung der Verhältnisse Westeuropas, Frankfurt/M. (D) et al., 1965, at 21 et seq., for an overview of the forms, at 27.

31 See *Herren*, Hintertüren zur Macht – Internationalismus und modernisierungsorientierte Außenpolitik in Belgien, der Schweiz und den USA 1865 – 1914, Munich (D), at 2000.

32 Institut International pour l'Unification du Droit Privé; on this, *Rabel*, Zwei Rechtsinstitute für die internationalen privatrechtlichen Beziehungen, [1932] JW 2225, 2227 et seq.; as regards the other institute, he is referring to the Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht (Kaiser Wilhelm Institute for Comparative Public Law and International Law), the forerunner of the MPI in Hamburg.

33 *UNIDROIT* (ed.), Principles of International Commercial Contracts, 1994; *UNIDROIT*, Grundregeln der Internationalen Handelsverträge ("UNIDROIT principles"), 1994; also translated in: [1997] ZEuP 890 et seq.; *Schulze/Zimmermann* (eds), Basistexte zum Europäischen Privatrecht – Textsammlung, 2nd ed., Baden-Baden (D), 2002; *Basedow* (ed.), Europäische Vertragsrechtsvereinheitlichung und das deutsche Recht, Tübingen, 2000, at 251 et seq.

34 *Bonell*, Das Unidroit-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge, [1992] 56 RabelsZ 274 et seq.; *id.*, An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts, 2nd ed., New York (USA), 1997; *id.*, The UNIDROIT Principles of International Commercial

principles for international commercial contracts appeared in the same year as the *Lando* commission's "Principles of European Contract Law";[35] furthermore, both of the non-binding works resemble one another in terms of approach as well as in some substantive respects.[36] The third part of the European principles has already been released,[37] whereas the *Bonell* group has announced a 2004 publication date for its concluding second part. The five new chapters will address difficult questions concerning agency, rights of third parties, transfer of rights, set-off and limitation. Established *usages* also play an increasing role in the areas of private law affecting commerce, such as the Incoterms (International Commercial Terms) covering the law of transport which were published by the Paris-based International Chamber of Commerce (ICC),[38] and regulations concerning documentary credits, definitions of clauses and terms, model contracts and other uniform rules.[39] Transborder regions (e.g. near the Rhine River) are forming on the basis of economic interests that do not rely on support or regulations from Brussels. The trend will continue on the strength of this fact as well as improvements in trade and media technology. As a result, an intense discussion has emerged as to whether a *lex mercatoria*, including an international commercial jurisdiction,[40] could emerge on the basis of the abovementioned regulations, or whether this has not in fact already taken place.[41]

b) UN Sales Law Convention

The most important international treaty in the area of private law is the *UN Convention of the International Sale of Goods* of 11 April 1980 (CISG).[42] In the meantime the CISG is valid law in 62 countries across the globe – in some cases with reservations regarding certain Art.s. It has thus made appreciable inroads as a separate, admittedly *partial substantive law governing the international sale of goods* (i.e. unified private international law).[43]

In any event, the CISG is not even in effect in all EC countries, as the United Kingdom, Portugal and Ireland have not signed the agreement.[44] Both parties to a *contract for the sale of goods* must have their *place of business* in different Contracting States (Art. 1(1)) and must not have effectively excluded the Convention's application (Art. 6).[45] Moreover, the CISG leaves broad sections of national private law *untouched* – notably the passing of ownership as well as the legal force of contracts, including the question of the effectiveness of clauses in the general terms and conditions that determine a national law by means of conflict of laws rules (Art. 4).[46] Critical is the fact that contracts for the sale of goods which are solely in-

Contracts? Towards a new lex mercatoria?, Revue de droit des affaires internationales, 1997, at 145 et seq.; *id.*, in: *Weyers* (ed.), Europäisches Vertragsrecht, Baden-Baden (D), 1996, at 9 et seq.; *Veneziano*, L'application des Principes d'UNIDROIT dans la vente internationale, [2001] RDAI 477 et seq.; *Berger*, Die Unidroit-Prinzipien für Internationale Handelsverträge – Indiz für ein autonomes Weltwirtschaftsrecht?, [1995] 94 ZVglRWiss 217 et seq.; *Kramer*, Europäische Privatrechtsvereinheitlichung (Institutionen, Methoden, Perspektiven), [1988] JBl 477, 481; *Kronke*, Ziele – Methoden, Kosten – Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT, [2001] JZ 1149 et seq.; *Frick*, Die UNIDROIT-Prinzipien für internationale Handelsverträge, [2001] RIW 416 et seq.; who, like *Herber*, „Lex mercatoria" und „Principles": gefährliche Irrlichter im internationalen Kaufrecht, [2003] IHR 1, 6, ultimately sees the emergence of UNIDROIT principles as the result of competition between the Institute in Rome and UNCITRAL in Vienna, thereby downplaying the considerable comparative legal research efforts of the *Bonell*'s team; *Basedow*, Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts, [2000] Uniform Law Review 129, 138 correctly sees the principles as a reaction to the crisis of unified private law.

35 In the meantime, *Lando/Beale* (eds), Principles of European Contract Law, Part I and II – Combined and Revised, The Hague (NL) et al., 2000; German version: [2000] ZEuP 675 et seq.; for more detail on this and other related efforts, *Rösler*, Der Griff nach dem Ungreifbaren – Zum Entstehen einer Europäischen Zivilrechtswissenschaft, [2002] KritV 392, 404 et seq.

36 For a comparison, see *Hartkamp*, The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law, [1994] ERPL 341 et seq.; *id.*, in: *Hartkamp/Hesselink/Hondius/Joustra/du Perron* (eds), Towards a European Civil Code, 2nd ed., The Hague (NL) et al., 1998, at 105 et seq.; *D. Coester-Waltjen*, Europäisierung des Privatrechts, [1998] Jura 320, 321; see also *Canaris*, in: *Basedow* (*supra* note 33), at 5 et seq.; *Bonell*, The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?, [1996] Uniform Law Review 229 et seq.; see further *id.*, The UNIDROIT Principles of International Commercial Contracts and CISG: Alternative or Complementary Instruments?, [1996] Uniform Law Review 26 et seq.; furthermore, *Lando* is, strangely enough, also a member of the Commission headed by *Bonell*.

37 *Lando/Clive/Prüm/Zimmermann*, Principles of European Contract Law, Part III, The Hague (NL) et al., 2003.

38 The International Chamber of Commerce was founded in 1920 as "a businessmen's League of Nations".

39 See *Berger*, Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung, [1999] JZ 369 et seq.; *Mertens*, Nichtlegislatorische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff, [1992] 56 RabelsZ 219 et seq.; on "Autoharmonisation" and the requirement of comparative legal research, *Mansel*, Rechtsvergleichung und europäische Rechtseinheit, [1991] JZ 529, 533 et seq.

40 *Schwab/Walter*, Schiedsgerichtsbarkeit – Kommentar, 6th ed., Munich (D), 2000; on the new regulation, *Voit*, Privatisierung der Gerichtsbarkeit, [1997] JZ 120 et seq.

41 On the current state of the dispute see the overview (with positive outcome) by *Lando*, in: *Müller-Graff* (*supra* note 8), at 567 (575 et seq.); furthermore, *de Ly*, in: *Hartkamp et al.* (*supra* note 36), at 41 et seq.; *U. Stein*, Lex mercatoria – Realität und Theorie, Frankfurt/M. (D), 1995; *Weise*, Lex mercatoria, Frankfurt/M. (D) et al., 1990; *Blaurock*, Übernationales Recht des internationalen Handels, [1993] ZEuP, at 247 et seq.; *Kappus*, „Lex mercatoria" in Europa und Wiener UN-Kaufrechtskonvention, Frankfurt/M. (D) et al., 1980, 1990, at 31 et seq.; *Cordes*, Was erwartet die (mittelalterliche) Rechtsgeschichte von der Rechtsvergleichung und anderen vergleichend arbeitenden Disziplinen?, [1999] ZEuP 544 et seq.; see also on legal approximation through legal practice and the methods for the creation of European contract law *Kirchner*, Europäisches Vertragsrecht, in: *Weyers* (*supra* note 34), at 103 (111 et seq.) and on the important contribution of jurisprudence on the drafting of contracts, at 128, 132.

42 BGBl. 1989 II, at 588, 1990 II, 1699; BGBl. 1990 II, at 1477, signed by Germany on 26 May 1981, with ratification on 21 December 1989 and entry into force on 1 January 1991. The CISG has enjoyed greater success, since it – in contrast to the Hague Agreement of 1 July 1964 – only concerns trade (Art. 2); furthermore, the familiarisation with the integrated rules on non-performance, as it is known in England (*Rösler/Tüngler*, Modalitäten der Ersatzleistung im englischen und deutschen Vertragsrecht, [2002] JuS 782, 783, 785), has in the meantime taken place.

43 *Schlechtriem* (ed.), Kommentar zum Einheitlichen UN-Kaufrecht, 3rd ed., Munich (D), 2000; *Herber/Czerwenka*, Internationales Kaufrecht, Munich (D), 1991; *Piltz*, Internationales Kaufrecht – Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung, Munich (D), 1993; *Chr. Schmid*, Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht: Lückenfüllung und Normenkonkurrenz, Berlin (D), 1996; *Schwartze*, Europäische Sachmängelgewährleistung beim Warenkauf, Tübingen (D), 2000, at 596 et seq.

44 On the limits of the CISG and its relation to the European Civil Code Project, see *Bonell*, The Need and Possibilities of a Codified European Contract Law, ERPL 1998, at 505 (506 et seq.).

45 According to German case law, the stipulation of German contract law alone does not suffice; instead, the choice of law under Art. 27 EGBGB is necessary specifically with regard to *non-uniform* German law – since the CISG also forms part of the German legal system.

46 *Goecke*, Der internationale Warenkauf, [2000] MDR 63, 66.

tended for personal, family or household use – i.e. consumer sales – are factored out, in consideration of national consumer protection rules (Art. 2(a)).[47] While the Hague Convention applies to private law sales contracts *as a whole*, the CISG renounces the inclusion of any consumer contracts whatsoever. At the same time, the fragmentary convention governs neither the validity of a contract and its provisions nor the effect that the contract may have on the property in the goods sold (Art. 4). Furthermore, the CISG does not apply to the non-contractual liability of the seller (Art. 5).

Naturally the CISG is taken into consideration not only in a direct way in the case of cross-border trade, but also – precisely because it, unlike EC law, does not apply to domestic cases[48] – in an *indirect way* by leading to an interpretative co-operation[49] and by functioning as a model for general amendments to national law that apply to purely intrastate transactions (e.g. modernising the law of obligations in Germany).[50] To this extent, the idea of a purely national private law has been reduced to an illusion.[51] However, it is striking how much the legal unification efforts discussed here were fashioned for the commercial field, thus leaving *social protection* and formal institutional aspects for the optimal implementation of legislation largely unnoticed – in contrast to the EC.

IV. Causes

The erosion of the illusion of an individual state orientated on a sovereign autarchy is thus incontrovertible.[52] Nation-states are historically not without merits; after all only the nation-state allowed for the durable realisation of the monopoly on power and thereby the rule of law, as well as democracy, general education, and health care, that demand a strong sense of community and the consequential solidarity. Nation-states and national identity will thus not lose their justification for existence and their identification role for citizens in the foreseeable future. However, the individual's nation-state becomes relativised as a benchmark due to the displacement of economics, politics and citizens from their spatially bound contexts. The meaning of the expression "nation and people" is losing footing in various social areas such as the economy, politics, science, art, public life, consumption and popular culture. At the same time, the country that is opening up gains discipline and is noticeably woven into a network of new creations and binding universal values. Rapprochement with transnational organisations in a no longer bipolar world order manifests itself even in the countries observing strict *neutrality*. The best example is Switzerland, where 54.6 % of voters approved UN membership in a plebiscite held on 3 March 2002, making their country the 190th member of that organisation as of 10 September 2002. Moreover, seven bilateral treaties had entered into force between Switzerland and the EU as of 1 June 2002 under the principle of autonomous implementation of Community law.[53]

In addition to the intention of a secular domestification of aggressive state powers, there are also other reasons for the pull towards the formation of higher ranking transnational organisations: These are to be found in the needs of an interdependent, structurally changed *global economy*, which is characterised not only by a digital network, and – problematically so – by a only partially[54] developing *global society*,[55] but also by a growing awareness of the minuteness, limitations and the worthiness of protection of the planet, its inhabitants and resources, which has contributed to a *universal sensitivity propagated by the media* that transcends national borders. The flipside is just as important – the adapting consumer interest in foreign products and cultural assets as well as the request for external news from the media. To this extent, there is a connection between human curiosity and the wish for a "better" life or higher living standards (which also means stronger and differentiated consumption according to needs in the face of increasing standardisation and brand orientation of consumer preferences[56]) and global capitalism as well as the dissolution of national sovereignty resulting from this constellation. *Loyalty to the national economy* – the idea that the local economy must be promoted or that national domestic products are per se superior to foreign goods – increasingly plays an altogether subordinate role for the consumer.[57] Precisely in the neutral role as consumer, people appreciably undermine the concept of nationalism. The consumer thus becomes one of the driving forces leading to the disintegration of the nation-state as well.

The trends towards *internationalisation*, *immaterialisation and individualisation*, coupled with worldwide standardisation in technology, business and law (e.g. for computer and communications technology, container shipping and air traffic) have led to serious *denationalisations.*[58] The unifications

47 See also *Schwenzer*, Das UN-Abkommen zum internationalen Warenkauf, [1990] NJW 602, 603.

48 *Grundmann*, Europäisches Schuldvertragsrecht – Struktur und Bestand, [2000] NJW 14, 16.

49 See *Burkart*, Interpretatives Zusammenwirken von CISG und UNIDROIT Principles, Baden-Baden (D), 2000.

50 *D. Coester-Waltjen* (*supra* note 36), [1998] Jura 320; *Schwartze* (*supra* note 43), at 600.

51 This is also demonstrated by the emergence of transnational European private law with intra- and interdisciplinary relationships, on this, *Rösler* (*supra* note 35), [2002] KritV 392, 400 et seq.

52 See also *Alfred Weber*, Die Krise des modernen Staatsgedankens in Europa, Stuttgart (D), 1925.

53 On free movement of persons, air and land transport, trade in agricultural products, scientific and technological cooperation, public procurement and mutual recognition in relation to conformity assessment (published in OJ L 114 of 30 April 2002); further agreements, e.g. on Schengen, asylum, services and media are currently in preparation. In any event, the free trade agreement of 1972, OJ L 300 of 31 December 1972, at 189 et seq.

54 With regard to the digital rift (one of many), "citizen" is often distinguished from "netizen".

55 See *Luhmann*, Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie, Frankfurt/M. (D), 1999, at 90 et seq.; the compilation of Art.s in *Stichweh*, Die Weltgesellschaft – soziologische Analysen, Frankfurt/M. (D), 2000; and, more specifically, *di Fabio*, Der Verfassungsstaat in der Weltgesellschaft, Tübingen (D), 2001.

56 See the seminal contribution by *Levitt*, The Globalisation of Markets, [1983] 61 Harvard Business Review 92 et seq.

57 In this respect, the mere growth in consumption can hardly result in a sustained improvement of the labour market; on this, *Kröger/Rösler*, Grenzen und Chancen des Rechts zur Steuerung des Arbeitsmarktes, [2001] ZRP 473, 475.

58 In this regard, see, especially *Remien*, Denationalisierung des Privatrechts in der Europäischen Union? – Legislative oder gerichtliche Wege, [1995] ZfRV 116 et seq.; *Werro*, in: *id.* (ed.), L'Européanisation

taking place in spatial, material and personal dimensions[59] as well as the new complexities[60] arising from independently acting companies, groups and individuals that have detached themselves from a nationalised context – therefore lacking in a clearly definable addressee – are both genuine challenges for *national and supranational capacity of regulation and control*.[61] In order to retain these capabilities, law in the "post-national constellation" must *catch up with* the present transnational realities in the *economy* and to a limited extent with individuals.[62] National institutions in their present form are thus to be critically scrutinised on the basis of this realisation. Consequently, in view of globally acting companies and international organisations, a democratic deficit becomes manifest. They elude state "paternalism" merely by changing their place of business. The EU would be in a position to act partly as a counterbalance: if constituted as a *multi-level democracy*, it could open up a real chance for citizens to participate in the extended areas of collective freedom and co-decision.[63] It is thus unfounded to bemoan the loss of control on the level of the mighty nation-state, without acknowledging the emergence of possible models of cooperation associated therewith.

V. Concluding evaluation and future prospects

The paradigm of the European Community was formed and developed entirely in keeping with the notion of a "federation of free states" advanced by *Immanuel Kant* (1724-1804) in "Toward Perpetual Peace" as the foundation of international law and of a "league of nations (…) [that] would not have to be a state consisting of nations".[64] At the same time, *Kant* emphasised the power of trade in creating bonds. Despite some setbacks, countries all over the world are cooperating in helpful ways governed by regulations and are able to find at least one common denominator in the opening of their markets. This new form of state, borne by the *spirit of trade*, is marked by an acceptance of the *loss of sovereignty*, *multilateralism*, the preference for *civil instruments* in the pursuit of state interests and the primacy of *increased prosperity*.[65] In instances of a *higher level* of cooperation between states, it includes also socio-political cofactors. This reveals for the area of legal studies that isolationist tendencies are untenable[66] and private law does not have to be tied to the nation-state and the "Volksgeist".[67] In the legal field (even outside of the relatively strict confines of the European Union) there are highly visible trends towards the tearing down of borders, which in itself portends an advance in the Union's process of integration, despite the upcoming burdens of eastern enlargement and the proliferation of interests inside the EU.

The internal perspective of the nation is prised open – even without the pressure from the trade sectors that are increasingly orientated towards export. Tourism, private communications, science and education remove barriers and act as complements to the internationalisation of the economy and labour. This affects the values in general – as evidenced by the strengthening of universal principles of justice enjoying a superior status, such as human rights. From this emerge *supranational structures, standards, and thus expectations of conduct*. But what about their protection? In many cases principles of *lex mercatoria* falter on grounds of being legally not binding – just as happens with the principle works and large parts of international law. Numerous rules are put forward only as options,[68] which does not seem appropriate in sensitive areas where parties have an inferior market and bargaining position. Furthermore, it lacks a uniform interpretation and final instance of judicial review. This becomes clear in the CISG – for instance with the relevant question of what the obligation according to Art. 35(2)(a) should mean. Whereas in English common law the "merchantable quality" is promoted as a criterion, the Germanic legal systems tend to view "average quality" as the yardstick.[69] A Netherlands arbitral tribunal has in turn advocated "reasonable quality" as a measure for determining whether there is conformity with the contract.[70]

Once again the compulsory effect of Community law and of the ECJ's aspirations for autonomous interpretation[71] reveal the strength of the EU, which overarches Member State legal traditions.[72] Its comparatively more advanced state of development[73] owes precisely to the fact that the European efforts are not exhausted in the reduction of complexity (e.g. to

du droit privé – Vers un Code civil européen?, Fribourg (CH), 1998, at 3 et seq.; *Denninger*, Vom Ende nationalstaatlicher Souveränität in Europa, [2000] JZ 1121 et seq.

59 On this, see *Rehbinder*, Rechtssoziologie, 4th ed., Munich (D), 2000, para. 81 et seq.

60 Borrowed from *Habermas*, Die Neue Unübersichtlichkeit, Kleine politische Schriften V, Frankfurt/M. (D), 1985; on the changed environment in this sense, *Ritter*, in: *Grimm* (ed.), Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts, Baden-Baden (D), 1990, at 69, 71 et seq.

61 On the trend towards privatisation of non-governmental organisations (NGOs) and transnational companies (TNCs), as well as corresponding prohibitive regulatory measures, see *Brühl* (ed.), Die Privatisierung der Weltpolitik, Bonn (D), 2001.

62 *Habermas*, Die Postnationale Konstellation, Frankfurt/M. (D), 1998, at 84 et seq., 79, who has mainly the – unrenounceable – creation of a European democracy in mind, see, in particular, p. 91 et seq.; *Joerges*, Markt ohne Staat? Die Wirtschaftsverfassung der Gemeinschaft und die Renaissance der regulativen Politik, in: *Wildenmann* (ed.), Staatswerdung Europas? Optionen für eine politische Union, Baden-Baden (D), 1991, at 225 et seq.; see, furthermore, *Michaels*, Globale Wirtschaft und lokale Gesetzgebung, [2001] 100 ZVglRWiss 182 et seq.

63 As indicated by *di Fabio* in FAZ, 6 April 1999, at 11.

64 *Kant*, Zum ewigen Frieden, Zweiter Abschnitt, Zweiter Definitivartikel zum ewigen Frieden, Königsberg/Berlin (D), 1795/1995, at 16 (English translation: Towards a Perpetual Peace, Section II, Second Definitive Art. for a Perpetual Peace, available online at www.mtholyoke.edu/acad/intrel/kant/kant1.htm, current 17 September 2003); see also *Slaughter*, International Law in a World of Liberal States, [1995] EJIL 503 et seq.; critical of this modern interpretation of *Kant*'s perspective, *Alvarez*, Do Liberal States Behave Better?, [2001] EJIL 183 et seq.

65 See *Staack*, Handelsstaat Deutschland – Außenpolitik in einem neuen internationalen System, Paderborn (D) et al., 2000.

66 With regard to the foreign factors affecting codification, see *Rösler*, Rechtsvergleichung als Erkenntnisinstrument in Wissenschaft, Praxis und Ausbildung (part 2), [1999] JuS 1186, 1187.

67 On the unclarity of the concept developed by *v. Savigny* (1779-1861), see *Rösler*, Rechtsvergleichung als Erkenntnisinstrument in Wissenschaft, Praxis und Ausbildung (part 1), [1999] JuS 1084, 1085; *Koschaker*, Europa und das römische Recht, 4th ed., Munich (D) et al., 1966/1976, at 198 et seq.

68 For further details, see *Schwartze* (*supra* note 43), at 601.

69 The term "vernünftigerweise" (reasonably) was dismissed as foreign to the German code and consequently not used in the reform of the law of obligations in the BGB, see BT-Drs. 14/6040 of 14 May 2001, at 21; thus, the German legislature differed from the Community legislature in connection with Art. 2 II d of the Consumer Goods Directive (Directive 1999/44/EC, OJ L 171, at 12 et seq.).

simplify the conclusion of crossborder contracts and pursuit of crossborder claims), but rather are culturally and historically founded on a *bequeathed and sense-adding interpretation model* of a Europe that can be further pacified by continued legal integration.[74] This also applies to the EU's eastern enlargement, which turns out to be a triumph over the wartime division of Europe along ideological lines at Yalta in February 1945.

[70] *Netherlands Arbitration Institute* (Rotterdam), judgment of 15 October 2002, No. 2319, Text-No. 61 et seq. – *Rijn Blend*, with numerous further references (for availability see further down); for an analysis of case law, see also, *Veneziano*, Non Conformity of Goods in International Sales, [1997] RDAI 39 et seq. The UNIDROIT and its Centro aims at achieving a certain degree of uniformity in the application of the CISG by means of information, as it makes a compilation of national decisions and summaries in English language – including the above mentioned Netherlands decision – and a list of corresponding legal writings on the CISG and UNIDROIT principles obtainable in the UNILEX databank (available under www.unilex.info, current 17 September 2003). Reference should also be made to www.uncitral.org/english/clout, current 17 September 2003.

[71] On the dynamic role of the Court, see *Rösler* (*supra* note 18), [2000] ZRP 52, 54 et seq.; on the responsibility of Member States' courts of justice, see *Basedow*, Nationale Justiz und Europäisches Privatrecht, Heidelberg (D), 2003, at 6 et seq.

[72] On this, see *Rösler*, Großbritannien im Spannungsfeld europäischer Rechtskulturen, [2001] 100 ZVglRWiss 448, 458 et seq.

[73] Especially as concerns consumer protection, which has a social dimension, highlighted by *Rösler*, Europäische Integration durch Verbraucherschutz: Entwicklungsursachen und Beschränkungen, [2003] VuR 12 et seq.

[74] See above on the foundation of the EU; because of this maturity, the EU can now also have a constitution; on the link between basic rights of Union citizens and Community consumer protection, see *Rösler* (*supra* note 73), [2003] VuR 12, 18 et seq.

International and European Procedural Law

Corte di cassazione (I) (plenum) 29 January 2002, No. 1150

Brussels Convention[1] Art. 17 – Requirement of a writing – Insertion of clause in the general terms and conditions of one of the contracting parties – Usages in international trade – Legal jurisdiction

The requirement in Art. 17 of the Brussels Convention of 27 September 1968 that agreements prorogating jurisdiction to the courts of a Member State be in writing is not fulfilled by the mere insertion of the pertinent clause in the general terms and conditions written on the back side of a form of one of the contracting parties; express reference to the terms and conditions containing the clause conferring jurisdiction must be made on both sides of the signed contract.

With respect to the new wording of Art. 17 of the Brussels Convention, evidence of prorogation in international trade in a form which accords with usages in that trade of which the parties are or ought to have been aware cannot be tied to the simple use of form contracts or standard conditions when the insertion of a clause conferring jurisdiction is a fixed practice in these terms and conditions.

Extract from the decision: "(…) Con il primo mezzo di cassazione, la ricorrente denunzia l'erronea dichiarazione della giurisdizione italiana, in relazione all'art. 360, primo comma, n. 1, c.p.c.

La sentenza impugnata avrebbe statuito la giurisdizione del giudice italiano basandosi su una pronunzia di questa Corte,[2] emessa però in una controversia alla quale sarebbe stato applicabile il precedente testo novellato dell'art. 17, la cui portata sarebbe diversa da quella indicata dalla Corte fiorentina.

Invero, gli ordini di acquisto trasmessi alla società attrice recherebbero, stampate sul retro, le condizioni generali di acquisto predisposte dalla società francese. (…) In forza della clausola contenuta nell'art. 11 delle indicate condizioni, ed ai sensi dell'art. 17 della Conv. Bruxelles, nel caso *de quo* il difetto di proroga sarebbe stato innegabile, perché la clausola avrebbe risposto pienamente all'ulteriore requisito stabilito dal citato art. 17, rivestendo una forma ammessa dagli usi del commercio internazionale e che le parti conoscevano o avrebbero dovuto conoscere. In tale contesto, contrariamente a quanto ritenuto dalla Corte di Firenze, non sarebbe necessaria una consapevole accettazione del patto di proroga della giurisdizione da parte dell'altro contraente.

Come sarebbe emerso in corso di causa, il rapporto di fornitura tra le parti si sarebbe articolato mediante l'invio, da parte della convenuta, di vari ordinativi per prodotti di abbigliamento intimo, trasmessi dall'attuale ricorrente alla società italiana, attrice, su moduli *standard* predisposti dalla compratrice e recanti sul retro anche la citata clausola n. 11.

Il requisito formale prescritto dalla Conv. Bruxelles dovrebbe considerarsi realizzato, perché il patto derogatorio della giurisdizione sarebbe stato inserito in un contesto di effettiva possibilità di conoscenza. In ogni caso, l'art. 17 della Conv. affermerebbe la validità dei patti di proroga conclusi in una forma ammessa dagli usi del commercio internazionale e che le parti conoscevano o avrebbero dovuto conoscere. Ai fini della validità conterebbe soltanto la conoscenza (o la conoscibilità) della forma con cui la clausola è stata inserita nel contratto, non quella del suo contenuto concreto. (...)

Infine, sarebbe evidente, in base al semplice tenore letterale dei moduli trasmessi dalla società francese, la conoscibilità anche delle condizioni generali da parte dell'attrice, la quale avrebbe ricevuto ed eseguito gli ordinativi di merce senza eccepire alcunché in me-

[1] Convention of 27 September 1968 (OJ 1972 L 299, at 32), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, at 1 and – amended version – at 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, at 1) and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, at 1).

[2] V. sentenza Cass. Sez. Unite (I) 26. 4. 1995, n. 4625.