EUROPEAN CONTRACT LAW HARMONIZATION: AIMS AND TOOLS

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I. INTRODUCTION

It is well known that European integration is to a large extent a legal process. The amount of legislation enacted by the European Community (EC or Community) is immense. According to estimates, European Free Trade Association (EFTA) states acceding to the European Economic Area (EEA) will have to adopt ten to twenty thousand pages of existing EC legislation as part of the *acquis communautaire*.[1] However, since the EEA does not govern all of the subjects in which the EC is active, this is only a portion of Community legislation. The large body of EC legislation, together with EC court practice, is often characterized as a special EC legal order in the sense that it is separate from and placed above the legal orders of the Member States. The European

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1. *EC, EFTA Foreign Ministers Reach Accord on New European Economic Area*, [July-Dec.] INT'L TRADE REP. (BNA) No. 8, at 1528 (Oct. 23, 1991) (stating that EFTA states must adopt approximately 1,500 EC legislative acts).

Court of Justice has strongly emphasized this characterization.[2]

This extensive legal structure, in many respects properly called a legal order, could be expected to have profoundly changed the national legal orders of its Member States. However, looked at from the perspective of traditionally central areas of legal thought, such as contract and tort law, the EC legal order has affected national law remarkably little.[3] The methods an English lawyer, educated in the common law, and a German lawyer, searching for answers in the Bürgerliches Gesetzbuch, use to approach a contract law problem have not been brought much closer as a result of European integration. Within Europe, a large variety of different conceptual regimes exist for regulation of all areas of contract law. The basics of contract formation and fulfillment, and sanctions for contract breach are regulated in so many different ways that one's "first impression might be that the underlying doctrines are so fundamentally different that it makes no sense to compare the solutions."[4]

The EC has taken some small steps toward harmonization of contract law. The first goal of this paper is to present the current state of EC contract law harmonization: the types of EC harmonization measures that have affected European contract law and those that are currently being prepared. Much of the pressure towards harmonization within the EC comes from the field of consumer law, while more general harmonization efforts are discussed mostly on an

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2. The Court used this characterization when it considered whether the original EEA agreement regarding court organization conflicted with EC law. The Court was evaluating provisions of the agreement based on the idea that the EC Court and the EEA Court would apply European law identically. However, according to the EC Court, this could not be presupposed, as the basic tasks of the Courts were different: the EEA Court merely had to "ensure the sound operation of rules on free trade and competition under an international treaty," but the EC Court had a larger goal of "secur[ing] observance of a particular legal order and ... foster[ing] its development." Opinion 1/91, RE: Draft Treaty on a European Economic Area, 1 C.M.L.R. 245, 268 (1992), 31 I.L.M. 300 (1992). The EEC rules on free trade and competition "have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement." *Id.*

3. *Cf.* Joseph Lookofsky, *Unionens Tilvand - i Kontrakt og Delikt*, 74 JURISTEN 109, 109-117 (1992). Lookofsky, on the basis of a short survey of the measures mentioned in Part II of this paper, claims that the EC is developing a strong property law (private law) union when compared with the weak property law union of the United States. This interesting claim does not, however, take into account the fact that the general legal base of the United States is much more uniform than in Europe.

4. KONRAD ZWEIGERT AND HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, VOLUME II: THE INSTITUTIONS OF PRIVATE LAW 200 (Tony Weir trans., 2d ed. 1987). Despite the strong theoretical differences between the various European contractual regimes, the authors point out that the practical results of the rules are often the same. *Id.* at 201.

informal level.

In order to reach a better understanding of the subject, the material is analyzed with the help of a conceptual apparatus focusing on the possible aims of harmonization. I will argue that it is fruitful to distinguish at least three types of harmonization: "legal-technical" harmonization, aimed at the facilitation of contract-making between parties from different jurisdictions; "regulatory" or "political" harmonization, aimed at achieving equal conditions of competition and a harmonized level of protection in the national markets; and finally "ideological" harmonization, aimed at promoting a common European identity. Identifying the aim of harmonization is important because the available tools of harmonization will vary according to its goal. These concepts provide a basis for comment on the future development of European contract law.

II. THE PRESENT SITUATION

A. *European Community Legislation*

The legislative activities of the EC have not yet led to any important changes in the core of Member State contract law. Some legislative measures affecting special problems or special contract types have been enacted, but these measures do not affect the general principles of contract law to any significant extent.[5] An example of this type of harmonization measure is the EC directive

5. In the context of directives affecting contractual relations, the contractual implications of EC competition law should also be mentioned. This large bulk of law directly affects the validity of various contracts restricting competition. *See, e.g.*, CHRISTOPHER BELLAMY AND GRAHAM CHILD, COMMON MARKET LAW OF COMPETITION 444-62 (3d ed. 1987); HANS STENBERG, STUDIER I EG-RATT (1974); PIRKKO ERÄMETSÄ, SOPIMUKSET EY-ALUEELLA (1992). Some regulations based on competition law concerning exemption by category, such as the Regulation on the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements, the corresponding Regulation Concerning Franchise Agreements, and the Regulation on the Selective Distribution of Motor Vehicles, contain contractual provisions preventing, for example, the use of discriminatory clauses. Commission Regulation 1983/83, 1983 O.J. (L 173) 1 (exclusive distribution agreements); Commission Regulation 4087/88, 1988 O.J. (L 359) 46 (franchise agreements); Commission Regulation 123/85, 1985 O.J. (L 15) 16 (selective motor vehicle distribution). *See also* LUDWIG KRÄMER, EEC CONSUMER LAW 181-86 (1986) (mentioning other examples of EC Competition Law interaction with Member State contract law). However, although the contract law effects of competition law may be of practical importance, they seem rather peripheral to the core areas of contract law. I will, therefore, not analyze them further in this context.

regulating the contractual relation between a commercial agent and his principal.[6] The directive contains only a few general provisions on the rights and obligations of the parties, a chapter on the remuneration of the agent and a chapter on the conclusion and termination of the agency contract. It is said to represent a very low degree of harmonization, which is explained by the existing disparities in the law of the Member States.[7]

In consumer legislation, the EC has adopted several directives that are directly relevant to contract law. The most important of these from a contract law perspective is probably the Directive on Doorstep Selling.[8] This Directive gives consumers a right of cancellation in certain doorstep contracts within a cooling-off period of seven days; it directly affects the rules on formation of contracts, although within a very limited sphere of application.[9] Other recent directives on consumer protection have also affected contract law, although in a somewhat less significant manner.

The Directive on Consumer Credit contains rules on information to be given in the precontractual stage, as well as rules on the obligatory use of written form.[10] This Directive materially affects contract law through articles on the repossession of goods, the right of the consumer to pay in advance, defenses against third party creditors and remedies against these creditors. However, the Directive sets only minimum standards that are general and imprecise, and the level of harmonization achieved is therefore not very high.[11] The recent Directive on Package Travel, Package Holidays, and Package Tours should also be mentioned in this context.[12] The contract law provisions of this Directive concerning the form of the contract, price revision, withdrawal and cancellation,

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6. Council Directive 86/653 of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L 382) 17.

7. *See* Ole Lando, *Principles of European Contract Law*, in LIBER MEMORALIS FRANCOIS LAURENT 1910-1987 555, 560 (John Erauw et al. eds., 1989). Lando states that the first version of the Directive was criticized because it was prepared on the basis of the German law of the Handelsvertreter and thus was alien to English lawyers.

8. Council Directive 85/577, 1985 O.J. (L 372) 31.

9. *Id.* The very limited scope of application is criticized by Krämer. KRÄMER, *supra* note 5, at 150. The idea of a cooling-off period will receive wider relevance if the ongoing work on a Directive on the protection of consumers in respect of contracts negotiated at a distance leads to results.

10. Council Directive 87/102, 1987 O.J. (L 42) 48, *amended by* 90/88, 1990 O.J. (L 61) 14.

11. *Id.* art. 15.

12. Council Directive 90/314, 1990 O.J. (L 158) 59.

and damages, are partly rather specific and partly relatively obscure.[13] Therefore, one should not overestimate its impact on consumer contract law more generally. Finally, the famous Products Liability Directive[14] is relevant from a contractual point of view because it forbids clauses limiting or excluding liability.[15]

These consumer law directives affect details that are not essential to national contract law structures, and therefore pose no threat to the survival of national traditions of contract law. There is, however, a recently issued directive that, judged from a narrow national viewpoint, looks more disturbing: the Directive on Unfair Terms in Consumer Contracts.

Work on harmonized regulation of unfair consumer contract terms has been in progress since the 1970's.[16] It has advanced slowly, as views have varied on whether a directive on this subject would be desirable. Since all of the Member States had some legislation concerning unfair contracts and sufficient practical experience concerning this legislation was available towards the end of the 1980's,[17] the time was considered ripe for moving the work further ahead. A proposal was published in 1990.[18] After having received the opinions of the European Parliament and the Economic and Social Committee, the Commission presented a new Proposal for a Council Directive on Unfair Terms in Consumer Contracts in 1992.[19] The Directive was finally adopted in April 1993.[20]

The scope of the Directive is to harmonize the national laws of the

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13. *Id.* arts. 4, 5.

14. Council Directive 85/374, 1985 O.J. (L 210) 29.

15. *Id.* art. 12. The Products Liability Directive only concerns goods. *Id.* art. 29. A directive concerning the liability of suppliers of services is being prepared as well. *See* COM(90)482 final.

16. *See* The Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy of 14 April 1975, 1975 O.J. (C 92) 1, 18-19, 24-25. The Council of Europe was also engaged in this work at this stage. The Council of Europe's Resolution 76/47 on Unfair Terms in Consumer Contracts and on Appropriate Method of Control, adopted by the Committee of Ministers November 16, 1976, was taken as one starting point for the work in the EC. *See* EIKE VON HIPPEL, VERBRAUCHERSCHUTZ 120 (1986). On further development, *see* KRÄMER, *supra* note 5, at 178-186.

17. *See* EWOUD HONDIUS, UNFAIR TERMS IN CONSUMER CONTRACTS i (1987).

18. Commission Proposal of 28 September 1990 for a Council Directive on Unfair Terms in Consumer Contracts, 1990 O.J. (C 243) 2.

19. Amended Proposal for a Council Directive on Unfair Terms in Consumer Contracts, COM(92) 66 final at 1 [hereinafter Amended Council Proposal].

20. Council Directive 93/13, 1993 O.J. (L 95) 29.

Member States relating to unfair terms and to make it the responsibility of these states to ensure that standardized[21] consumer contracts do not contain such terms. The Member States are obliged to use administrative law as well as contract law measures to achieve this end. They must make unfair terms legally void and create adequate and effective controls to prohibit their use.[22] The material definitions of unfairness on which these measures are based are gathered in two general clauses.[23] These clauses are confirmed by an Annex containing an indicative and non-exhaustive list of terms that may be regarded as unfair.[24]

Harmonization of the control of unfair terms in consumer contracts does not necessarily imply harmonization of material contract law within the EC. It is a first step, limited to the sphere of consumer law. A directive of this kind, however, would nevertheless increase the pressure towards harmonization of contract law in general. To some extent, any control of unfair terms is always related to the material background rules of contract law in the country in question.[25] Considering the extensive variation in the background rules within the EC today, the practical result of a common control mechanism necessarily would be different in different countries. For this reason, Ewoud Hondius has termed the varying national contract law a "time-bomb," in the context of controlling unfair contract terms.[26] As a consequence of the harmonization of fairness control, the pressure towards a wider harmonization of material contract rules must necessarily increase.

This pressure towards wider harmonization is evidenced by the proposed Directive, especially its earlier version. The concrete examples of unfair clauses contained in the Annex have direct implications for background contract law.

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21. In the adopted version of the Directive its scope of application was limited to contractual terms "which has not been individually negotiated." *Id.* art. 3. Another important delimitation of the scope of the Directive which was introduced in the Common Position was the exclusion of "the definition of the main subject-matter of the contract" and "the adequacy of the price and remuneration." *Id.* art. 4(2).

22. *Id.* arts. 6, 7.

23. *Id.* arts. 3, 4. The proposal distinguishes between contracts which have and those which have not been individually negotiated. In both types of contracts unfair terms are forbidden; the definitions of unfairness differ in order to make the hurdle for intervention lower in case of contracts which have not been individually negotiated.

24. *Id.* art. 3(3).

25. NORBERT REICH, FÖRDERUNG UND SCHUTZ DIFFUSER INTERESSEN DURCH DIE EUROPÄISCHEN 179 (1987).

26. HONDIUS, *supra* note 17, at 246.

In the 1992 proposal, the provisions concerning guarantees had been moved to the body of the Directive, because the "aim of the provisions in question is to give consumers definite rights regarding guarantees for goods and services."[27] According to Article 6 of the proposal, consumers who have been sold defective goods should have a choice of the remedies of reimbursement or reduction of price, or replacement or repair of the goods, as well as compensation for damage caused by the defect.[28] The Article presupposes that these rights will be recognized in national legislation.[29] The Directive thus would require some harmonization of the law of consumer sales and consumer services.[30] The Article was removed from the adopted version of the Directive, and the Council agreed to refer the question of harmonization of guarantees to a specific directive.

The issuing of a directive concerning unfair contracts will also give the European Court of Justice jurisdiction in these cases. The courts of last instance of the Member States will be obliged to refer cases concerning adjustment of unfair consumer contracts to the EC Court and other lower Member State courts will have the right to do so. This obligation is limited by only two factors: the doctrine of *acte clair*; and the rule that courts may refer only questions of law to the Court of Justice, not questions of fact.[31] As there obviously will be many cases in which the doctrine of *acte clair* does not apply (the text of a general clause seldom suggests interpretations as to which there is no reasonable doubt, and the clarifying effect of precedent is often limited in such cases), and because the line between interpretation of law and application of it to the facts of the particular case is impossible to fix in a case of this type,[32] a large portion of the cases concerning unfair contract terms may have to be referred to the Court of Justice. The Court of Justice would then assume an important position as a harmonizer of Member State practices concerning unfair consumer contract terms

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27. Amended Council Proposal, *supra* note 19, art. 6.

28. *Id.*

29. *Id.*

30. *See* Peter Hommelhoff, *Zivilrecht unter dem Einfluss europäischer Rechtsangleichung* 192 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 71, 84 (1992) (concerning the Directive's impact on German law).

31. *See* PAUL JOAN GEORGE KAPTEYN AND P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITY 325-30 (2d ed. 1990). The doctrine of *acte clair* allows Member State courts to decide an issue without reference to the Court of Justice, provided that the law is clear on the subject. *Id.*

32. A court may only refer matters of law, not of fact to the Court of Justice. *Id.* at 315-22.

and would certainly gain influence over the development of the material background rules on these contracts. This influence may eventually reach far into the established general rules and doctrines of national contract law beyond the consumer realm.[33] It is interesting to note that this aspect is hardly touched upon in the debate concerning the proposed Directive.[34]

Even though most of the consumer law measures of the EC are only of limited significance to Member State law, pressure towards a wider harmonization of at least parts of consumer contract law are apparently accumulating. As the separation of consumer contract law from general contract law in most countries is not very thorough, these pressures will also indirectly affect the development of general contract law.

B. Toward Harmonized Principles of Contract Law

In the European literature on Comparative Law, discussion concerning, or even propagandizing for, the need for harmonization of European private law has persisted for quite some time.[35] This debate has provided the main impetus for the work on harmonization of general contract law in Europe.

The attempted harmonization has focused on the general principles of contract law. On a European level, it has been performed by a group of lawyers called the Commission on European Contract Law (CECL) which was

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33. It should be noted that, according to the practice of the European Court of Justice, even previously adopted national law shall be interpreted, if possible, in light of the wording and the purpose of a subsequently enacted directive. *See, e.g.*, Case 106/89, Marleasing S.A. v. La Comercial Internacional de Alimentación S.A., 1990 E.C.R. 4135, 1 C.M.L.R. 305 (1992). In *Marleasing*, the Court of Justice declared certain sections of the Spanish Civil Code concerning nullification of contract inapplicable to the formation of companies. Although the prevailing view in Spanish legal literature was that these provisions should apply by analogy to the formation of companies, the Court viewed the question of nullity of public limited companies to be exhaustively regulated in the First Company Law Directive, thereby displacing previous Spanish interpretation of the Code.

34. The Economic and Social Committee of the EC, in its opinion on the proposal, stated that it had "considered the major role to be assumed by the Court of Justice of the European Communities in refining the Community notion of unfairness in preliminary rulings requested by national Courts." Opinion on the Proposal for a Council Directive on Unfair Terms in Consumer Contracts, 1991 O.J. (C 159) 34, 35. This short statement, however, was not developed further, and it appears to function largely as an argument against a proposed European body for the monitoring of unfair terms.

35. *See, e.g.*, NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE (Mauro Cappelletti ed., 1978); Hein Kötz, *Gemeineuropäisches Zivilrecht, in* FESTSCHRIFT FÜR KONRAD ZWEIGERT ZUM 70 GEBURTSTAG 481, 481-500 (1981); Ernst A. Kramer, *Europäische Privatrechtsvereinheitlichung*, 110 JBL 477, 479 (1988).

established in 1980.[36] The CECL is informal and has not been appointed by any government or interest group, but it has been subsidized by the EC.[37] The CECL's aim is to draft a collection of General Principles of Contract Law (Principles) for the EC countries. Thus far, the CECL has concentrated on drafting principles concerning performance of contracts and the remedies for non-performance.[38]

The CECL has concluded that the time is not yet ripe for a Uniform European Code of Obligations. Therefore, the primary purposes of the Principles will be to provide a common legal environment for the interpretation of the existing, but fragmented and specialized body of uniform law, to function as a guideline for national legislators, and to serve arbitrators developing a European *lex mercatoria*.[39]

Beyond the informal work of this Commission, the European Parliament has also addressed this question on a formal level. In 1989, the Parliament adopted a resolution on action to harmonize the private law of the Member States.[40] In this resolution, the Parliament emphasized that "the most effective way of carrying out harmonization with a view to meeting the Community's legal requirements in the area of private law is to unify major branches of that law," such as contract law. The goal of the Parliament's resolution is to draft a common European Code of Private Law. The resolution noted, however, that

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36. On a international level, mention must be made of the work on a Progressive Codification of International Trade Law, later renamed Elaboration of Principles of International Commercial Contracts, within UNIDROIT (The International Institute for the Unification of Private Law). *See* Michael J. Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Trade Law*, 27 INT'L & COMP. L. Q. 413-41 (1978) [hereinafter Bonell I]; Michael J. Bonell, *Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge*, *in* 1992 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECT 274-89 (Bernhard Aubin et al. eds., 1992) [hereinafter Bonell II]; Kötz, *supra* note 35, at 492; Ole Lando, *A Contract Law for Europe*, INT'L BUS. LAW., Jan. 1985, at 17; Kramer, *supra* note 35, at 479; and Lando, *supra* note 7, at 562-64. The reasons why this work does not preclude a separate work on EC principles of contract law are described by Lando, *supra* note 7, at 563.

37. Ole Lando, *Principles of European Contract Law - an Alternative or a Precursor of European Legislation*, 1992 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 261, 268 (Bernhard Aubin et al. eds., 1992).

38. Ole Lando, *The Techniques of Harmonization and Remedies for Non-performance of Contracts*, *in* THE BALTIC SEA - A LEGAL INLAND SEA? 39 (1991).

39. Lando, *supra* note 7, at 560-2.

40. 1989 O.J. (C 158) 400. See the report drawn up on behalf of the Committee on Legal Affairs and Citizens' Rights of the European Parliament for more information. Report on Action to Bring into Line the Private Law of the Member States, EUR. PARL. DOC. A2-157/89.

each Member State must decide whether to participate in this undertaking.[41] Thus, the Parliament's resolution will probably have no practical significance at all. It is significant, however, as an illustration that ideas of harmonized codification are expressed and taken seriously within the EC.

The Parliament's resolution emphasized the need for comparative legal studies in order to achieve the goal of creating a common European Code.[42] Most general proposals to harmonize contract law in Europe have come from legal scholars, and legal literature strongly emphasizes the role of comparative legal research as a means for harmonizing European private law.[43] The drafting of a "Restatement of European Law," *inter alia*, in the field of contract law, is presented as a task for legal science.[44] The progress towards harmonization should be supported by a European legal education and textbooks on common European private law.[45]

C. *The CISG as a Possible Basis of Harmonization*

The development of contract law within the EC is, of course, not isolated from international experience. Measures on harmonization of international contract law may have considerable effects on European contract law. The most important current international legislation on contracts is the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna in 1981 (CISG or Convention).[46]

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41. 1989 O.J. (C 158) 400.

42. *Id.*

43. *See, e.g.*, Winfried Tilmann, *EG-Kodifikation des wirtschaftsnahen Zivilrechts*, 1991 EUROPARECHT 379, 379-81 (1991).

44. *See* Lando, *supra* note 36, at 18. Such a "Restatement," however, would not be comparable to American Restatements because the large variations among the European legal systems make it impossible to claim that a Restatement would encompass existing European law. *See* Lando, *supra* note 7, at 564.

45. *See* Kötz, *supra* note 35, at 498; Jan Kropholler, *Die Wissenschaft als Quelle der Internationalen Rechtsvereinheitlichung*, 85 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 143, 155-163 (1986); Kramer, *supra* note 35, at 488-89.

46. United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, UN Doc. A/Conf. 97/18, Annex 1, *reprinted in* 19 I.L.M. 668 (1980). [hereinafter CISG]. For records of the conference, *see* United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meeting of the Main Committee, Official Records, U.N. Doc. A/Conf. 97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter Conference Documents].

One may ask whether the Convention, which will regulate the law on international contracts between parties in the EC Member States,[47] will more generally contribute to the harmonization of European contract law. This question is justified by the scope of the Convention's coverage of private contract law. The Convention is not directed toward peripheral areas of contract law, like the EC directives discussed earlier, but instead is directed at the very core of the regulation of contract. Just as many regard the law of sales as a model for general contract law in national law,[48] the Convention has direct relevance to the process of harmonization of the principles of general contract law in the international context.

The Convention may promote harmonization on two different levels. First, the Convention in the international setting might function as the needed model for a broad international contract law. Second, the Convention could contribute to harmonization in a deeper sense by influencing purely national contract law.

Article 7(2) of the CISG expressly provides that questions concerning matters governed by the Convention that are not expressly settled therein "are to be settled in conformity with the general principles on which it is based...."[49] This provision, which is designed to counteract disharmonies that inevitably arise when an international act is implanted in national law,[50] demonstrates the drafters' belief that the CISG would embody, to some extent, general contractual principles applicable outside of the Convention's scope.[51] It would be quite

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47. Among the over 30 countries which have already adopted the Convention are several EC Member States, such as Denmark, France, Germany, Italy, the Netherlands, and Spain, and future EEA states like Austria, Finland, Norway, Sweden, and Switzerland. Multilateral Treaties Deposited with the Secretary General, update as of Feb. 12, 1992, U.N. Doc. ST/LEG/SER. E/9 (1992).

48. Lando, *supra* note 7, at 565.

49. CISG, *supra* note 46, art. 7(2).

50. *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 125-25 (1982); Jan Hellner, *Gap Filling by Analogy, Article 7 of the U.N. Sales Convention in its Historical Context*, *in* FESTSKRIFT TILL LARS HJERNER (STUDIES IN INTERNATIONAL LAW) 219, 221 (1990).

51. *See, e.g.*, John O. Honnold, *Uniform Words and Uniform Application, the 1980 Sales Convention and International Juridical Practice*, *in* EINHEITLICHES KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 115, 139-40 (Peter Schlechtriem ed., 1987). Honnold mentions, on the basis of national reports from different countries, as examples of such principles: the duty of loyalty to the other party, the duty to cooperate, the duty to mitigate damages, the duty to act in accordance with standards of a reasonable or businesslike person, the obligation not to contradict a representation on which the other party relied, the protection of reliance in general, the foreseeability of legal

natural to ask whether these principles, derived from CISG, could be generalized into a common basis for the development of international contract law. John Honnold believes that the Convention "already is beginning to serve an even wider need in laying foundations for a cosmopolitan approach to legal methodology as a tool for strengthening structures for international legal order."[52]

That the Convention could lay a foundation for wider attempts at harmonization is self-evident, but the extent to which the CISG may influence more concrete rules of general contract law is less clear at this stage. Courts are, of course, free to apply by analogy the principles embodied in the CISG to transactions that are not within its scope. Some provisions of the CISG are clearly more appropriate to use by analogy outside the sphere of the law of sales than others. For example, Articles 49 and 64 both state that fundamental breach of contract is a prerequisite of avoidance, a provision which could be applied in any contractual setting. But the process of broadening the application of the provisions of the Convention must obviously be selective.

The Nordic experience demonstrates the potential of the CISG to promote harmonization both in creating new international contract laws and in influencing the development of national contract law. The new Nordic legislation on the sale of goods was prepared by a joint Nordic working group that investigated the possibility of drafting a general sales act containing rules on international sales derived from CISG, as well as rules on domestic sales. However, for various reasons, the countries involved (except Norway) decided to adopt the Convention and to draft a separate act on the sale of goods for domestic and Nordic sales. Although this differentiated solution was adopted, the content and the structure of CISG was taken into account when the national sales acts were drafted.[53] The direct influence of the Convention is thus seen in many central points of the Nordic acts on sale of goods. A similar development is, of course, possible in

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consequences of breach of contract and the striving for preservation of the contract, among others. Many of these principles are also mentioned by M.J. Bonell in his commentary to Article 7(2) of the CISG. *See* C.M. BIANCA AND M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 80-88 (1987).

52. Honnold, *supra* note 51, at 146.

53. *See* Report of the Nordic Working Group on Sales Legislation, Nordisk utredningsserie (NU) 1984:5, at 158 [hereinafter NU 1984:5].

other countries as well.[54] There are usually no insurmountable borderlines between national and international contract law.

The impact of the CISG on EC contract law may therefore be twofold. First, the CISG already regulates international sales of goods between many of the Member States, as well as between Member States and states outside the Community.[55] These rules may, to some extent, be applied outside the scope of the sale of goods by analogy to other types of international contracts. Second, the CISG may influence the development of the internal principles of contract law in the Member States. For example, the rules of the Convention have already influenced the work of the aforementioned Commission on European Contract Law. Adoption of Convention rules has, however, been selective: the Commission has only adopted CISG provisions when it has found them generally suitable for all, or at least many, types of contract.[56]

III. Different Levels of Harmonization

Harmonization of contract law, as well as harmonization of private law more generally, should not be analyzed as one coherent phenomenon. The process can have various objectives, and concern various types of rules. These are reflected in the degree of harmonization attempted and the tools used in the harmonization procedure. As mentioned earlier, three types of harmonization can be identified: "legal-technical;" "regulatory;" and "ideological."

A. Legal-Technical Harmonization

Perhaps the first objective of efforts to harmonize international contract law is to lower transaction costs of trade by placing parties on equal ground with

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54. An example of an international agreement having a similar type of influence preceding the CISG is the Yugoslav codification of the law of obligations in 1978 which was strongly influenced by the 1964 Conventions on international sales (ULIS and ULFIS). *See* Stoljan Cigoj, *Das jugoslawische Schuldrecht unter dem Einfluss der Vereinheitlichungsbestrebungen auf dem Gebiet des Warenkaufs*, 1987 Zeitschrift für Rechtsvergleichung 97, 97-106 (1987).

55. CISG, *supra* note 46, art. 1.

56. Lando, *supra* note 7, at 565. The CISG has also been considered an important point of orientation in the UNIDROIT work on Elaboration of Principles of International Commercial Contracts. *See* Bonell, *supra* note 36, at 280.

common rules.[57] Harmonized contract laws would simplify the arrangement of international transactions and, through this cost savings, lead to an increase in international trade.[58] Some experts consider the disparities of contract law as "a considerable impediment to a more intensive exchange of goods and services."[59] Others, however, are not prepared to acknowledge such an important role for contract law in this respect.[60] Whichever theory is correct, the former argument is certainly the driving force behind the effort to harmonize international contract law.

The main object of harmonization efforts aimed at reducing legal impediments to international trade is the more technical, often non-mandatory rules of contract law concerning problems such as the making and fulfillment of contracts and the remedies for breach of contract. Although these concrete rules of contract law naturally have ideological and political aspects, they are predominantly legal-technical. Harmonization on this level could therefore be called legal-technical harmonization, despite the danger of underestimating the important ideological and political elements in seemingly "technical" legislation.

Legal-technical harmonization must aim at a high level of unification in the affected areas of law. If the parties to a contract are led to believe that contract laws are similar, they will stumble on a hidden pitfall when those laws are actually divergent. One only need consider a situation where divergences exist in the rules on giving notice of breach of contract in order to realize how risky such variations may be. Thus, it is vital to legal-technical harmonization that the harmonized norms be applied in a uniform manner and measures for

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57. Hein Kötz, *Alternativen zur legislatorischen Rechtsvereinheitlichung*, 1992 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 215, 216 (Bernhard Aubin et al. eds., 1992).

58. This is also stressed in connection with the harmonization of Nordic law. The Nordic Working Group on Sales Legislation has stressed the obvious fact that the existence of uniform Nordic acts on the sale of goods will eliminate or diminish the need for deciding questions concerning international private law in Nordic sales, which will make contract negotiations easier and give the parties better opportunities to foresee their legal position. These advantages were considered especially important for small and middle-sized enterprises with no legal expertise. NU 1984:5, *supra* note 53, at 159.

59. Lando, *supra* note 7, at 555.

60. *See* Otto Kahn-Freund, *Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 137, 141 (Mauro Cappelletti ed., 1978) ("[H]armonization ... of the general principles of the law of contract ... is not needed for a functioning and successful economic community.").

securing a unified application of harmonized norms have therefore been created.[61] The hope of unified application, however, is difficult to attain in practice.[62]

The characterization of this type of harmonization as legal-technical may, to some extent, explain why these measures can often succeed on an international level. The low political/ideological content of these norms allows acceptance over a broad range of underlying social ideologies. As seen previously, the most important piece of legislation of this kind is the international CISG. The creation of the CISG has, of course, not eliminated work on similar lines within the EC, such as that done by the Commission on European Contract Law. One of the arguments for drafting a special European code, however, has been the desire to go beyond the borders of legal-technical regulation and to take into account public policy concerns.[63]

In sum, the tools required for harmonization on this level are primarily legislation concerning international contracts, such as the CISG. As the European example has shown, legal science may also play an important role. Discursive contacts between dogmatists in the countries involved are important from the perspective of harmonization not only to encourage a uniform interpretation of the uniform laws, but also to develop new common legal principles in formerly unregulated areas.[64] Finally, a very important tool of practical harmonization is the creation of standard conditions for use in contract-making. This holds true in the European context, where the contract forms elaborated by the Economic Commission for Europe are well-known and

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61. For example, the UNCITRAL Secretariat has established a system for collecting and disseminating information on court decisions and arbitral awards concerning UNCITRAL texts, including the CISG. The system is called "CLOUT" standing for Case Law on UNCITRAL texts.

62. Compare the very divergent views on how the exemption rule in Article 79 of the CISG should be applied in the case of defective goods. The British delegate to the Vienna conference recommended a very narrow interpretation of the exemption. Conference Documents, *supra* note 46, Summary Records, at ¶¶ 10-15. A much wider scope is recommended by the German author Huber. Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens für internationale Warenkaufverträge*, 1979 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 413, 496 ff. (1979). The differing views are obviously connected with different national principles in the said countries.

63. Lando, *supra* note 7, at 563.

64. The reception of many German theories in Nordic, especially Finnish, law at the beginning of this century is a good example of such a process. *See* LARS BJÖRNE, OIKEUSJÄRJESTELMÄN KEHITYKSESTÄ (2d ed. 1986).

frequently used.[65]

B. Regulatory Harmonization

Contract law does not contain only legal-technical norms. To an increasing extent, there are also intervening norms aimed at the promotion of fair contractual relations and other societal interests in the contractual context.[66] These vary from general clauses giving a court dealing with a contractual dispute the opportunity to disregard unfair terms in a contract, to complex systems of regulating fairness of standard contracts occasionally with special supervising authorities involved. Intervening regulations of this kind are generally directed at domestic contractual relations. From the economic-practical viewpoint of contractual relations between enterprises in different countries, a harmonization of this type of regulation therefore does not seem very urgent. However, viewed from the perspective of European integration, the need for harmonization on a regulatory level is clear.

In the process of creating an integrated market, special interest is attached precisely to these intervening regulations affecting the functioning of the market. It is well known that the harmonization of law within the EC predominantly concerns intervening regulations, because these regulations function as barriers to trade. The aim of harmonization is to create equal conditions of competition for enterprises in the different countries by removing these barriers. The EC legislation on contract law is primarily based on this aim.[67] This type of

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65. For example, the most utilized forms ECE 188 and ECE 188A, have heavily influenced the Nordic General Conditions for the Supply of Machines and other Mechanical and Electric Equipment within and between Denmark, Finland, Norway, and Sweden, agreed to by the Nordic metal industry associations.

66. Håkan Hydén distinguishes three main types of legal regulations in modern law. He mentions norms which regulate planned systems, such as the educational system, norms in self-regulating systems like the market, and norms within intervening systems which aim at influencing the self-regulating systems to eliminate or delimit their negative external effects, like, for example, the system of consumer protection. The legal-technical norms of contract law mentioned earlier are typical norms in a self-regulating system aimed at facilitating the work of the system. HÅKAN HYDÉN, RÄTTENS SAMHÄLLELIGA FUNKTIONER (1978).

67. The preamble of the Amended Council Proposal, *supra* note 19, notes that "[w]hereas national laws of Member States relating to the terms of contract applicable between the seller of goods or services, on the one hand, and the purchaser of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other Member States...." *Id.* This is not to say that social considerations do

harmonization is here termed regulatory harmonization. Since intervening legislation is more closely connected with the political sphere of society, this type of harmonization could also be termed political harmonization.

Because the intervening norms have strong political content, they often are specific, short-lived and without deeper connections to the basic structures of the legal order. This may be one explanation for EC law's relatively minimal effect on the core areas of Member State legal orders. In most cases, the objectives of regulatory harmonization of these norms does not even require thorough harmonization. Harmonization which strives at a rough equivalence between the respective national laws is often sufficient with regard to creating equal conditions of competition.[68] Differences in legal details are seldom of such importance that they would create competitive barriers. Thus, most of the EC directives in the field of consumer law, with the exception of the important Products Liability Directive, are minimum directives expressly allowing the Member States to adopt stricter rules more favorable to the consumer than those of the Directive. The goal of regulatory harmonization, European integration, need not result in any common private law of Europe.

Legal science cannot create intervening norms. The primary tools of regulatory harmonization are national or international legislation. As intervening norms often are general clauses administered by special administrative and judicial bodies, organizational contacts between these bodies may also promote harmonization in practice.[69]

C. *Ideological Harmonization*

The objectives of harmonization described earlier are practical in nature. Both legal-technical and regulatory harmonization seek to create an environment conducive to international trade. Legal-technical harmonization lowers barriers to creating contracts between individuals. Regulatory harmonization seeks to lower barriers to competitive entry in a variety of marketplaces. The third type of harmonization, ideological, seeks to attain a completely different goal: the creation of a common identity between the peoples of the various states. Once

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not influence the legislation of the EC as well. *Cf.* REICH, *supra* note 25, at 293 ff. (noting development towards a "Social Europe").

68. A different situation is presented by directly product-related standards. This article, however, only analyzes harmonization in the field of contract law.

69. The intense and partially institutionalized cooperation between the Nordic Consumer Ombudsmen is a good example of such a process.

one begins to consider a common European legal order in this more advanced sense, referring to the system of law, the conceptualization of and the mode of legal reasoning, the primary aims are not necessarily practical.

It is interesting to note how thorough societal upheavals have often historically resulted in new civil codes. The French revolution produced the Code Napoleon (Code Civil), and the (first) unification of Germany was symbolized in law through the general codification of 1896, the Bürgerliches Gesetzbuch. In the so-called socialist countries, as well, new civil codes were produced as important symbols of societal change. This symbolism of a common legal order has also been emphasized in the work promoting Nordic harmonization of private law. The harmonization of law has been viewed as a way to strengthen the general unity of the Nordic countries, a goal which the Nordic states believe is of ideological and political value in itself.[70]

Against this background, one would expect the process of European integration, moving towards the creation of a European nation, to spark demand for a common European Civil Code. As noted earlier, this idea has been expressed in many quarters and even by the European Parliament. In the debate concerning harmonization of private law, emphasis is placed on harmonization's effect in strengthening the European identity. Some state that harmonization on this level would mean a qualitative jump from an economic community to a legal community. The overall importance of such a jump is related to the fact that private law is one of the central components of the European culture.[71]

Harmonization aimed at strengthening the European identity, which here will be termed ideological harmonization, is the most far-reaching type of harmonization. It achieves its goals not only by requiring identical content of practically relevant norms, but also by requiring identical conceptual and structural solutions. The norms must not only have the same content, but also look the same and embody the same policy as well. For obvious reasons, the primary tool for achieving such a goal must be legislation. No one else but a legislator can create a new comprehensive civil code or even a simple contracts code.

Even such a drastic step as a European Civil Code would not necessarily bring about a common European contract law. The deep structure of contractual philosophy is affected to a very limited extent by explicit legislation. The legislator cannot effectively bind the development of legal ideology because

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70. The goal of Nordic unity is stated even in the preparatory works of such technical legislation as that concerning limited share companies. *See* Kommittébetänkande Doc. 1969:A20, at 49.

71. *See* Kramer, *supra* note 35, at 487.

legislation is viewed and interpreted through the lens of traditional contractual theory. Changes in contractual theory occur slowly and primarily on the basis of the development of legal science. Harmonization of contract law on this level always requires increased discursive contacts between representatives of legal science in the countries involved as well.

IV. SUMMARY AND PERSPECTIVES

The analysis summarized in Table 1 shows the types of harmonization ordered by their effects on national contract law. This conceptual scheme clarifies the purposes of efforts to harmonize European contract law.

As previously discussed, most of the contract legislation of the European Community creates regulatory harmonization. The intervening norms on consumer contracts are harmonized in order to achieve equal conditions of competition throughout the Community. As new projects are continuously taken up on the Community agenda, the process of harmonization on this level will probably continue, affecting an ever-growing area of problems and focusing on increasingly central questions of consumer contract law. Crucial in this respect is the Directive on Unfair Terms in Consumer Contracts. This Directive will necessarily exert pressure towards a harmonization of material areas of consumer contract law in addition to its effect on conditions of competition.

The growing bulk of EC consumer contract legislation will also strengthen the role of the European Court of Justice in the development of European contract law. The general clause concerning unfair contract terms gives the Court power to interfere in rather detailed questions of contract law[72] and thereby punctually to enforce a relatively precise harmonization of consumer contract law.

Still, despite the occasional unification in detail, a harmonization process

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72. For example, in a recent case concerning misleading advertising, the Court of Justice decided such detailed problems as the understanding of the term "new cars" and, more fundamentally, created a requirement that actual misleading must be shown. Case C-373/90, Procurer de la Republique v. X, Jan. 16, 1992, case not yet reported. With regard to the description "new cars," the Court noted that the advertising in question could not be considered misleading simply on the grounds that these cars were registered before being imported into France. According to the Court, putting the cars into circulation, not registering them, is what determines whether the cars are new. *Id.* Addressing advertising on the lower price of the cars, the Court observed that this could be considered misleading only if it was demonstrated that a significant number of consumers to which the advertisement was addressed made their decision to purchase without realizing that the car that was sold at a lower price was equipped with fewer accessories. *Id.*

on this regulatory level does not necessarily produce identical national norms. The growing quantity of EC consumer contract law does not, in itself, imply a far-reaching harmonization of European contract law, though it can contribute to the pressure in that direction.

Despite this pressure, a harmonization of general contract law in Europe aimed at reaching more or less identical norms appears difficult to achieve. Although practical reasons can be given for legal-technical harmonization, several problems are attached to this endeavor. Some of the difficulties are connected with the great variations between the laws of the EC Member States, while others are of a "constitutional" nature. Since the CISG has demonstrated that variations can be overcome, to some extent, with practically oriented regulation, I will only briefly touch on the latter.

Opponents of EC legislation in this area stress that Community legislators do not have the power to enact legislation to harmonize Member State contract law. Earlier, different opinions were expressed concerning the "constitutionality" even of the EC Directive on Unfair Contract Terms. Some claimed that Article 100 of the Treaty of Rome, which empowers the Council to issue directives for approximizing national norms directly affecting the establishment or functioning of the common market, did not offer a sufficient ground for harmonizing standard form contract law in the EC.[73] Proponents of EC legislation believed that this view of Article 100 would cause an unacceptable impairment of the Common Market because regulation concerning unfair terms could vary greatly within the Community. These writers found no "constitutional" obstacles against an unfair consumer contracts directive.[74] The debate shows that the powers of the Community legislator are restricted in the area of contract law. One cannot assume today that general contract law could be largely harmonized through EC legislation.[75]

It seems unlikely that there will be much direct Community activity in the

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73. REICH, *supra* note 25, at 179 ff.

74. KRÄMER, *supra* note 5, at 183. *See also* HONDIUS, *supra* note 17, at 245 (noting very briefly that the constitutional problems were sufficiently discussed in connection with the Products Liability Directive).

75. REICH, *supra* note 25, at 180. The new Article 100a of the Treaty of Rome, on the basis of which the Unfair Contract Terms Directive was issued, does not seem to alter this general conclusion. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 100a. It may be noted in this context that the European Parliament in its aforementioned Resolution of 1989, which recommends the unification of major branches of private law, has not assumed the EC to have any legislative power in these matters. On the contrary, it recommends the work be undertaken on a voluntary basis through cooperation between the interested Member States.

field of legal-technical harmonization of general contract law in the near future. This does not preclude a narrowing of the differences between the contract laws of the Member States. In such a process, however, the CISG will probably play a greater role than any Community instruments.

If this is so, it is also clear that the ideas of a European Civil Code or even a European Code of Obligations[76] at this stage seem quite utopian. It is perfectly clear that no such codification will take place during this millennium.[77] What will happen after the year 2000 is, of course, impossible to predict. It may only be stated that there are many obstacles in the way of a codification.

The greatest obstacle to the development of a civil code, of course, lies in the deep-rooted differences between the legal traditions in the European countries. Reference is often made to the difficulties of harmonizing two fundamentally different legal families as the Civil Law and Common Law.[78] Though the distinct legal traditions of the Civil and Common Law are clearly the widest gulf to be bridged, differences among even German, French and Nordic Civil legal traditions should not be underestimated. Building a common code on this ground could prove to be an impossible task.

In addition, a complete codification can be hard to realize in today's legal culture, which is characterized by interventionist norms with a relatively short lifespan. The Code Civil and Bürgerliches Gesetzbuch were constructed principally to contain norms for a self-regulating system in a liberal society. It would hardly be thinkable, and certainly not desirable, to build new codifications without taking into account the development of the law in the welfare state. It is not easy to find examples of successful codifications of the heterogeneous and contradictory interventionist legal material of the modern state even on a national level.[79] It would certainly not be easier to write such a modern code in a European context.

The willingness of the Member States to take part in such a process of harmonization would probably be very small. Even the restricted and specific

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76. Unlike a complete civil code, a code of obligations would not need to address morally sensitive areas like family law, where harmonization obviously would encounter still greater difficulties.

77. As Lando notes it is "the prevailing view, even among those who wish a code, that Europe is not yet ripe for it." Lando, *supra* note 7, at 560. *But cf.*, Lando, *supra* note 36, at 264 (making this claim only in reference to the past).

78. *Cf.* Kramer, *supra* note 35, at 488 (rejecting the argument by referring to the example of CISG).

79. As an example of a modern codification in Europe one could mention the new Dutch Civil Code. I am not in a position to evaluate to what extent this Code has succeeded in incorporating welfare state legal materials in a large codification.

EC directives which have been created to the present have not been implemented fully in national law.[80] Is it realistic to expect greater enthusiasm for measures which would affect the fundamental structures of national legal orders?

The road towards a unified European legal order is certainly very long and cumbersome. The question whether the Community should embark on that journey at all, or whether it should be regarded instead as a richness for Europe to accommodate a plurality of developed legal cultures, I will leave to the audience.

80. Of the approximately 900 directives which should have been enforced nationally, the most "obedient" Member States, Denmark and Germany, had at 31 December 1990 implemented 96.6% and 95.3%, while the slowest Member State, Italy, had implemented only 81.7%. Eighth Annual Report to the European Parliament on Commission Monitoring of the Application of Community Law 1990, COM (91)321 final at III.

Table 1
Harmonization of Contract Law[81]

Type	Objective	Tools	Level
Regulatory harmonization	Equal conditions of competition	Legislation (Directives) Administrative Cooperation	Corresponding norms
Legal-technical harmonization	Facilitation of contract-making	Legislation (Conventions) Standard conditions Legal science	Mostly identical norms concerning practical matters
Ideological harmonization	Common identity	Legislation (Code) Legal science	Identical norms, structures, and concepts

81. This table is a developed and revised version of a table presented in Thomas Wilhelmsson, *Objectives and Objects for the Harmonization of Contract Law in the Baltic Countries, in* THE BALTIC SEA - A LEGAL INLAND SEA? 27, 38 (1991).