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The European contract law project

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Thank you very much Chairman for that introduction, well, as a swinging lady. Anyway you have asked me to come to speak about harmonization of contract law and in particular to address the European Contract Law Project. So thank you very much for that invitation. I want to share with you today the thoughts of a directly-elected parliamentarian, a politician at supra-national level and to show how we have to deal with issues of private international law, of contract law harmonization in a transparent, open and accountable democratic decision-making process. Indeed, I feel a bit bad about that because if my electors knew I am actually dodging one of my parliament sessions today in Strasbourg, so you are very lucky.

But it is difficult to deal with these matters in a democratic way and I would suggest that the EU perhaps has the best experience to offer. We are experiencing, we are celebrating 50 years of the European Union this year so perhaps we have gone the furthest in this project.

But let me tell you in detail something about the European Contract Law Project.

The European Parliament has been a big fan of this, going back to 1989, our basic feeling being that you will make the internal market one of Europe's biggest successes, even better if you can break down the differing laws that form sometimes the barrier to trade, cost us in terms of transactional costs, perhaps cause a lack in consumer confidence, in engaging in a market where there are different laws and legal systems. And better still, it would help Europe's economy be that best economy in the world that we have sought to make it.

But it is odd because if you look at the European Contract Law Project, it has its genesis, it has its beginning in consumer law, not in the area of civil justice. It comes out of a feeling that in the area of consumer law, historically we have a large number of directives, central directives, dealing with different issues that are topics to do with contract law but we have ended up with something of a mess, a hotchpotch, a patchwork of different definitions, different ideas that need to be reviewed and sorted out.

In this context, there is also a large research project funded by the Commission to look at contract law which is producing something known as the CFR, the Common Frame of Reference. It is an academic work so it has also been about consultation exercise with stakeholders from business, from consumer groups, from lawyers, all sorts, across the whole of Europe.

But what are we actually doing? Well, we are going with this. Parliament wants it to be much more than just something that looks at tidying up consumer laws and there are various possibilities, therefore, that could happen. It could remain with the CSR as just an academic work on the shelf. It could be what has been called a legislative toolbox. It could be an optional instrument. It could be a European Code of Contract. It could be a mix of any of those.

Let us have a look at each.

An academic work, of course, that would have huge significance in its own right and that will happen anyway. A huge study, putting together comparative analysis from all of Europe's legal systems, there to inform students, practitioners, judges for the future. That maybe would lead to a long-term slow, gradual convergence, not harmonization through legislation.

Then the idea of a legislative toolbox. There is much preoccupation among legislators at the moment about what is called better legislation. So if we want to get rid of all the anomalies, differences in European legislation that refer to contract law, especially in the consumer field, how can we do this? Can we have a sort of an encyclopaedia of terms, of definitions that every time we make law in this field, either at European or national level, the legislator will refer to this so-called toolbox or toolkit that the European Commission sometimes refers to. So that is another possibility.

Then there is the possibility of the so-called optional instrument, which, I think, to many people in this hall will be obvious. A body of contract law that parties may opt into from different countries to avoid the problems of the differences in national law. But, of course, this is absolutely important to the better functioning of Europe's internal market. It gets away from the problem of different national laws. But here we hit the problem. The European Union has no competence to harmonize basic civil law, so taught(?) and contract. Even in the name of the internal market, there is no legal base for us to do this. Instead, what we have chosen to do, rightly or wrongly, is to proceed to harmonize the laws which deal with the choice of applicable law, the so-called conflict laws. Those we have harmonized. Currently we are looking at Rome I that deals with contract. Yesterday, in the Parliament, we voted and we finalized Rome II, which deals with taught(?) with non-contractual obligations.

But these regulations at European level actually underline national law. They show that there is a choice to be made but is still based on national law. And even if you look at the internal market area where we have a principle called the Countries' Origin Principal or Mutual Recognition, it still leads you back to national law. So still we have the problem of bringing two sides or more together.

If I give a taste of the debate on the Rome I regulation, moving from the Rome Convention to a European regulation, we have a huge discussion about the consumer provisions. Business, it faces 27 different national legal regimes. National governments do not want harmonization of basic law so it is an impossible situation and, therefore, the optional instrument looks like the perfect answer. Some have described, for instance, in Internet trade, you could have a blue button with the EU flag on it and if the parties want this optional instrument, they press the blue flag, the blue button. That could be the way of the future. That might be what the CFR might end up as, so an optional instrument.

But what is sad is in the text for Rome I, the Commission proposed that the parties should be able to actually do this, to opt for the CFR or other supra-national texts like the UNIDROIT Principles. But we are being told 'no'. Business lobbies tell us they do not want it, it is uncertain. Governments tell us they do not like it because it is not linked to a body of national laws, it is not linked to a national legal system. So the vision of the blue button is beginning to look a bit shaky. Some of us want to keep it, at the very least, as a recital in the Rome I text.

But this brings us back to the problem that, I come from a Parliament, this is a political matter, this is a democratic matter, governments and others want to keep law under their control to at least be able to have some democratic accountability about the way it is formed and the way it is developed.

The last option for the CFR, which I think you will guess by now, I think, highly unlikely, is that it could be defined now as a European Code of Contract. I do not think so. In my own country, the United Kingdom a common law country, even if you say the word 'Code', you are likely to be hung by the nearest lamppost. We do not like codes and we do not like constitutions which is all very sad, all very sad, but the CFR could, I believe, be an embryonic code for future generations who have less difficulties over these words.

But let us be in no doubt, national governments regard basic contract law as their own preserve and the conflict of laws rules that we have and we still are developing, underline that sort of choice. And we then to be continuing in this direction. If you look at some of the other cross-border legislation in the civil justice area in Europe, you will see that we go towards developing a twenty-eighth regime. One additional regime above that of all the individual member States, rather than interfering or touching the national legal order. And this goes back to the problem that the treaty does not give us the power to do it. Traditional cooperation, yes, mutual recognition, yes, except in the consumer field. In the consumer field, and that is why the Contract Law Project came from the consumer field. We are able to harmonize.

So it may be, with the review of the consumer key that we get some form of harmonized instrument. But let us be in no doubt what difficult political discussions this phrases. In the last weeks in the Parliament, we have come to the conclusion that possibility the only items that we might be able to get in a harmonized horizontal instrument are the definition of a consumer, and even that is fraught with difficulties, something on pre-contractual information and something on the rights of withdrawal, but even that would be a huge debate about the actual timespan.

But contract law goes through everything, through all our human relationships, not just consumer issues. Many of us in the Parliament would like to see afar, to go much, much further than just consumer law. But harmonization is such a complex issue and the European Union, I have to say, is the most advanced supra-national example we have where we have the sort of political development that has allowed us to get as far as we have got, but there are still huge tensions to be resolved between this level and the national level. But what worries me is the aspect of justice and justice for our citizens and for those who have to use the law that we make and the legal system through which it can be accessed. And I sense a growing fear or anxiety amongst some of my colleagues about a body of law or bodies of law that become detached from democratic accountability. I am not sure how we deal with it but I share this last thought with you.

Over the last years, I have been in a privileged position on behalf of the Parliament to attend many times discussions at The Hague Conference. I felt myself to be an oddity there as the only parliamentarian among many experts and government representatives. I think for the future, we have said in the European Parliament, we would like to see a parliamentarian organization shadowing, as it were, and I hope informing in the right way, the work of something like The Hague Conference. We have to ensure, whatever we do, in the name of harmonization, works for our citizens, works for the society that we are creating and, above all, gives us access to justice and democratic accountability.