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Chapter I

Contract Law in the 21st Century – the purpose of this book

“In a shrinking world [...] there must be some virtue of uniformity of outcome whatever the diversity of approach in reaching that outcome.” Lord Bingham, Fairchild v. Glenhaven (House of Lords)¹

In Europe and in many other parts of the world, the reform of contract law is very much on the agenda. Contract law as it currently stands is characterised, first, by the great diversity of the traditional national contract law systems and, secondly, by the coexistence of the national systems of contract law, uniform and harmonised law, and non-binding contract instruments (principles of contract law); these non-binding instruments are available for the international community to adopt in contracts, and are used by judges and legislators as a source of inspiration for law reform as well as for filling the gaps in national contract laws. This book provides an introduction to both comparative contract law and comparative methodology.

I. Contract law in the 21st Century – overview

National contract laws continue to play an important role in practice, particularly in purely domestic scenarios. However, nowadays they are far from being the only rules to be applied in the field of contract law. This is particularly true for transnational contracts.

For transnational sales contracts, the domestic systems coexist with uniform rules, in particular the *United Nations Convention on Contracts for the International Sale of Goods* (CISG or Vienna Sales Convention).² According to Article 1(1) of the Vienna Sales Convention, it is applicable to contracts for the sale of goods between parties whose places of business are in different Contracting States, or when the conflict of law rules of the country in which the court is located lead to the application of the law of a Contracting State. The Vienna Sales Convention has proved to be probably the most successful exercise in the global harmonisation of the law; it is in force in 73 States (*inter alia* the USA, Canada, China, Japan, Russia, Australia and the EU Member States with the exception of England, Ireland, Portugal and Malta).

¹ [2002] 3 All ER 305 at 334 (liability for damage due to exposure to asbestos; problem of proving the causal link between the negligent behaviour of several, subsequent employers and the damage suffered by their employee; the court took into consideration the laws of Germany, Austria, Switzerland, The Netherlands, Norway, France, Italy, Greece, California, Canada, Australia, South Africa, and the American Restatement Second on Torts, at 326–34).

² United Nations Convention on Contracts for the International Sale of Goods; Text, Contracting States, Cases and Bibliography available at: www.unilex.info.

In the mid-1990s, the International Institute for the Unification of Private Law (UNIDROIT³) presented its *Principles of International Commercial Contracts* (UNIDROIT Principles).⁴ At the same time, the Commission on European Contract Law, a private group of researchers coordinated by the Danish law professor Ole Lando, presented its *Principles of European Contract Law*, modern rules of contract law that, like the UNIDROIT Principles, are the result of two decades of comparative research and, again like the UNIDROIT Principles, are perfectly adapted to the needs of transnational actors.⁵ Today, parties to (transnational) contracts not only have a choice between the rules of different domestic contract laws and the CISG⁶; they can also choose to incorporate the UNIDROIT Principles or the Principles of European Contract Law into their contracts. In arbitration procedures they may even decide to submit their contract entirely and exclusively to these modern contract instruments and bind the arbitral tribunal accordingly.⁷

Over the last few decades, the European Community has enacted a series of Directives in the field of contract law, governing numerous specific aspects, namely those relating to specific marketing techniques, in particular with regard to consumer contracts. This selective and sectoral approach to harmonisation has, however, led to inconsistencies and has proved to have considerable limitations.⁸ Therefore, the European Parliament has called for work to be started on the possibility of developing a more comprehensive European private law in several of its resolutions.⁹ In 2001, in response to these resolutions, the European Commission launched a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with on the European level.¹⁰ This culminated in the publication of a first draft of a *Common Frame of Reference (CFR)* in January 2008 and, in 2009, in the publication of an improved version of the *Draft Common Frame of Reference*. The draft CFR was largely inspired by the Principles of European Contract Law and by the *Acquis Principles*. The *Acquis Principles* were presented in 2007 by the European Research Group on Existing EC Private Law (Acquis Group).¹¹ The CFR is intended to provide the European Commission with a “tool-box” and act as a guide for future Community legislation in the field of contract law and related areas.¹² Some observers consider the CFR to

³ UNIDROIT is an independent intergovernmental organisation headquartered in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law between States and groups of States; see www.unidroit.org/dynasite.cfm?dsmid=84219.

⁴ International Institute for the Unification of Private Law (UNIDROIT): Principles of International Commercial Contracts, Text, Official Comment, Cases and Bibliography available at: www.unilex.info.

⁵ Commission on European Contract Law, *Principles of European Contract Law*, Text in French, English, German, Spanish, Italian and Dutch available at: http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html; Text, commentary and annotations in: OLE LANDO and HUGH BEALE (eds), Commission on European Contract Law: *Principles of European Contract Law*, Parts I and II, The Hague: Kluwer Law International, 2000.

⁶ For the conditions of the application of the CISG, see below, **Part B, Case 9**.

⁷ For more information, see below, **Part B, Case 9**.

⁸ See **Part B, Case 10**, in particular **I., IV.1, 2**.

⁹ See the case scenario below, **Part B, Case 10**.

¹⁰ Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11.07.2001, COM(2001) 398 final; extract below, **Part B, Case 10, I.**; see further the Communication from the Commission to the Council and the European Parliament, *A more coherent European contract law – an action plan*, Brussels, 12.2.2003, COM(2003) 68 final, extract below, **Part B, Case 10, IV.1**.

¹¹ European Research Group on Existing EC Private Law (Acquis Group), www.acquis-group.org.

¹² See the Communication from the Commission of 2003 (above, n 10) and DIANA WALLIS, “Is It A Code?”, *ZEuP* 2006, 513–14, extract below, **Part B, Case 10, IV.3**.

be the first step towards a European contract code,¹³ whilst others are firmly opposed to the creation of such a code.¹⁴

Numerous countries, for example the Netherlands and many countries in Central and Eastern Europe, have either recently modernized their civil codes, including the rules on contract law, or are about to do so. They have taken their inspiration from foreign sources and comparative law to such an extent that the comparative method has been described as the “main method used for private law in today’s legislative drafting”.¹⁵

In France, a project is currently underway to reform the law of obligations in the *Code civil*. It promises to be the most significant reform of the law since the Code’s entry into force in 1804. Whereas other legislators have taken their inspiration from international principles of contract law, this reform will probably leave in place many special features of French contract law.

In 1999, a new Chinese contract code came into force, largely inspired by the UNIDROIT Principles.¹⁶ This new code needs to be applied and its provisions need to be interpreted. It suggests itself that the interpretation of similar rules abroad should be taken into consideration when working with this new code. For foreign actors, it is interesting to note that the new Chinese contract law provides for many solutions that are well known in other regions of the world, in particular in Europe and in the CISG Contracting States.

The Organisation for the Harmonization of Business Law in Africa (*Organisation pour l’Harmonisation en Afrique du Droit des Affaires*, OHADA) is made up of 16 West African States. At OHADA’s request, UNIDROIT has developed a preliminary draft of a Uniform Act on Contract Law, the aim being the unification of the contract law of the OHADA Member States.¹⁷

Most of the recent legislation on contract law, and most current projects on contract law, are thus based on comprehensive comparative analysis. For international actors, the diversity of the law makes it more and more important to compare different solutions to a given problem, to analyse the pros and cons of different approaches, to choose between different options and thus to benefit from a comparative perspective. In the field of contract law, a truly international legal discourse is developing.

II. The purpose of this book

This book provides an introduction to contract law in all its diversity. It is an invitation to study both contract law and comparative methodology using a case-orientated and problem-based approach.

Part A introduces a modern approach to comparative law and comparative methodology,¹⁸ and gives reasons for the choice of the legal orders that are found in Part B of the book. Chapter

¹³ See, on this issue, DIANA WALLIS (above, n. 12).

¹⁴ For more details, see the materials provided below, **Part B, Case 10**.

¹⁵ PAUL VARUL, “Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia”, *Juridica international* (Estonia) 2000, 104, at 107: “The main method used for private law in today’s legislative drafting is the comparative method”.

¹⁶ 中华人民共和国合同法 (*Contract Law of the People’s Republic of China, 1999*); for references see **Part B, Case 1, n. 17**.

¹⁷ For references, see **Part B, Case 2, XII. 5 and n. 13**.

¹⁸ Below, **II**.

III of Part A provides a brief introduction to the Principles of European Contract Law and to the UNIDROIT Principles of International Commercial Contracts, and sets out the needs to which these uniform rules respond, and the purposes for which they were designed.¹⁹

Each of the 10 case studies in Part B starts with a scenario taken from the case law of a European country which raises a highly topical issue of contract law. Targeted questions follow, serving to guide the reader through the materials, and encouraging reflection on the differences and similarities inherent in the contract law of the 21st century. In each of the first eight case studies, materials from different legal orders are provided. They allow the reader to solve the respective case scenario under different national laws, as well as under international law and the non-binding principles of contract law. The materials (e.g. extracts from national civil codes, court decisions and extracts from academic literature from different countries) are provided in the original version with English translations. They present the law as it currently stands in England and Wales, the United States, Germany, France, Italy, Switzerland, and a selection of other countries, such as the Netherlands, Poland, Russia and China.

Readers are given precise questions to guide them through their work with each case and the materials. The first step is to solve each case according to the different national laws. The second step is to analyse and compare the solutions found in the different national laws, and to discover if any common principles exist for the issue in question. The reader then looks at international legal materials such as the *CISG*, the *UNIDROIT Principles of International Commercial Contracts*, the *Principles of European Contract Law*, the *Draft European Contract Code* and the *Draft Common Frame of Reference*, and analyses and compares the solutions for each of the case scenarios. Where the solutions diverge, the reader is invited to analyse their respective pros and cons, and to discuss which of the solutions might be the most appropriate to resolve the problem at issue from a comparative and international perspective.

Case study 9 deals with the question of how the different national contract law systems are coordinated at present; it provides some basic information on conflict of law issues in contractual matters, and points to the strengths and weaknesses of dealing with legal diversity from the perspective of conflict of laws (or private international law). Lastly, case study 10 addresses the question of the role of contract law in common markets and in regional organizations of States and, in particular, the question of the future of European contract law.

Working with the book will help to familiarize the reader with foreign contract laws, the Vienna Sales Convention, and the modern contract instruments and rules on contract law. The book provides an invitation to work with legal materials from different countries such as continental civil codes and court decisions (e.g. decisions of the French or Belgian *Cour de Cassation*, the German and Swiss Federal Courts of Justice, and the English Court of Appeal and House of Lords). At the same time, and due to the format of the textbook, readers have the opportunity to explore the peculiarities of form and style in foreign legal materials first hand.

The comparative approach enables the reader to take inspiration from different legal orders, be it as a future solicitor, barrister, or judge, and prepares him or her for work in an increasingly international environment that will, for a long time to come, be characterized by legal diversity. The book is based on the firm conviction that comparative methodology cannot be taught using a purely theoretical approach; the reader is therefore invited to *learn by doing*.²⁰ Last but not least, working with this textbook should help readers to better understand their foreign colleagues with different legal backgrounds, and to feel at home in a world filled with very diverse legal thinkers.

¹⁹ Below, **III.1. and 2.**

²⁰ For the suggested method to be applied, see below, **II.**

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