HARMONISATION PROJECTS: LESSONS FROM THE EUROPEAN EXPERIENCE?

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Abstract
In recent years a number of different projects of harmonisation of private law, and in particular contract law, have been developed at both the regional level and the international level. In Europe for twenty-five years efforts were made to work out a possible model for the harmonisation of contract law: by the end of 2014 this appeared not to have succeeded, but there are lasting results of the process which had a significant influence in the process of the reform of the law of contract in France in 2016. This illustrates the value which such projects can have, and can provide a lesson for other regions such as Latin America.

Key words: *Harmonisation, Contract law, Principles of European Contract law, Reform of French contract law, Principles of Latin American Contract Law.*

1. INTRODUCTION: THE ROLE OF HARMONISATION IN PRIVATE LAW

1.1 The appetite for "harmonisation" in private law

In recent years there has been a real appetite for harmonisation in private law across national legal systems, and especially within contract law. The notion of "harmonisation" can take varying different forms.[1] We may sometime speak of the creation of a "uniform" law, or the "unification" of an area of the law, through instruments which are designed to supplement or even to supersede national law for particular purposes: international legislative instruments such as United Nations Convention on Contracts for the International Sale of Goods (CISG),[2] or contrac-

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1 In the European context, see Zimmermann (2006); McKendrick (2006); and in the Latin American context, see Momberg (2017), pp. 8-20. See also papers from the UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration in *Uniform Law Review*, Vol. 8, Nos 1 and 2 (2003), pp. 81-170.

2 CISG (1980), Preamble: "*The State Parties to this Convention .... Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in

tual instruments such as the UNIDROIT Principles of International Commercial Contracts.[3] Sometimes we may speak even of "codes" which would be designed to replace whole areas of national law.[4] But a more common (and, indeed, linguistically more accurate[5]) use of the term "harmonisation" would refer to the process of bringing national systems into alignment; not superseding them but reconciling them, typically through "soft law" instruments—texts which contain model rules which can inspire the reform of national law, and can even become "hard law" if national lawmakers choose to adopt them through their normal internal legislative processes, and which might be so adopted in whole, or in part, or with adaptations that are designed to fit the national system in question. This way of looking at the notion of harmonisation is particularly apt in the context of the example that will be discussed later in this article—the recent reform of the law of contract in France.[6]

This development of the modern movement for harmonisation of private law has operated at both the international level and the regional level, and in this process there has been interaction and influence between international and regional actors. Internationally, the main actors have been the United Nations Commission on International Trade Law (UNCITRAL[7]), which produced the CISG in 1980,[8] and the International Institute for the Unification of Private Law (UNIDROIT[9]), which produced the first edition of the Principles of International Commercial Contracts in 1994. Regional harmonisation projects have often drawn on these international instruments. For example, the Organisation for the Harmonization of Business Law in Africa (OHADA) has been working since its establishment in 1993 to harmonise, or unify, various aspects of commercial law across its member states (currently numbering 17), including working with UNIDROIT on a draft OHADA Uniform Act on Contract Law during the 2000s.[10] Perhaps the most well known, and most widely

international trade and promote the development of international trade, *Have agreed* as follows:..."

3 UNIDROIT (2016), Preamble: "These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators."

4 See the European Parliament resolution 26 May 1989, [1989] OJ C158/400, requesting "that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law".

5 OED Online (2017) "harmonization, n.": "Reduction to harmony or agreement; reconciliation".

6 Section 3 below.

7 http://www.uncitral.org.

8 CISG (1980).

9 http://www.unidroit.org.

10 Fontaine (2004). For papers from a colloquium held in November 2007 to discuss the draft, see *Uniform Law Review*, Vol. 13, Nos 1-2 (2008). This draft has not, however, been finalised.

influential, of the regional harmonisation projects are found in Europe.[11] The *Principles of European Contract Law*[12] in particular, have acted as a catalyst for some of the regional developments elsewhere, although they have generally been read alongside the CISG and the UNIDROIT Principles by the drafters of other new regional projects. In East Asia, a project on the *Principles of Asian Contract Law* has been in the course of development since 2004, focusing on the potential for harmonisation of the contract law of China, Japan and Korea.[13] And in Latin America, the *Principles of Latin American Contract Law* (*Principios latinoamericanos de derecho de los contratos*) have been developed since 2010, alongside other initiatives for the unification or harmonisation of Latin American private law.[14] And the harmonisation movement continues: in 2015 the Organisation for the Harmonization of Business Law in the Caribbean (OHADAC) published its *Principles on International Commercial Contracts*, designed to harmonise the law of Caribbean countries within the exclusive framework of international commercial contracts, and drawing on the experience of earlier instruments, such as the UNIDROIT Principles, OHADA, and the European harmonisation instruments.[15]

1.2 Why all this harmonisation?

This movement for harmonisation in private law, not only at the regional level but also internationally, and even with the rather grand aim of "global" unification,[16] is naturally focused on fields in which the law itself is transported around the world, through transactions across legal borders, and mainly contract law which is the basis of (international) commercial transactions. Different laws are commonly perceived as obstacles to cross-border trade by legal writers and by practitioners,[17] and also by legislators and other legal actors who use this argument to promote their harmonisation projects. To take just one example: the resolution of the European Parliament of 26 May 1989, which initiated preparatory work designed to lead to a possible common European Code of Private Law, emphasised the significance of "harmoni-

11 Section 2 below.

12 PECL (2000).

13 See Han (2013). For the first volume in another project, *Studies in the Contract Laws of Asia*, which does not seek to draft the text of a harmonised law, but to provide a comparative account of the contract law regimes of selected Asian jurisdictions, see Chen-Wishart *et al.* (2016).

14 See Momberg (2017), pp. 15-16. The draft *Principles* have been further developed since the version discussed in that book.

15 OHADAC (2015).

16 Schwenzer (2016).

17 Schwenzer (2016), pp. 60-61; McKendrick (2006), pp. 14–15. See also *The Clifford Chance Survey on European Contract Law*, conducted in 2005 and discussed in Vogenauer and Weatherill (2006), pp. 117-136, which found that 65% of 175 companies (both larger and smaller) across Europe said that they experienced some obstacles to trade, and 83% viewed the prospect of a harmonised European contract law favourably or very favourably.

sation" or "unification" of private law, and in particular contract law, in order to facilitate cross-border transactions within Europe (the internal, single market) and trade with other countries outside Europe, such as Latin America:[18]

> The European Parliament, ...
>
> A. whereas the Community has to date harmonized many individual aspects of private law but not whole branches of it,
>
> B. whereas the legal coverage of individual subjects does not meet the needs and objectives of the single market without frontiers, particularly as formulated since the entry into force of the Single Act,
>
> C. whereas 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,
>
> D. whereas a modernized, common system of private law is a means of directly or indirectly broadening the Community's links with countries outside itself, with particular reference to the Latin-American countries,
>
> E. whereas unification can be carried out in branches of private law which are highly important for the development of the single market, such as contract law, without this, of course, exhausting the possibilities for unification,
>
> F. whereas the Treaty and the Single Act offer a comprehensive legal basis for the objective pursued in this resolution,
>
> G. whereas to promote reciprocal understanding of the various existing codes and systems of private law in force in the Member States, and to assist with the work of unification, there is a need to give moral and material encouragement to studies of comparative law carried out within the Community and to codifying endeavours in general,
>
> H. whereas a common system of private law will be to the advantage of all the Member States and to those of the countries belonging to the Community which are not involved in approving it,
>
> I. whereas, as a first stage, the Member States will consider the matter, exchange views and state whether or not they will be involved in the efforts towards unification,
>
> J. whereas, subsequently, the Member States which decide to be in-

18 [1989] OJ C158/400.

> volved in unification will set up a committee of experts which will determine the priorities and organize the whole undertaking,
>
> 1. Requests that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law, the Member States being invited, having deliberated the matter, to state whether they wish to be involved in the planned unification;
>
> 2. Requests that, following discussions among the Member States which agree in principle to unification, a committee of appropriate experts be set up to define the priorities and organize the whole undertaking of unifying private law in those States;
>
> 3. Requests that aid be given to centres for comparative legal studies in the Community and to endeavours at codification in general ...

This line of thinking was further developed by the European Commission in its Communication on European Contract Law in 2001, which drew attention to the consequences of diversity in contract laws which might obstruct the functioning of the internal market:[19] different national systems contain different degrees of freedom of contract (in particular, there are different approaches to the question of which terms, in which types of contract, are mandatory and therefore cannot be subject to negotiation—but there can sometimes even be a conflict between the mandatory terms of the national systems of each of the parties to a cross-border contract); there are different contractual practices in different states as regards the standardisation of terms in (for example) particular commercial sectors, which, though not mandatory by law, are in practice difficult to displace through negotiation; and the mere difference in law provides disincentives for both consumers and small and medium-sized enterprises (SMEs) to use cross-border transactions where they are unfamiliar with the other system's law, coupled with higher transaction costs for cross-border contracts which are concluded, because the parties are forced to obtain legal advice about the other system.

1.3 Problems of harmonisation?

Harmonisation is not, of course, without its own inherent problems, and is not necessarily a good thing in itself. There are practical challenges, and even objections in principle.[20]

The point of harmonisation is (as a minimum) to bring legal systems into alignment, either in the formulation of their legal rules or at least in their effect, and this

19 COM(2001) 398, 11 July 2001, paras 26-33.

20 See also Gómez (2008) for a discussion of the costs and benefits of the European contract law harmonisation project (section 2 below), much of which applies equally to harmonisation projects in general.

involves some change in the national (domestic) laws in order to produce a harmonised (transnational) law. If the national law is changed for all purposes—for both internal and cross-border transactions—then questions inevitably arise as to how much the system is giving up as the price of harmonisation, and whether it is worth it. But if harmonisation is to take effect only for certain transactions—only some types of transaction, or only cross-border transactions—there is tension, and potential confusion, between the law applied generally and the law applied to the particular categories of transaction.

The differences between national contract laws vary, and therefore the practical significance of harmonisation projects for different national systems will vary. Even amongst legal systems in the same so-called legal "family",[21] there are often significant differences of detail in their rules or (even where they appear rather similar in detail) in how they are interpreted and applied. But the comparative law theory of legal families is designed to draw attention to the fact that, even if there are differences within the family, there are greater differences between families. This is a significant issue for projects designed to harmonise contract law within Europe, given the presence of both common law systems (England and Ireland) and civil law systems within the body of Member States, and given the significant contrast in approach to the law of contract law between the common law and the civil law.[22] But the tension created by harmonisation projects here runs deeper, given the apparent dominance of English law as a law of choice in the international contract market.[23]

This points to another general issue of principle: the role of competition between laws. It may be argued that harmonisation is in fact contrary to the national interest by removing competition of the national law with other laws—and that removing such competition undermines a national economic interest. Such an argument can be seen in the mouths not only of those who perceive their own system as benefiting already in practice from the choice of their law, therefore resisting harmonisation,[24] but also of those who favour reform which is perceived as allowing the nation to catch up within the international commercial market (through national reform) or as levelling the playing field (through harmonisation).[25]

21 For different approaches to grouping legal systems into "families" for the purposes of comparison, see Zweigert and Kötz (1998), ch. 5; Arminjon *et al.* (1950), Vol. 1, pp. 49-53; David *et al.* (2016), pp. 15-23; Gordley (2006), pp. 761-762.

22 Cartwright (2016), esp. ch. 3.

23 This point has been used to argue against harmonisation from the UK perspective: see, e.g., Ashton (2006), p. 246.

24 See e.g. Ashton (2006), p. 246; City of London Law Society (2012), p. 10, para. 10. *The Clifford Chance Survey on European Contract Law* in 2005 (above, n. 17) found less enthusiasm in the UK than elsewhere for a harmonised European contract law.

25 This was said to be a motivating factor behind the recent reform of the law in France: see below, section 3 and esp. nn. 70, 71. See, however, Vogenauer (2013), arguing that there is no evidence of regulatory competition in contract law, but that parties choose the law according to their familiarity with the chosen regime, and intuitive global judgments on the overall sophistication of legal systems.

There remains a significant question about how "harmonisation" is to be achieved—even harmonisation of the kind that seeks only to bring the national systems into alignment, rather than to impose on them a single new text (a new Code).[26] This involves states being willing to adapt their law to align with the harmonised model. Such adaptation may be designed to conform the legal systems at the level of principle, but may still allow for differences of detail. The more freedom the separate systems retain as regards their own rules, the more the purpose of harmonisation is undermined. This has arisen in Europe, where much of the harmonisation of consumer contract law has been achieved through Directives, a method which gives freedom to the Member States as to *how* to implement the law, consistent with the rest of their system.[27] This is a very useful means of achieving harmonisation, but it is open to the risk of Member States not in fact implementing the law identically; and many Directives have not required full harmonisation, only the introduction of the European rules as a minimum, leaving significant scope for continuing differences between systems. The Commission's *Proposal for a Regulation on a Common European Sales Law* made this clear:[28]

> There are significant differences between the contract laws in the Member States. The Union initially started to regulate in the field of contract law by means of minimum harmonisation Directives adopted in the field of consumer protection law. The minimum harmonisation approach meant that Member States had the possibility to maintain or introduce stricter mandatory requirements than those provided for in the acquis. In practice, this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level. In contrast, the recently adopted Consumer Rights Directive fully harmonises the areas of pre-contractual information to be given to consumers, the consumer's right of withdrawal in distance and off-premises contracts, as well as certain aspects of delivery of goods and passing of risk.

2. THE RISE AND FALL OF THE EUROPEAN CONTRACT LAW HARMONISATION PROJECT

The European experience is enlightening about the challenges of achieving a harmonised contract law across different legal systems. Over a period of twenty-five years, from 1989 to 2014, efforts were made to work out a possible model for the harmonisation of contract law within Europe. The fact that this was done within a supranational legal order—the European Union—in which mechanisms already exist

26 Section 1.1 above.

27 TFEU, art. 288: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

28 COM(2011) 635.

for harmonising the laws of Member States through binding legal acts such as Regulations and Directives,[29] provided a context in which such a project might prosper, at least if a common political will could be found to settle its form and to implement it. We shall see that, as a harmonisation project for European contract law, it seems in the end not to have succeeded, at least in the terms that were set out by the European Parliament when it fired the starting gun in 1989. However, the lasting products of the project are of real value, not only in providing materials for comparative lawyers as they study the harmonisation process and the national contract laws of each of the Member States, but also in offering possible reform models to law makers, not only in Europe but also elsewhere. First, however, we should trace briefly the key steps by which the European contract law harmonisation project rose, and later faltered.

2.1 Key steps along the way

In 1989, the European Parliament passed a resolution[30] requesting "that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law, the Member States being invited, having deliberated the matter, to state whether they wish to be involved in the planned unification". This led to much valuable work comparing the national contract laws of Member States; indeed, this was one of the aims of the Parliament, which also requested in its resolution "that aid be given to centres for comparative legal studies in the Community and to endeavours at codification in general". Work was already underway on what was to become the *Principles of European Contract Law* by the Commission on European Contract Law, a private academic group, chaired by Professor Ole Lando, but which later received funding from the European Commission as well as from private sponsors.[31] Part I of the *Principles of European Contract Law* was published in 1995,[32] and then a revised version of Part I, together with Part II, was published in 2000.[33] Part III followed in 2003.[34] In 2001 the first book of the *European Contract Code*, *Preliminary Draft* was published by the Academy of European Private Lawyers in Pavia, co-ordinated by Professor Giuseppe Gandolfi, another private academic group, which had begun work in 1990.[35]

29 TFEU, art. 288.

30 [1989] OJ C158/400; section 1.2 above.

31 For an account of the origins and development of the Commission on European Contract Law, see PECL (2000), pp. xi-xvi.

32 PECL (1995).

33 PECL (2000).

34 PECL (2003).

35 For an English translation see Radley-Gardner (2003), pp. 439-519. A revised and corrected version was published in 2004: see AEPL (Gandolfi) Code (2004). For an account of the origins and development of the Academy of European Private Lawyers and their work, see AEPL (Gandolfi) Code (2004), pp. xli-xlvi.

In 2001, the European Commission issued a *Communication on European Contract Law*, [36] designed "to initiate an open, wide-ranging and detailed debate with the participation of the institutions of the European Community as well as of the general public, including businesses, consumer associations, academics and legal practitioners."[37] It offered four options, to be explored further: (1) no EC action; (2) to promote the development of common contract law principles leading to more convergence of national laws; (3) to improve the quality of legislation already in place; (4) to adopt new comprehensive legislation at EC level.

In 2003, the Commission issued a further Communication: *A more coherent European contract law; an action plan*,[38] which proposed that legislative intervention should remain sector-specific, but that solutions should be found to increase the coherence of the Community acquis in the area of contract law—through developing a "common frame of reference" ("CFR") establishing common principles and terminology in the area of European contract law; to promote the elaboration of EU-wide general contract terms; and to examine further whether problems in the European contract law area may require non-sector-specific solutions, such as an optional instrument. This Communication recognised that choice of law is not a simple solution, especially for contracting parties (such as SMEs) without sufficient economic bargaining power.

In 2004 there was a further significant step which pointed the way forward for the project for the coming years. The Commission issued a *Communication on European Contract Law and the revision of the acquis: the way forward*,[39] which set out the plan to develop an optional instrument in European contract law in parallel with the work on developing the CFR. The CFR was to be used "as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law". It would provide "clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC acquis and on best solutions found in Member States' legal orders". But—significantly—the Commission made clear that it was not its "intention to propose a 'European civil code' which would harmonise contract laws of Member States".

The course was therefore set for the development not of a Code to replace the national contract laws, but a "common frame of reference" to set out such things as model rules, based on contract law as it already existed at the European level (the "acquis") and the national law of Member States; as well as to put together an "optional instrument" of European contract law, whose form and use were still to be settled. These proposals were then further developed through the preparation and publication in 2007 of the first volume of the *Acquis Principles*;[40] followed in 2008

36 COM(2001) 398, 11 July 2001.

37 COM(2001) 398, para. 71.

38 COM(2003) 68, 12 February 2003.

39 COM(2004) 651, 11 October 2004.

40 Acquis Principles (2007).

by an "Interim" version of the *Draft Common Frame of Reference* ("DCFR") which was issued in its final version in 2009;[41] and then by the publication in 2010 of the European Commission's Green Paper on *Policy options for progress towards a European Contract Law for consumers and businesses*.[42] The Green Paper provided various options for the legal nature of the instrument of European Contract Law: it "could range from a non-binding instrument, aiming at improving the consistency and quality of EU legislation, to a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules".[43] All options were on the table: (1) publication of the results of an "Expert Group" which it had recently set up[44] to develop a possible instrument of European contract law based on the DCFR; (2) an "official toolbox" for the legislator; (3) a Commission Recommendation (which would not have binding force[45]) on European Contract Law; (4) a Regulation (which would be binding and directly applicable in Member States[46]) setting up an optional instrument of European Contract Law; (5) a Directive (which would be binding on Member States but would have to be implemented in national laws[47]) on European Contract Law; (6) a Regulation establishing a European Contract Law; or (7) a Regulation establishing a European Civil Code. Although this appeared still to leave open the possibility of the most fundamental intervention, in the form of a mandatory new Contract Code or even a complete new European Civil Code, the model that appeared to be favoured by now was the optional instrument, to be introduced into the national contract laws of all Member States by means of a Regulation, to sit alongside the national law. The "Expert Group" was appointed in 2010, and during 2011 published an original version and a revised version of its "Feasibility study for a future instrument in European Contract Law";[48] and in 2011 the Commission crystallised the project with its *Proposal for a Regulation on a Common European Sales Law* ("CESL").[49] This contained the draft text for an optional instrument, which parties would be able to choose for cross-border transactions for the sale of goods, for the supply of digital content and for related services, as long as the seller/supplier is a trader, and at least one of the other parties is a consumer or a small or medium-sized enterprise.

41 DCFR (2009).

42 COM(2010) 348, 1 July 2010.

43 COM(2010) 348, para 4.1.

44 COM(2010) 348, para 2; Commission Decision of 26 April 2010, OJ L 105, 27.4.2010, p. 109.

45 TFEU, art. 288.

46 TFEU, art. 288.

47 TFEU, art. 288.

48 Commission Press Release IP/11/523 (3 May 2011). The feasibility study, with essays discussing it, is published in Schulze and Stuyck (2011).

49 COM(2011) 635, 11 October 2011.

Intense debate followed on the form and substance of the Commission's proposal.[50] It was finally (and rather quietly) withdrawn at the end of 2014, when it was left out of the Commission's Work Programme for 2015,[51] presented to the European Parliament on 16 December 2014; the proposal for the CESL was later replaced by much narrower proposal for a Directive on contracts for the supply of digital content.[52]

2.2 Why did the project not succeed?

Lessons can be learnt from the European experience discussed above. The proposal from the European Parliament, taken up and pursued by the Commission, appears not to have succeeded, and we might naturally ask why.

In the first place, it may simply have been too ambitious. The first idea was of a European civil code: the resolution of the European Parliament in 1989 referred to "unification" not just "harmonisation", and to a "European Code of Private Law";[53] the idea of a Code was maintained through the form of the *Draft Common Frame of Reference* which, though avowedly an academic project,[54] incorporated and developed the *Principles of European Contract Law* but also extended its scope to include not just general contract law, but certain specific contracts, the law of obligations generally (including non-contractual liability and unjustified enrichment), and aspects of the law of movable goods and trusts. The ideas of a Contract Code or even a European Civil Code were again options in the Commission's Green Paper in 2010,[55] and although the final proposal was a Regulation for an "optional instrument", even this was seen as too much and too controversial.[56]

There was certainly resistance from individual Member States, which suggests that the proposal was too difficult to sell politically. The compromise required, even in an optional instrument where if the instrument were to be used, there might be a conflict with standards normally provided by the national law (such as high standards of consumer protection), appear to have combined with the more general concerns of some systems about the way in which their own principles, rules and standards of contract law might be undermined. In the United Kingdom this is not a new problem. A significant project was initiated in 1965 by the Law Commission for England, joined by the Scottish Law Commission, to formulate a new Contract Code for the

50 See, e.g., the Editorial and its attached bibliography in the *European Review of Private Law*, Vol. 21, Nº 1 (2013) pp. 1-12; and (in France) the debates reported in the *Revue des Contrats* 2012, Nº 4, pp. 1393-1484.

51 COM(2014) 910.

52 COM(2015) 634, 9 December 2015.

53 Section 1.2 above.

54 DCFR (2009), pp. 8-9.

55 Section 2.1 above.

56 See Cartwright (2011). For examples of discussion, comment and criticism, see also Schulze (2012); and (in France) the debates reported in the *Revue des Contrats* 2011, Nº 3, pp. 1027-1101, and Nº 4, pp. 1361-1491.

whole of the UK. This would therefore cover both the common law of England, and the mixed system in Scotland which (in its contract law, at least) has a visibly civilian basis. The project ultimately failed when there was no final agreement over the compromises that had to be made to achieve a workable set of rules between the two jurisdictions, and neither Law Commission went on even to produce a Code for its own jurisdiction.[57] In the case of the European Commission's proposal in 2011 for an optional instrument, there was strong criticism from the UK. In advice they gave to the UK Government,[58] the English and Scottish Law Commissions criticised the proposal, arguing (inter alia) that traders are unlikely to allow consumers to choose whether to contract under the optional instrument or their own national law, which would simply add another legal system to the current confusion; and that "English and Scots law have a reputation for leaning towards the certainty end of the scale. By contrast, the CESL is firmly towards the fairness end"; but if the CESL is optional, it does not protect weaker parties given that the choice of law is likely to be dictated by the stronger party.[59]

The criticism was not, of course, limited to the UK, and for our purposes it should be noted that there was also resistance from France.[60] However, the European project gave the French a renewed inspiration to review and revise their own (national) Code civil, but on the French model, not as a European code. This is discussed below.

2.3 What are the lasting results of the European contract law harmonisation project?

Although the European project did not result in a fully harmonised European contract law, it should not be thought that the project did not produce some very valuable output. The academic work undertaken to compare the European legal systems is very significant—and has given a renewed impetus to the comparative study of contract law across Europe. The tangible output includes not just the text of the various drafts and proposals, such as the *Principles of European Contract Law*, the *Draft Common Frame of Reference* and the proposed *Common European Sales Law*, but also the notes and comments in the published volumes of the PECL and the DCFR, as well as the significant academic literature that they have inspired.

Although they have not been adopted or enacted as a harmonised European contract law, the texts are themselves also very valuable: they crystallise models of contract law which could function as independent legal systems (drafted in the form

57 See Cartwright (2009), pp. 168-169; MacQueen (2005), pp. 157-161. The text of the draft was eventually published in McGregor (1993).

58 Law Commissions (2011).

59 Law Commissions (2011), paras S.12, S.44, S.45. The UK Government does not have a history of welcoming proposals for harmonisation of contract law: see, e.g., Ashton (2006), p. 247 ("the government sees no benefit in either mandatory or voluntary harmonisation of European contract law"); and note that the UK has not ratified the CISG.

60 Ancel *et al.* (2017), pp. 35-39.

of codes) but can also offer ideas (and the text to implement those ideas) about a model contract law. In this respect they can function as a "toolbox" for further development of national systems within the scope of the (European) order from which they were created; and as an inspiration for other (non-European) systems, whether they are based historically on the continental European systems (such as in Latin America) or elsewhere (such as in East Asia). We have seen already that these European texts, and in particular the *Principles of European Contract Law*, have already been influential in other reform proposals around the world.[61] Closer to home, however, there is perhaps the best illustration of their influence in the reform of contract law which was enacted in France in 2016.

3. THE INFLUENCE OF HARMONISATION PROJECTS IN PRACTICE: THE EXAMPLE OF FRANCE

The general law of contract in France was reformed by *Ordonnance* with effect from 1 October 2016.[62] There had been plans to reform the French contract law during the course of the twentieth century: the text of the Code in this area was largely unchanged from its original drafting in 1804, and there had already been an impetus to reform the Code at the time of its first centenary in 1904. But the prospect of the development of a general European contract law in the second half of the twentieth century put the French internal developments on hold, and other areas of the civil law (such as family law) were prioritised instead. From the time of the bicentenary of the Code in 2004, there was a new impetus to reform the national Code—an impetus which has been seen as either a backlash against the Europeanisation process which had become too "uncontinental", or as taking the opportunity to modernise the law in line with (or, at least, taking into account) the European harmonisation projects.[63] French academic reform projects were published in 2006[64] and 2009;[65] then the project was taken on by the Ministry of Justice, eventually resulting in an *Ordonnance* of 10 February 2016, brought into force on 1 October 2016.[66]

61 Section 1.1 above.

62 See generally Cartwright and Whittaker (2017). For detailed explanation of the stages of development leading up to the reform, summarised in this paragraph, see Fauvarque-Cosson *et al.* (2017); Ancel *et al.* (2017), pp. 1-66.

63 Ancel *et al.* (2017), p. 21; Chantepie and Latina (2016), pp. 8-9, 11-12.

64 Catala (2006).

65 Terré (2009).

66 *Ordonnance* n° 2016-131 du 10 février 2016. Since the reform was effected not by *loi* but by *ordonnance* under the authority of a *loi* (*Loi* n° 2015-177 du 16 février 2015, art. 8), the *Ordonnance* is subject to a Parliamentary ratification procedure, which gives an opportunity for further amendment of the law. The first readings of the draft ratification *loi* were passed by the Senate and by the National Assembly on 17 October and 11 December 2017 respectively: there is disagreement between the Senate and the National Assembly, but it is clear that some (at least relatively minor) amendments will be brought into effect once the ratification procedure is complete during the course of 2018. For links to the current progress of the ratification, see https://www.senat.fr/dossier-legislatif/pjl16-578.html.

The European developments—in particular the *Principles of European Contract Law*, but also the *Draft Common Frame of Reference*, the *European Contract Code, Preliminary Draft* (the Gandolfi Code), and a French draft of "common contractual principles" (*principes contractuels communs*)[67]—as well as the UNIDROIT *Principles of International Commercial Contracts*, had a significant influence in the French reform process. The Ministry of Justice, presenting the *Ordonnance* to the President of the Republic in a Report published in the Official Journal,[68] drew attention explicitly to the influences which the European texts had had on the drafting of many of the new French provisions, whilst still emphasising that the underlying aim was to modernise the French national code: to retain the "spirit of the Code Civil, both favourable to a consensualism which encourages economic exchange, and protective of the weakest".[69]

Areas where the Ministry made clear that it had relied on the European developments and texts in drafting the new French provisions are as follows:

- the overall structure of the new provisions, to trace the life of the contract from negotiations to its end;
- provisions on precontractual duties to inform (art. 1112-1) and misuse of confidential information (art. 1112-2);
- the choice of time and place of receipt by the offeror as the time and place of acceptance (art. 1121);
- allowing enforcement of a unilateral promise which has been wrongly revoked (art. 1124);
- the removal of *la cause* as a condition of validity;
- the insertion of a section containing provisions on representation, together with some of its particular provisions;
- the adoption of the terminology of the "content" of a contract (art. 1128);
- the introduction of a provision sanctioning of exploitation of the other party's state of dependence (art. 1143);
- the provisions for framework contracts to allow the price to be fixed unilaterally by one of the parties (art. 1164);
- the use of objective standards (reasonableness, legitimate expectation) to supplement the contract where it is silent as to the standard of an obligation (art. 1166), and in interpreting a contract in case of doubt over the parties' intention (art. 1188);
- the introduction of an article expressly providing for the general principle of consensualism (art. 1172(1));

67 Association Henri Capitant *et al.* (2008).

68 Report to the President (2016).

69 "l'esprit du code civil, à la fois favorable à un consensualisme propice aux échanges économiques et protecteur des plus faibles."

- the recognition of change of circumstances and remedies, including a power for the court to adapt the contract (art. 1195);
- the limitation on the remedy of enforced performance where the cost to the debtor would be manifestly disproportionate to its interest for the creditor (art. 1221);
- the introduction of price reduction as a general remedy for non-performance or imperfect performance (art. 1223);
- the introduction of unilateral termination by notice by the creditor (art. 1226);
- the specific provision that termination does not affect terms defining dispute resolution or obligations of confidentiality or non-competition (art. 1230).

This is a long list which shows the range of influence of the European projects. Some items in the list are presented as just confirming the direction in which the French courts were already moving in interpreting the old Code of 1804. But many are new provisions, said to be "inspired by" the European harmonisation projects in general, or attributed to individual texts such as the *Principles of European Contract Law*, the *Draft Common Frame of Reference*, the *Unidroit Principles* or the *European Contract Code, Preliminary Draft* (the Gandolfi Code). However, even in cases where there is a direct attribution of a source in one of these texts, the reform does not simply follow the European models: there is still a national interest, a desire to use the Code to promote French law, in the face of other legal systems, and in particular in the context of choice of law in international contracts. This was the reason given by the Ministry in particular for the decision to abandon the notion of *la cause*:[70]

> The second aim of the Ordonnance is to reinforce the attractiveness of French law, at a political, cultural and economic level. The legal certainty conferred on our law of obligations, which is at the base of economic exchange, should thus make it easy to apply in international contracts. In this respect, formally abandoning the notion of *la cause*, which gave rise to significant debate, will allow France to become closer to the laws of many foreign legal systems, whilst still establishing in legislation the various functions (including the re-balancing of the contract) which the case-law had given it.

And in the legislative process before the Senate, proposing the use of the *Ordonnance* procedure to reform the Code (rather than the use of primary legislation by

70 The French text is:

"Le deuxième objectif poursuivi par l'ordonnance est de renforcer l'attractivité du droit français, au plan politique, culturel, et économique. La sécurité juridique conférée à notre droit des obligations, qui constitue le socle des échanges économiques, devrait ainsi faciliter son application dans des contrats de droit international. A cet égard, l'abandon formel de la notion de cause, qui a suscité de nombreux débats, permettra à la France de se rapprocher de la législation de nombreux droits étrangers, tout en consacrant dans la loi les différentes fonctions, dont celle de rééquilibrage du contrat, que la jurisprudence lui avait assignées."

a *loi*), the Minister of Justice, Mme Taubira, drew a picture of the current state of French law:[71]

> As you know, there is a battle going on in Europe for influence, in particular between our continental law—the force of our law, as it is written and as it is conceived—and the so-called *common law*, which has its own influence, its conception of services and of certain professions. This battle is engaged daily and constantly. Our law of contract no longer inspires anyone in the world—those who were inspired by it have already taken the next steps! —so we should not be surprised that we have lost influence. However, France has long been a shining influence by its law, not only in Europe but also throughout the world.

Whether this aim will be achieved by the new code—indeed, whether a revision of a civil code can in principle have such an effect—is a matter for debate.[72] But it reinforces the point that states have national interests to be weighed in the context of proposals for harmonisation of contract law.

4. LESSONS FOR LATIN AMERICA?

Latin America is engaged in the discussion about harmonisation of contract law—and naturally so.[73] The common heritage of the codes of private law in the Latin American countries, and their common interests in relation to regional trade, provide a context in which the arguments for closer harmonisation of national contract laws can be advanced. It is not, of course, simply a reproduction of the European arguments: there is no supranational legal order providing mechanisms for harmonising or unifying the laws of individual states in a single market.[74] And although there has already been significant rewriting of some of the national codes during the later twentieth and early twenty-first centuries, these have not been done with an eye to harmonisation within Latin America.[75] However, in a regional context where harmonisation of contract law is now being explored, it is natural to look to the European experience, to see what lessons can be learnt.

71 JO S (CR) du 24 janvier 2014, p. 632. The French text is :

"*Vous le savez, une bataille d'influence se livre en Europe notamment entre notre droit continental – la force de notre droit tel qu'il est écrit et tel qu'il est conçu – et ce que l'on appelle la common law, ayant sa propre influence, sa conception des services et de certaines professions. Cette bataille est quotidienne et permanente. Notre droit des contrats n'inspire plus personne dans le monde – ceux qui s'en sont inspirés ont déjà franchi les étapes suivantes! –, ne nous étonnons donc pas de perdre de l'influence. Pourtant, la France a longtemps et largement rayonné par son droit, aussi bien en Europe que dans le monde*."

72 See e.g. Cartwright (2015); Deshayes *et al.* (2016), pp. 8-9; Chantepie and Latina (2016), pp. 18-23; Vogenauer (2013).

73 See generally Momberg (2017), pp. 4-8 and other sources cited there.

74 Section 2 above.

75 Momberg (2017), p. 7.

Some of the difficulties encountered in Europe[76] will not be in issue within the Latin American context. The (over-)ambitious project of unification, rather than harmonisation, through a "European Code" which might supersede national laws, or even just an "optional instrument"—which may be optional for the parties (or, rather, for the stronger party to the contract[77]), but would not have been optional as a system but would have been imposed by a Regulation as an additional contract law in the national systems of all Member States—is simply not on the table within the Latin American context of individual, independent states. So the more natural approach is "harmonisation" in the sense of seeking to bring the internal rules of national systems more closely into alignment.[78]

One tension that was clearly present within the European context—between the civil law and the common law approaches to contract law—is not in issue within Latin America, where the "legal family" belongs to the civil law tradition.[79] However, the affinity between systems in the same family does not exclude differences—sometimes significant differences—between them. The recent French reforms[80] illustrate this, reasserting a national contractual identity—or even redefining it in such a way that it becomes more distinct from some of the other family members with which it has historical links and which its (now-changed) rules originally inspired.[81] Tension is therefore still inevitable between states in response to any suggestion from the outside that they modify or even abandon their own legal rules, which are perceived as having been developed for their own good reasons.

However, the real lesson from the European experience is one that can certainly translate to the Latin American context. The increase in understanding amongst the European nations about their systems of contract law—the similarities and differences, both in principle and in the effects in practice of their legal rules in action—and an understanding of the direction in which the national systems as a whole are moving in their own internal developments of their contract laws, allow a more mature reflection within each state of whether and (if so) how best to reform its own law. This is the real value of the comparative law exercise in which Europe has been engaged for the last three decades. And it similarly justifies the work behind projects such as the *Principles of Latin American Contract Law*. Regional projects of this kind should not simply be copies of the *Principles of European Contract Law*, but they need to engage at a regional level with the same issues: finding the best models that fit the legal systems and which do not simply describe their common principles but

76 Section 2.2 above.

77 Cartwright (2011); Law Commissions (2011), para. S.45.

78 Section 1.1 above.

79 Section 1.3 above; Momberg (2017), pp. 4-5.

80 Section 3 above.

81 E.g. in the removal of *la cause* from the conditions of validity of a contract, in the name of making French law more accessible, but which at a stroke removes one of the traditional features which has been reproduced in other members of the "Romanistic" legal family.

can also point to the direction in which the individual systems might move, both to bring them together and (bearing in mind that such *Principles* are drafted not just in a regional context, but also in an international context[82]) in line with trends in the international market. National systems in Europe are looking at the European harmonisation projects to reflect on their own laws. France, in particular, did not simply follow the European projects in its contract law reforms, but was comforted that some of is proposed reforms were consistent with the general development of contract law in Europe, and was even overtly inspired by them to take some significant new steps.[83] This demonstrates that projects of this kind can have a very significant value.

82 Section 1.1 above.

83 Section 3 above.

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