

PRIVATE LAW: REFORMING THE LAW OF OBLIGATIONS IN EUROPE¹

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I. IN SEARCH OF A PRIVATE EUROPEAN COMMON LAW.

Few argue about the existence of European Private Law. This concept corresponds to a notion of positive law, that is, laws in force in all EU countries. According to Sanchez Lorenzo², this is not only a formal concept, but also a material one:

“Private Civil Law (PCL) is not only found in EU law which stems from regulations contained in European Constitutional Law and the Private or harmonisation law which form the so-called “positive integration”. This concept also covers “negative integration” that is the general or specific rules, especially rules based on case law which establish the limits of national Private Laws imposed by the internal market and free movement”³.

According to this, the concept of European Private Law also covers “negative integration” that is the general or specific rules, especially rules based on case law which establish the limits of national Private Laws imposed by the internal market and free movement”.

Will this lead to a European formal Code, or there are other possibilistic ways to achieve a common Law? In my lecture I will try to offer some ideas for discussion.

In fact, there are two fields relating Law of obligations in Europe: the first one deal with Consumer Law. The other deals with the more abstract problems of the uniform or harmonised contract law in Europe.

The first to be in mind is that the horizontal effect of the European law occurs only by way of Regulation, not by Directives. So, if the EU wants to impose obligations on private parties, it must use the instrument of Regulations.

¹ Updated text of ha lecture held in the Münster University Law Faculty in March 2013.

² SANCHEZ LORENZO (2002), p. 4.

³ See also DIAZ-AMBRONA (2001), p. 27, for whom there exists a concept of *European Civil Law*, which is that “regulating the individual, his rights and personal and economic relations stemming from the fact of being a subject of rights within the family and the community” and he continues by stating that “European Civil Law includes individual in such a way that they are not only its aim but also its cause, and regulates the person considered individually, with the rights which belong to her as such and considered in his projection of life as regards to others, in his otherness”. This definition has failed to convince me, since this is not, in fact, the aim of European Private Law, based above all, on the internal market and free movement. The Law concerning individuals could perhaps be found in the Fundamental Rights of EU Citizens Act, but so far all European Private Law has had to base itself on EC Treaties and, therefore, has a different basis from those given by the writer quoted.

From the very beginning, the European Community showed a high interest in the consumer's protection. Several Directives came into effect in order to establish rules beyond the Civil and Commercial Codes in force among European Countries. Among them, the Directive on Unfair Terms in Consumer Law (93/13/EEC), Directive 2005/29/EC on Unfair Commercial Practices and more generally, the Directive 98/27.

Not only Directives take part of the whole, but also Regulations, as a primary source of European Law. The aim of Regulations is to establish a uniform regime among the EU countries, in order to have the same solutions to prevent legal pluralism in subjects as family law conflicts, succession law, etc. It is, according to Reich⁴, that European law takes supremacy and enjoys direct effect under certain circumstances, and "this law is creeping into even more areas of everyday life of citizens". According to the same writer, the structure of EC Law is a vertical one, because the actions are directed against Member States, for actions of any public authority breaching EC law, not private parties. We will see in the mortgages cases.

As important law writers show, European private law penetrates deeply the so called private law area, because imposes "itself on relations governed by private law", as contract law, tort law, company law, services, labour, assurance law, agency. In some countries, EU law produced the change of the Civil Code in force, as in Germany, in 2004. In other countries, as in Spain, the implementation of Directives by means of national laws, keeping in force the current private law rules in force in the Codes, has produced a double level of regulations: the traditional one, established in the Civil and Commercial Codes, as well as the laws derived of the compulsory implementation of Directives.

As a first conclusion, we must say that referring only to Contracts and Obligations, Directives and their implementation in each country transformed in fact the different systems in force. We will see the impact of compulsory European Court of Justice Judgments in the interpretation of Directives.

The second aspect I will refer relates to the possible harmonisation of Contract Law through a European Civil Code or by enforcing Regulations in different matters of Private Law.

The experience in the EU led several academic groups to a research in the fields of obligations and contracts. The Principles of European Contract Law (Lando-Beale, 2000); the Gandolfi-Project; the work of Trento Group; the Principles of European Tort Law (PETL 2005); the European Insurance Group and the Draft of Common Frame of Reference (DCFR Von Bar and alii, 2009). Could this work lead to a European Civil Code? It is worth noting that the Proposal for the Regulation on a Common European Sales Law 2011, exposed the different possibilities to enact this type of Regulation.

⁴ Reich (2010), p. 57.

After summarising the arguments of the Parties, among them, a “European Civil Code”, arrives to a conclusion that “the options for an optional uniform contract regime, a full harmonisation Directive and a Regulation establishing a mandatory uniform contract law would meet the policy objectives”. However, for several reasons, as “the burden for traders”, the “costs attached to familiarise” with a new uniform contract law regime, etc., the Explanatory Memorandum says that an “optional uniform contract law regime was therefore reasoned to be the most proportionated action”⁵. I will be back to the argument.

A) Arguments in Favour of European Codification.

Hence, we are obviously faced with an undeniable reality, which must necessarily influence the development and the very structure of national laws. When mentioning European Harmonisation of Civil Law, such Codification, a number of questions will be raised which are being widely discussed throughout the whole of Europe.

1. Law is a cultural product which responds to some particular reasons and follows some very specific aims. Cultural reasons may be used both to support the need for harmonisation and to reject a general Code. In this sense, an argument arises concerning Continental Law *versus* Common Law. One of the authors most reluctant to accept the technique of Codification on a European scale is Pierre Legrand⁶, for whom Common Law and Civil Law are two different kinds of legal experiences which affect the nature of legal reasoning, the systematic method used, the nature of the legal rules, the different role that facts play in both systems and, above all, the meaning of rights as regards the actions.

2. A second issue focuses on arguments in favour of European Codification. Rational criteria are currently being used, especially economic ones. One example of this lies in Hesselink’s reasoning, when he argues that for the average European citizen there are not enough features in his national Law to enable him to identify, without any doubt, that his legal system is different from his neighbour’s. The aforementioned scholar wonders: is it justifiable that one and the same problem currently has twenty seven different legal solutions?⁷

Economic analysis of law provides arguments in this sense, since the existence of legal diversity is an issue that raises a feeling of insecurity for those involved in applying the laws, and at the same time, generates high transaction costs and discourages cross-border operations⁸. That is why the need to enforce one single set of

⁵ European Commission Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL on a Common European Sales Law. (SEC(2011) 1165 final) (SEC 2011 1166 final). Brussels 11.10.2011 COM(2011) 635 final. 2011/0284 (COD).

⁶ LEGRAND (1996), *in totum*.

⁷ HESSELINK (2001), p. 48.

⁸ This is how SANCHEZ LORENZO sees it (2002), p. 155. See also *Comunicación de la Comisión al Consejo y al Parlamento europeo* dated 1 July 2001 (DOCE 2001/C 255/01), nums. 23-33. Especially nums. 32 & 33 refer to what is mentioned in the text.: “32. Furthermore, the higher costs of transactions

rules is being encouraged to facilitate financial transactions across the EU⁹. Whether this involves a comprehensive Code or a set of principles, which has been called soft law, is a simple issue of methodology: what really matters is that one uniform law should exist as a clear example of the unification of Europe. That is, the aim is to harmonise legal systems that currently exist.

This was the concrete objective of the Project of Regulation on Common European Sales Law. In the memorandum it is written that a high level of transactions costs in cross-border transactions due to different foreign laws to be applied increases the costs and complexity prevents opportunities for cross-border trade and “have a negative impact upon European consumers”.

3. If this is true as regards financial transactions, further difficulties exist in other branches of Law. Indeed, the EU has attempted to ensure the rights of citizens through systems such as Regulations, which attempt to facilitate the free movement of people across the EU, in addition to further objectives. Among others, this is the aim of Regulations related the enforcement of judicial decisions over the European countries. Although this governs aspects of the enforcement of rulings passed by European Courts concerning divorce, parents’ responsibility, succession Law, etc., it does not mean that the aim is to unify this area, which, on the other hand, would come up against major difficulties from the viewpoint of jurisdictional powers¹⁰. Actually, it is all about mutual recognition of Court decisions, based on trust and which involves guaranteeing security of citizens in the EU¹¹. Nonetheless, it should be emphasised that the possibility of establishing standard rules in Family Law is not included in the aims stated in EU Treaties¹². It is difficult to attempt to create a meaningful European Family Law. We must keep within the boundaries of procedural issues.

may be a disadvantage to competition, for instance, in the case in which a foreign supplier competes with a supplier established in the same country as a potential client”. Also CAMARA (1999), p. 1671 mentions this type of argument based on market needs.

⁹ Likewise, in the resolution passed by the European Parliament, dated 15 November 2001, (COM[2001] 398-2001/2187[COS]) which states that International Private Law is no longer a useful instrument in the European single market which has already reached an advanced stage of integration and that Directives do not create an adequate framework for the internal market.

¹⁰ Yet, there are some European groups working on this approach, such as the Commission on European Family Law (CEFL), set up on 1 September 2001. See their work, organisation, etc. at <http://www.law.uu.nl/priv/cefl>. According to their statement of intentions, this Commission proposes: “to study the present state of compared research as regards harmonising Family Law in Europe [...]. Search for the common core which allows legal problems to be solved by comparing the different solutions adopted in Family Law within the different European legal systems. To study the role of the future (potential) EU member States in the process of harmonising Family Law”.

¹¹ As HERRERO DE MIÑON says in *La Europa del Derecho*, an article published in the newspaper *El País*, 13 January 2003.

¹² SANCHEZ LORENZO (2002), p. 205. CAMARA (1999), p. 1671 seems to show greater optimism concerning harmonising these issues, even though CAMARA later ends up saying that “if we have to be realists, in spite of the progressive convergence (above all in solutions to the new social reality), the perseverance of purely national rules in these fields is huge”.

4. Some believe that a European Code is the only way to protect minority rights. As long as it is possible to include some of these solutions in the future unified text, this may help protect them. Otherwise they run the risk of being devoured by the large systems as a consequence of harmonisation based on market interests.

5. For a part of scholars, the system of Directives has failed to work¹³. It is said that though Directives are the appropriate instrument when the EU attempts to introduce European Law into national laws, they also show a lack of coherence. The incoherence stems from their limits regulating very specific aspects of the legal system, and this gets worse when the national legislator transfers them to the domestic system. Actually quite often concepts are used which are inconsistent with each other, as happens with the successive and various definitions used for *consumer*, or when the Directives introduce concepts that are inconsistent with the legal system to which they are being transferred, as happens with the concept of good faith in Common Law¹⁴. Directives are not comprehensive, since they only cover aspects mentioned in EC Treaties (arts. 94 & 95 of the EU Treaty). They are therefore a provisional, partial and slow remedy, apart from the fact that their enforcement does not aim to unify Private Law, but is aimed at increasingly more varied objectives.

As the Proposal of Sales Regulation states, “The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State”.

To sum up, as Castronuovo says¹⁵, the main criterion concerning the functionality of future European Law cannot be reduced to efficiency or purely economic reasons, but must be measured in accordance with the values linked to the general category of welfare.

B) Which Contract Law and For What?

The aforementioned arguments lead us to consider the problems of European policies in matters of Civil Law.

¹³ Concerning the problems raised by the Directives, see CASTRONUOVO (2001), p. 247; HESSELINK (2001), pages 37-40 and SANCHEZ LORENZO (2002), pages 37-43, among others.

¹⁴ McKENDRICK (2002), pages 96-98 for an analysis of the problem mentioned here.

¹⁵ CASTRONUOVO (2001), p. 229.

In 1989 the European Parliament required that member States should begin the preparatory work for drawing up a common European Code on Private Law¹⁶. Another, in which, followed this decision in 1994 once again, a call was made reiterating the need to draw up a European Code covering the areas of Private Law¹⁷. The problems faced by the single market and the need to create what has been called a European Legal Area, led, among other reasons, to the Council of Ministers in Tampere (1999), proposing a greater convergence of Civil Law:

“39. As regards material Law, a comprehensive study is required regarding the need to bring together the member States’ legal systems concerning civil matters, so as to overcome the obstacles facing the correct functioning of civil procedures”.

From here on, the outcome is well known¹⁸: for the time being, it has ended with the resolution passed by the European Parliament, dated 15 November 2001. It urged data to be compiled regarding legal concepts and common solutions to these as well as a common legal terminology among the then 15 member States of the EU, especially in the following areas:

“general law governing contracts, regulating sales and purchases, contracting services, including those regarding financial services and insurance, personal securities (payment bonds), non contractual obligations (damages and restitution), the law regulating the transfer of ownership of moveable assets, guarantees of credits and moveable goods and trust”.

Since 2001, the Commission started a consultative process with the aim to get opinions about the legal framework in contract law and the effects of such fragmented regulations in cross-border trade. In 2010 a “Green Paper on policy options for progress towards European contract law for consumers and businesses” was published. The European Parliament issued a Resolution on 8th June 2011, in which “it expressed its strong support for an instrument which would improve the establishment and the functioning of the internal market and bring benefits to traders, consumers and Member States’ judicial Systems”. According to the Memorandum of the Sales law Regulation Proposal, “The Commission Communication ‘Europe 2020’ recognises the need to make it easier and less costly for traders and consumers to conclude contracts with partners in other Member States, notably by making progress towards an optional European contract law. The Digital Agenda for Europe envisages an optional instrument in European contract law to overcome the fragmentation of contract law and boost consumer confidence in e-commerce”.

¹⁶ Ruling dated 26 May 1989. Resolution *On Action to Bring into Line the Private Law of Member States* (O.J.C.158/400,26 May 1989)

¹⁷ *Resolution on the Harmonisation of Certain Sectors of the Private Law of the Member States*. [1994]O.J.C.205/518, 6 May 1994].

¹⁸ See DIEZ PICAZO, ROCA, MORALES (2002), pages 104-107 and 121. Concerning the consultation made by the European Commission in July 2001 on the convenience of beginning work on the future unification of Private Law in Europe and the different responses, MARTIN (2002), pages 637-641.

Yet, is it possible? The future uniform Contract Law will be the result of a specific legal culture¹⁹, but which one? The next question we should ask refers to the need to co-ordinate such distinct systems as the Codes belonging to the French family, those belonging to the German family, those belonging to the Scandinavian family and the whole Common Law. Now, this does not only involve organising a culture located, to a greater or lesser extent, in a larger or smaller geographic area, as happened with the old German Codification. It involves harmonising different legal experiences, different systems. Without overlooking the fact that if a text of this sort is finally approved, it will raise another problem of how it should be applied, which could lead to a new form of inefficiency: that caused by the interpretation and application by professionals from completely different legal backgrounds.

Thus, we are back to the initial idea of what is the purpose of a Uniform Law and which aims should it achieve in this specific moment in time: this is a political, not technical, idea. If enforcing a Civil Code in the 19th century was a way to show the exclusive sovereignty of the State, currently enforcing a Uniform Law Contract Law in the EU implies that member States must necessarily yield their sovereignty²⁰. That, in turn, raises new problems, such as justification of powers based on the principles of proportionality and subsidiarity established in article 5 of the Treaty²¹ and furthermore, raises problems in the States with various legal systems, such as Spain and the United Kingdom.

Indeed, scholars totally in favour of the European Uniform Contract Law will state that a technical tool is needed that can facilitate integration, but they overlook the fact that there are difficulties which stem from the distribution of powers in accordance with EU Treaties²². They will say that the European Uniform Contract Law is a tool which will facilitate a specific change of mentality, but they forget that Civil Law is not something that affects relationships among citizens in a dramatic way. It is a political problem and at the same time a technical one and therefore the only mentality that it can change is the one of those applying the laws, with the aforementioned cultural limits. Legal changes handled from above are not usually very effective. By now, however, only an optional uniform contract law regime is considered as the possible action.

¹⁹ The relationship between European Code and culture is also highlighted by CASTRONUOVO (2001), p. 225.

²⁰ The relationship between sovereignty and European Codification is well outlined in CASTRONUOVO (2001), p. 222.

²¹ Concerning this issue, SANCHEZ LORENZO (2002), pages 218-224, MANGAS-LIÑAN (2000), pages 48-49 and MARTIN (2002), pages 641-645.

²² SANCHEZ LORENZO highlights the material limits (pages 202 sqs), stemming from the principles of subsidiarity and proportionality (pages 217 and sqs) and cultural ones (pages 225 and sqs), which makes achieving this final goal difficult; CAMARA (1999), p. 1670, MARTIN CASALS (2002), pages 641-645 and DIEZ PICAZO, ROCA, MORALES (2002), pages 121 and sqs, when dealing with the problems arising from the relationship between PECL and the European Civil Code. So the path is not an easy one to take.

If we continue to maintain the idea that the Uniform Law or a complete Regulation of the Law of obligations is a political tool, we must conclude that in European legal culture the means to avoiding the problems stemming from the present situation, has always been Codes, with different options, but always a Code. And on the other hand, establishing a text of this sort would imply a clear exercise of sovereignty since it would oblige the member States to accept this general text and to decide upon the domestic legal systems²³.

II. ADVANTAGES AND DISADVANTAGES OF A UNIFORM CONTRACT LAW.

In a paper presented in a meeting held in Firenze in 2008,²⁴ Fabrizio Cafaggi said that the Private Law policy affects one of the latest problems in private law in the European Union. The issue regarding a future European private Law has been the subject of a number of resolutions in the European Parliament, and some documents by the Commission, but so far no decision has been taken on it. The debate is currently approached on an academic level, seeking what the scholar identifies as “the search for a common core of principles on the rationalisation of the *acquis communautaire*, and the advantages and disadvantages of codification of private law”. However, the present problems are not limited to this issue: they go far beyond this, since there is a certain common European Law which forms the body of the Directives, *acquis communautaire*, though the lack of a clear European policy on this subject causes a considerable dispersion. Cafaggi asks us to consider several aspects and I shall take the liberty of contributing to this reflection by adding some new thoughts. He begins with the need of a new methodology in the field of European private law, which focuses on the following: (i) avoiding complete harmonization and encouraging the use of general clauses, although he accepts that the use of a complete regulation would “minimize the risks of conflicting interpretations”. A “rule-based legislation” increases the cost of adaptation; (ii) “The improvement of the modes of coordination among national judiciaries”, since “adequate judicial training becomes a precondition for implementation of policies based on judicial governance”.

I feel obliged to add a number of thoughts to this analysis of the present European legal system as regards the way European private law is really applied.

²³ But the discussion could be dealt with in another area: that of harmonising the rules governing disputes, based on art. 65 of the Treaty and which writers who are experts in the field maintain as a more useful way to achieving the goal of a unified law. See SANCHEZ LORENZO (2002), chap. IV *in totum* and the bibliography quoted. Notwithstanding, the European Parliament when proposing the methodology and schedule of future Uniform European Private Law, expressly points out that International Private Law is no longer a useful tool for a European common market, which has achieved a high degree of integration, quoting the *Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*. September 2001, p. 53.

²⁴ Cafaggi, Fabrizio. “Internal market, Contract Law and New Governance”. National Courts and European Private Law. European Institute of Florencia, 2008.”New Gov. New Modes of Governance Project. Policy Brief #26, spring 2008, p. 1. Rewed in Internet 8/06/2015.

In my opinion, the subject must focus on two large issues: (i) the first, one must focus on the discussion about the convenience of a single European text, and (ii) the second, on the need to establish some clear ways to obtain a progressive approach among European judges on matters related to the interpretation of the law, not just European law but also internal law.

The most important question is the following: Must the harmonization of private law be complete? This is a hotly debated issue among scholars and different research groups. This is proven by the proliferation of groups of scholars whose aim is to obtain as a result, a more or less complete text. The publication of the text called *Principles, Definitions and Model Rules of European Private Law*²⁵, presented as a draft by two European groups and based on the text of the Lando Principles of European Contract Law is an example of what is stated by this paper, as is the text on European Group in Tort Law. The European Commission, however, has for now rejected the idea of a general European Code and the Treaty of Lisbon does not contain any reference of unifying private law in Europe. In fact, the Treaty maintains the Maastricht methodology as regards setting the internal market as an object, at which all the rules are aimed (article 114.1TFUE) and to give up all general rules, to establish the identification of subjects which are the exclusive power of the EU and those which are shared with member States. Only in the field of Family Law is there any specific reference in article 81.3 TFUE, which regulates cooperation in civil law and including the rules in the Brussels 2 and Brussels 2 A regulations. The reported Proposal discussed until 2014 in the European Parliament was a good example as they rejected both a “Regulation establishing a European contract law and a Regulation establishing a European Civil Code”. Perhaps in the high echelons of the EU they may consider that the methodology of the European Civil Code is an obsolete idea and this may possibly be true, and it would also be very difficult to achieve.

But it is true that the techniques used so far have not been very useful. Directives have been considered as a tool for harmonizing European private law and they have certainly introduced general criteria in certain fields, with their difficulties, in consumer law, sales of goods, regulation of new technologies, such as electronic commerce, etc. The *acquis communautaire* is broader than private law related Directives and Contract Law²⁶. They have also caused a need to break with the traditional schemes of legal thought because they require the transposition to internal law. So, complete areas of national systems are affected by the entry into force of Directives and by the fact that their application by internal courts is not being done in accordance with the interpretation made of internal law, but in accordance with the aims provided by such a

²⁵ *Principles, Definitions and Model Rules of European Private Law*. Draft Common Frame of Reference (DCFR). Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Edited by Christian von Bar, Erich Clive and Hans Schulte-Nölke, and Hugh Beale, Johnny Herre, Jérôme Huet, Mathias Storme, Stephen Sawn, Paul Varul, Anna Veneziano and Fryderyk Zoll. Sellier. European Law Publishers, 2009.

²⁶ Micklitz-Kafagi. “Introduction”. In Micklitz-Kafagi (2010), p. xvi.

Directive. It has been correctly stated that Directives lead to unification at the EU level, but also disintegration at a national level. The conclusion is that Directives are a provisional remedy to achieve this unity. The criticism of this system can barely resist. They are just regulations in private law in the widest possible sense, since the way their drafting and enacting respond to quite different aims and probably never to the aim of unifying European law in general.

The way taken by the European Parliament in the Common European Sale Contracts Proposal, is the creation of an optional uniform contract law regime, which “harmonises the national contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract”. The legal basis for this Regulation lies in the article 114 TFEU. It is worth considering that such a Regulation can collide with the principles of subsidiarity and the principle of proportionality.

III. JUDICIAL GOVERNANCE

Cafaggi provided interesting ideas in this field, for it is true that checking how much European law is applied is a difficult task but it is also a crucial one since “adequate implementation and legal integration are strictly connected”. According to him “governance would be perceived not only as an institutional response to cultural differences, associated with national identities in order to make them compatible by creating an internal market, but also as a comprehensive response to market and governmental failures”. So judges become “key actors to implement policies defined through European legislation”. Therefore, this is not only about the EU acting to develop its policies in subjects that it has powers upon, which could be defined as a first level of action, but about these policies being effective due to their actual application by judges who are the main targets. This would represent the second, probably more important level, since any reluctance by the judges to apply European laws would destroy the system.

It is indispensable to grant judges an important role in the gradual unification of private law in Europe. It is true that although a single legislation was reached and the different private systems were harmonised, only judges would hold the key to the effectiveness of European legislation, as already application of Directives has shown. In the DCFR Introduction, it is said that “shortly after their publication, the principles of European Contract Law (PECL), which the DCFR (in its second and third Books) incorporates in a partly revised form, received the attention of many Higher Courts in Europe and of numerous bodies charged with preparing the modernisation of the

relevant national law of contract”²⁷. Among them, Spanish Supreme Court as well as Spanish Lower Courts.

The role of the European judge must be examined through the use of preliminary ruling. Let me refer to this important matter.

The harmful issue aims to clear up the meaning of EU law which is applicable to a certain national litigation. It “mainly aims to place a European institution, the Court of Justice, in a position to set common directives which must be considered by national judges and courts when ensuring that the correct, uniform development of European law is observed, maintaining the agreement achieved at the stage of producing regulations to its effective enforcement”. So the Court sets a uniform doctrine which must be followed by the courts in the EU member states. The problem lies in the fact that it only refers to European law and that is why the Court of Justice is legitimised to establish the correct interpretation. So this is not useful to achieve certain interpretative unification in other aspects of private law, when it has its origin in the member states.

The problem raised by the preliminary ruling lies in the fact that it only refers to European law and that is why the Court of Justice is legitimised to establish the correct interpretation. So this is not useful to achieve certain interpretative unification in other aspects of private law, when it has its origin in the member states.

The most interesting case law affecting Spanish Contract Law system is the Aziz case. Aziz was a citizen who concluded before a notary, a loan agreement secured with a mortgage. According with the terms of the contract the agreement provided in clause 6, for annual default interest of 18,75% automatically applicable to sums not paid when due, without any notice. The same clause conferred to *Catalunyacaixa*, the creditor, the right to call in the totality of loan where the debtor failed to fulfil his obligation to pay in the time-limit any part both the principal and the interests of the loan. Mr Aziz failed to pay and the creditor, *Catalunyacaixa*, instituted enforcement proceedings, until on July 2010, when a judicial auction was arranged, according with the rules in the Civil procedure Code. As a consequence M. Aziz was evicted from his home. Meanwhile, Mr Aziz had applied for a declaration seeking the annulment of several clauses of the mortgage loan agreement, on the ground that they were unfair. The Commercial judge expressed doubts concerning the conformity of Spanish law with the framework established by the Directive 93/13/CEE on unfair terms in consumer contracts.

Among other statements the judgement of the European Court of Justice of 14th March 2013 says that “it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (*Banco Español de Crédito*, paragraph 39)”, and as a consequence, “the answer to the

²⁷ DCFR, p. 9. Intr. 10.

first question is that the directive must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision”.

The second question asked by the Spanish Court referred to the meaning of “unfair term”, as it is used in the Directive 93/13/EEC (article 3.1). The conclusion is not now²⁸ interesting for these paper arguments. I wanted to point out that EUCourt of Justice is entitling for interpretation of the European Law applicable in domestic cases. This system guarantees that a common interpretation will be in force over the European Judges.

However, these techniques should be discussed at a European level to facilitate a meeting point between all the national judges to enable them to solve certain problems, common to all the European legal systems in a uniform manner.

²⁸ “Article 3(1) of Directive 93/13 must be interpreted as meaning that: – the concept of ‘significant imbalance’ to the detriment of the consumer must be assessed in the light of an analysis of the rules of national law applicable in the absence of any agreement between the parties, in order to determine whether, and if so to what extent, the contract places the consumer in a less favourable legal situation than that provided for by the national law in force. To that end, an assessment of the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms, should also be carried out; – in order to assess whether the imbalance arises ‘contrary to the requirement of good faith’, it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations”.

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