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The Eye of the Storm: on the Case for Harmonising Principles of Damages as a Remedy in Contract Law

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Abstract: Taking the current work on refining the contract law acquis as its starting point, this article considers whether there is a case for greater harmonisation of the law of damages in contract law within the EU. The law of damages is a platform for enforcing contractual interests. As long as remedies in general and damages in particular remain subject to divergent national solutions, the Community will have difficulties in achieving its goal of coherency in contract law.

By demonstrating the complexities surrounding this area of law and discussing recent decisions of the European Court of Justice, it argues that the current inconsistencies in the law of damages justify action at community level. The article outlines possible options for the Community that are consistent with the current climate of political, legal and social integration within the EU. It concludes by demonstrating that Europe could use the medium of contract law and the law of damages to deliver social and economic justice.

I. Introduction

Few areas have attracted as much comment in the EU as the future of private law.1 This comes as no surprise. Legal harmonisation within the EU was not designed with the goal of economic integration in mind, but restricted to areas of law where national rules causing impediments to trade between Member States were to undergo alignment. This intrinsic ‘single market

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matrix’ has consistently posed a stumbling block to legal harmonisation.\(^2\) Despite the relatively high degree of approximation that has taken place in various sectors of law through this process\(^3\) – notably within the field of contract law\(^4\) – no ultimate political agreement or decision has ever been formally reached on any further-reaching convergence in the sense of a European Civil or indeed Contract Code.

Paradoxically, however, preoccupation with these very subjects remains high on the European agenda.\(^5\) The lack of formal legislative competence has not detracted from this field in any way.\(^6\) Interest in legal convergence between Member States continues unabated,\(^7\) despite a lack of immediately quantifiable need for further intervention.\(^8\) The subject has developed into a ‘neo-

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3 The Single European Act (SEA) departed from the original requirement of unanimous voting under Art 100 EEC (old), thus paving the way for majority decision voting and increased harmonisation under the new Art 95 EC.

4 A list of eight European contract directives that constitute the acquis is contained in the Commission Communication European Contract Law and revision of the acquis: the way forward COM(2004) 651 final of 11 October 2004. All previous Commission Communications can be accessed from http://www.eu.int/comm./consumers/index_en.htm (last visited 23 January 2006).

5 A comprehensive list of the groups dealing with Contract law can be found in Commission Communication (2004), n 4 above; details of their activities are available in House of Lords, European Contract Law – the way forward, 12\(^{th}\) Report of Session 2004–05, 5\(^{th}\) April 2005, HL Paper 95, 13–15.

6 In exercising the powers attributed to it, the Community is required to act within these parameters, see Art 5(1) EC, whilst ensuring that its actions are proportional to the ends to be achieved, Art 5(3).


8 See S. Vogenauer / S. Weatherill, ‘The European Community’s Competence for a Comprehensive Harmonisation of Contract Law – an Empirical Analysis’ 2005 European Law Review 821–837 for references to studies carried out on behalf of the Commission in relation to consumer law, including a discussion of the research conducted by Clifford Chance in 2005 among 175 firms in eight Member States under the academic supervision of the authors.
Pandectist’ project: from its preoccupation in the eighties’ and nineties’ with completion of the single market, Europe is now progressing to a more controversial project of consolidating private law. This transition is most clearly visible in relation to the work on a more coherent European contract law.

Such projects are not, however, without their critics. There is concern that the laudable aims of disentangling discrepancies in areas already harmonised, thereby streamlining the acquis, could engender a side-stepping of more fundamental processes of legitimate consensus-building. This in turn could neatly deflect from the central issue of whether Europe has any competence to increase involvement in its private law beyond mere free movement demands. There is no lack of scepticism that this type of project might develop into a self-propelling legislative experiment in which a European Civil Code becomes its ultima ratio, obviating democratic discussion as to the social, political and indeed cultural values on which Europe’s future rules of private law should be modelled.

It is precisely such reservations which have inspired reflection on the choice or selection of rules of private law that have or are to become subject to harmonisation in Europe. More precisely – in the context of European contract law – which rules of contract law (if any) could benefit from being subjected to greater Europeanisation?

The immediate focus of this paper is the first issue – the boundaries of harmonisation of private law in the context of the law of damages in contract law. The second issue of competence will be referred to where appropriate within this context. The paper essentially seeks to highlight the issue of whether a case can be stated for harmonisation or at least greater unification of the law of damages in European contract law. The law of damages fulfils a central socio-economic role within contractual remedies and balances contracting parties’ interests, expectations and losses in the event of breach. 

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this respect, it raises fundamental questions of social justice within European contract law since there is a need for consistency in the law of damages in the EU.\textsuperscript{13} Equality in freedom to contract and contractual fairness require that parties receive equal treatment in relation to the distributive effects of the law of damages. It is a logical continuation of the work already undertaken by the Community to achieve transactional equality within general and consumer contract law.

The first part of this paper deals with the more general question of the regulatory legitimacy of the consultation processes in the EU and the means used to achieve harmonisation of European contract law. The second part concentrates on the law of damages and examines the need for consistency, fairness and equality of treatment in this particular area of the law.

II. Trends in European Lawmaking

1. Lawmaking by Networking

The field of contract law is currently pre-empted by various expert network groups, cooperating in the development of studies on areas of common ground, producing draft styles and codes, whilst reviewing imbalances between national laws caused by differing transposition of European directives. Among the more recently established groups is the consultative body of experts developing a Common Frame of Reference\textsuperscript{14} (CFR) – an authoritative explanatory commentary (\textit{thesaurus}\textsuperscript{15}) or reference work for the EU, designed to reduce divergences and inconsistencies caused by imprecise or unclearly drafted directive law.\textsuperscript{16} The Study Group on the European Civil

\textsuperscript{13} Since 1975, the Community has consistently worked towards strengthening proper redress and access to justice as a fundamental right, see Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for consumer protection and information policy, \textit{OJEC} 1975 C 92/1. Art 20 Charter of Fundamental Rights of the EU, 2000/C364/01 of 18 December 2000 (equality before the law).

\textsuperscript{14} The CFR will elaborate guidelines for interpretation, clarification of abstract terms and greater coherence in the areas of secondary contract law, see HL paper 95, n 5 above, 16; in the Commission Communication, n 4 above, the CFR is described as having three chapters: principles, definitions and model rules, see Annex 1, 14 ff.

\textsuperscript{15} HL Paper 95, n 5 above, 22; the CFR has attracted various epithets including toolbox, lawmaking toolkit and thesaurus.

\textsuperscript{16} The traditional sectoral approach to harmonisation in the EU has led over time to divergences in application of the law, making a re-appraisal of original content and goals of secondary legislative measures necessary. These have been indicated in various reports, see above n 4, Commission Communication; HL Paper 95, n 5 above, 16. See further A. Haagsma, ‘L’analyse des effets et le droit des contrats européen’, \textit{Gaz. Pal.}
Code\textsuperscript{17} is equally active in pursuing drafting efforts towards a European Civil Code, as is the \textit{Acquis} Group\textsuperscript{18} which is undertaking a compilation and filtering of contract law falling under the banner of the \textit{acquis}. In short, European contract law is being exposed to a high level of creative re-modelling. None of these groups has, however, any legitimacy in the sense of being part of an elected or entrusted national or European parliamentary committee empowered to draft legislation.\textsuperscript{19}

In this respect, the work currently undertaken in streamlining European contract law demonstrates that a lack of an immediate legislative competence is not \textit{per se} an impediment to pursuing the general cause of greater legal integration in Europe. The approach to refining legal rules through networks or the CFR itself constitutes a new form of dialogue in Europe, from which binding rules could, however, conceivably one day derive their legitimacy. As a \textit{modus operandi}, soft law models such as the CFR and Civil Code networking are an innovative form of cooperation, in keeping with the ongoing process of convergence in Europe. But, as with the American Restatements, their roles can only ever be limited to a model character.\textsuperscript{20} They cannot replace the common law or continental codes in the face of unsettled constitutional aims and lack of consensus as to the future shape and content of an integrated European private law.

Creating legal dialogue by networking should not detract from two central issues: firstly, the boundaries for pursuing legitimate harmonisation of private laws; secondly, the limits of soft, non-binding legal rules within an integrated European legal order.
law in the EU and in this context, the individual legal rules chosen to undergo this process; secondly, the appropriate form of consultation and preparation to flank future law-making at Community level. The *sui generis* nature of European integration lends itself well to restatements of the law, but the case for a Civil Code in Europe still needs to be made. Member States, in the absence of an all-encompassing provision along the lines of Article 293 EC, have a legitimate interest in retaining control over sacrosanct issues of national law. The challenge for the future development of European private law is to monitor, participate and even create common ground without overstepping legitimate boundaries. Soft law alone cannot constitute the legal basis for a functional European civil society. Serious consideration should be given to the ends to which such soft law rules may legitimately be put.

2. Subtle Inroads into Community Competence

Until the Commission’s first Communication in 2001 on European governance, diversity between Member States’ private laws was traditionally viewed as the *quid pro quo* for strict Community competence issues that allowed harmonisation in terms of Article 95 EC (single market norm-empowerment), flanked by Article 153 EC where action at Community-level is justified by consumer needs and Article 65 EC, which instituted cooperation in civil justice. National law remained sacrosanct insofar as no overriding Community need or obstacle to the proper functioning of the single market provided justification for legal harmonisation in specific sectors.

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21 See ‘Manifesto’, n 12 above, 656, 657, 663; HL paper 95, n 5 above, 24.
24 The provision on judicial cooperation in civil matters was first introduced by the Treaty of Amsterdam. The immediate significance of the extension of powers under Art 65(b) EC to include conflict of laws is taken up further below, cross reference to conclusion.
Since then, however, there has been a general tendency to adopt a *per se* Community approach. This can be observed in the choice of areas set apart for European legislation.26 It is particularly evident in the immediate project on a European contract law. This reflects a subtle extension of both European method and competence. How the transition towards broader Community competences occurred is illustrated briefly below.

The test of whether different national legal rules constitute obstacles to the single market has undergone various transitions in the 50 years since the establishment of the Community.27 Transgression from the original test of whether a national rule constituted a barrier to trade (the analysis of effects doctrine), as enunciated in *Dassonville*28 first took place after the ECJ decision in *Cassis de Dijon*.29 This effectively opened the flood-gates for broader harmonisation of areas of national law;30 harmonisation became a logical substitute for the *Cassis de Dijon* mutual recognition approach. Although the decision in *Keck*31 was originally hailed as marking a period of decline in harmonisation, the all-out approach was soon readopted. Only in the *Tobacco* judgment did this *communautaire* cycle revert to the Court’s original stringent analysis of effects.32 This circular approach to Community competence forms part of what has been termed by Stephen Weatherill as the competence creep:33 a process by which competences are extended through alterations in the political agenda, latterly the Hague Agenda, thereby circumscribing new areas for action. In practice, it is a self-proclamation of power leading to an effective extension of competence.

Be this as it may, the directive-only approach to harmonisation has not always produced optimum results. In some instances it has led to significant

26 See G. Howells / S. Weatherill, *Consumer Protection Law* (2nd ed, Aldershot: Ashgate, 2005) ch 2 for a full treatment of the development from negative to positive harmonisation and latterly the development of Community Action Programmes within the EU.

27 See Haagsma, n 16 above, 49–52.


29 Case 120/78 *Rewe Zentrale v Bundesmonopol für Branntwein (Cassis de Dijon)* [1979] ECR 649 (ECJ).

30 The direct effect of Art 28 EC operated as a red rag to Member States. The Single European Act was agreed on in 1985, marking the move away from unanimity and a release from the informal constraints of the Luxemburg Agreement so that the way for harmonisation was opened, see Haagsma, n 16 above, 52; Howells / Weatherhill, n 26 above.


32 Case 376/98, n 2 above.

divergences in application of Community law, particularly through the use of opt-in opt-out formulae.\textsuperscript{34} To a certain extent some rules may even be counter-productive.\textsuperscript{35}

No immediate single market rationale for harmonising specific areas of private law appears discernible any longer. Recitals to directives are of such length as often to provide all-encompassing buffers to their legal basis.\textsuperscript{36} From a communautaire viewpoint, the adoption of a coherent community approach to the law of damages in contract seems desirable and consistent if a European contract law is to be considered seriously and social justice to be seen as more than just one of the Union’s stated objectives.\textsuperscript{37}

\section*{III. Damages in European Contract Law: the Need for Consistency, Fairness and Equality of Treatment}

\subsection*{1. Coherency in the Law of Damages}

The entry point for this enquiry is whether, in this search for greater coherence within the spectrum of contract law rules in Europe, a case can be made for greater substantive consistency in the rules applicable to the law of damages. The historic prominence of the general liability rule has been superseded by a fragmentation that has both legal and practical consequences. But it is not just the development of rules that is important. The implementation of these rules, the manner in which they are applied by the Member States and courts, is equally important. The goals of the Community’s Damages Directive (92/44/EC) were to “[...] create a coherent framework for the determination of damages and to ensure fair treatment in the relationship between the parties [...].” Equally, the aims of the Directive on the sale of consumer goods (85/577/EEC) were to “promote legal certainty and simplify the rules governing the relations between the parties in such matters.” However, the rules are not just important for the parties and their legal predicament: they also influence the public perception of justice and the protection of individual rights. Any substantial changes to the law of damages can impact upon perception. But is a coherent approach possible? Or is the ambition of harmonisation impossible and a different approach necessary? This paper will consider these and other questions in order to determine if coherence in the law of damages is possible and desirable, considering: the nature of damages; the application of the rules; and the coherence of the rules themselves.

\textsuperscript{34} The use of opt in and opt out formulae was a political move to ease agreement. Its general acceptance as a \textit{modus operandi} can still be seen in relation to the optional instrument, see Commission Communication, above n 4, Annex II, 17–18. Vogener / Weatherill, n 8 above, 834, see the establishment of an optional European contract law in addition to existing national contract law as not ‘entirely unrealistic’.


\textsuperscript{36} In Case 344/04, n 2 above, para 102, the ECJ pronounced: ‘It is settled case-law that the preamble to a Community act has no legal binding force and cannot be relied on as a ground for derogation from the provisions of the act in question.’ \textit{Dir} 93/314 \textit{OJEC} 1990 L 158/59 on package travel and package holidays has twenty five recitals; \textit{Dir} 1999/44/EC \textit{OJEC} 1999 L 171/12 on sale of consumer goods has twenty six; see K. Lenaerts, ‘Constitutionalism and the many Faces of Federalism: “There is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community.”’ (1990) 38 \textit{American Journal of Comparative Law} 205, quoted in Haagsma, n 16 above.

\textsuperscript{37} Art I-3 Treaty on European Constitution.
damages.\textsuperscript{38} Consistency in this context means the substantive content of a rule on damages \textit{(qua} compensation for non-performance\textit{)}, going beyond a mere common denominator such as its function and purpose,\textsuperscript{39} to achieve the same operative outcome in substance at Member States level.\textsuperscript{40} What is meant here is the measure of fairness and outcome in compensation for aggrieved contracting parties in the sense of equal perception, thereafter equal exposure to remedies in the face of the same or similar contractual grievances. The need for a common perception of not only the role and function of damages but also their operation is explained below.

Firstly, damages \textit{qua} compensation are a measure of economic rights perceived by parties to the contract, a measure of performance or interest in the contract, failure of which gives rise to various models of compensation. Some but not all jurisdictions use classifications such as positive (fulfilment interest) and negative (reliance) interest\textsuperscript{41} to distinguish the type of loss involved, depending on whether damages are for ancillary losses (simple), whether fulfilment can still take place (and/or is warranted) and whether expenses have been made in anticipation of performance that does not materialise. The objective is to determine to what extent unfulfilled or badly performed contractual interests can be recompensed. Within the EU, a common position in law could readily be taken within what is otherwise an integrated (social-justice)\textsuperscript{42} market economy with common social and economic goals defined

\begin{footnotesize}
\textsuperscript{38} Whether the divergences in damages constitute a ground for an all-out alignment of European contractual remedies is not considered here, but remains an issue. Diversities in qualification of obligations as a result of international private law considerations could provide a legal basis for Community legislative competence, see below cross reference to conclusion.

\textsuperscript{39} Substantive content should go beyond the degree of common ground associated with the ongoing Common Core project on comparative law and convergence in private law. For details of publications and research groups, see http://www.jus.unitn.it/dsg/common-core (last visited 23 January 2006).


\textsuperscript{42} N 37 above.
\end{footnotesize}
in Article 2 EC. It is the other side of the coin of market freedoms granted by the Treaty and consistent with any move towards a coherent approach to European contract law.43

Secondly, care is required with the category of damages for non-financial interests. Such interests may have been contracted for (or be implied within the contract) or may entail losses inherent in the contractual interest ancillary to the breach. Such a loss is generally referred to as consequential loss. This need not be of a material kind but may extend to losses such as status, comfort or other benefit. Some jurisdictions are wary of recognising non-material losses within the category of consequential loss.44 Border lines between pecuniary and non-pecuniary losses can on occasion lead to further differentiations between contractual and tort obligations.45 The treatment of consequential, economic and pure economic loss is a complex matrix, demonstrating constants and diversities in all legal systems.46 The Principles of European Contract Law (PECL) have included non-pecuniary loss within their ambit.47 Case law too is making inroads in the recognition of ‘well-being’ (be it in an employment, club membership or holiday situation) as an economic right,48 including it as consequential non-pecuniary loss.49 Dis-

43 The CFR is to include the definition of damages within its ambit, see Commission Communication, n 4 above, Annex II, 14.


48 See McKendrick / Worthington, n 44 above, 287–322.

49 Ibid 294, see the reference to Iacobucci J. in Wallace v United Grain Growers Ltd [1997] 152 DLR (4th) 1, 33: ‘work is one of the defining features of people’s lives’. 
criminatory practices in employment and interference in contractual relations can equally lead to this type of claim.\textsuperscript{50}

Finally, the case for aligning the scope of damages between the categories of pecuniary and non-pecuniary loss within the Member States appears the greatest. As demonstrated by the Court of Justice in its 2002 judgment \textit{Simone Leitner},\textsuperscript{51} there is an implicit need to ensure that provisions of national law create an effective interface with secondary law to ensure its uniform application within the Community. In the particular instance involving a package holiday, spoiled by unpleasant illness and resulting in loss of enjoyment, the ECJ was required to undertake an appreciation of damages (in the form of non-pecuniary loss) claimed by Simone Leitner under Article 5 Directive 90/314/EEC on package travel, as implemented into Austrian law. The loss in question (loss of enjoyment) had been declared inadmissible by the lower instances: this head of damage is both excluded by the Austrian Civil Code, unless explicitly governed by a \textit{lex specialis} (eg § 1325 ABGB) and courts had consistently refused to give it any recognition.\textsuperscript{52} A coherent approach towards non-pecuniary loss between Member States, accompanied by an autonomous and uniform interpretation of Community law was required, to the exclusion of concepts based on national law. The ECJ confirmed that one of the main purposes of the Directive was the elimination of disparities between national laws and practices of the various Member States (in the law of damages) that in turn could lead to significant distortion of competition in such fields.\textsuperscript{53}

This is the very crux of the matter. Not all Member States regard loss of enjoyment as a category of economic or consequential loss. Austria does

\textsuperscript{50} In Case 271/91 \textit{M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (No 2)} [1993] ECR 1993 (ECJ), the ECJ defined damages for discrimination under the EC Directive on Equal Treatment 76/207/EEC (since amended by Dir 2002/73/EC) as follows: ‘financial compensation is the measure to be adopted in order to achieve the objective … it must be adequate in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full’. Dir 2000/43 on equal treatment irrespective of racial or ethnic origin, \textit{OJEC} 2000 L 180/22 requires a system of effective sanctions to be established within Member States. These directives have formed the basis for claims for compensation for unfair dismissal under national law, see for German law, §§ 611a II, III BGB; further, von Bar / Drobnig, n 45 above, 101.

\textsuperscript{51} Case 168/00 \textit{Simone Leitner v TUI Deutschland GmbH & Co KG} [2002] ECR I-02631 (ECJ).

\textsuperscript{52} Ibid, para 10.

\textsuperscript{53} Ibid, paras 20, 21.
not.\textsuperscript{54} German case law has over recent years forced the issue.\textsuperscript{55} English law concedes this category of claim.\textsuperscript{56} If divergences in the law of damages at national level can lead to distortions in competition, can it be logically assumed that such divergences create legal barriers within the single market, thereby justifying legislative intervention?\textsuperscript{57}

2. Damages as a Barrier to the Single Market

It is clear from the foregoing that directives have merely created an additional scaffolding of rules supported by national remedies including damages. In principle, the barrier-to-trade test is applicable where legal rules lead to varied outcomes and effects on market behaviour. From the single market perspective, differences in the law of damages can operate as a barrier to the single market where they lead to actual or potential sources of economic and individual social imbalance between customers in the EU.\textsuperscript{58} Normally, this would require an empirical assessment of the effects of legal remedies on customer behaviour, in the sense of whether customers are more (or less) cautious of contracting in other European jurisdictions as a result of such

\begin{itemize}
\item \textsuperscript{54} See § 1325 ABGB. The lower Austrian courts held that the wording of Art 5 Dir 90/314/EEC was not precise enough to include loss of enjoyment within its scope. An award for pain and suffering was, however, recognised at first instance.
\item \textsuperscript{55} For the effects of the 2002 Civil Code reform and the new provisions of § 253 II BGB, including references to recent case law, see D. Coester-Waeltjen, ‘The New Approach to Breach of Contract in German law’, in Cohen / McKendrick, n 44 above, 135–156, at 153; further von Bar / Drobnig, n 45 above, 91, 106–7.
\item \textsuperscript{56} \textit{Jackson v Horizon Holidays} [1975] 1 WLR 1468; \textit{Jarvis v Swan Tours Ltd} [1973] QB 233. For a review of international treaty provisions and national laws on non-material loss, see Tizzano in Case 168/00 (\textit{Leitner}), n 51 above, paras 38–43.
\item \textsuperscript{57} See Report on the Implementation of Dir 90/314/EEC on Package Travel SEC(1999) 1800 final, para 1.2.2.: ‘The non-performance of services … in most Member States entails the direct liability of the tour organiser but not of the retailer. Yet this might lead to shortcomings … which would entail all the disadvantages of trans-border litigation. This would be contrary to the aims of the Directive’. In their study, von Bar / Drobnig, n 45 above, 460–461, recommend that the CFR not be limited to contract law alone since the single market interference problem can only be reviewed within a wider spectrum of overlapping circles and concurrence of actions in tort and contract. Further, Vogenauer / Weatherill, n 8 above, 835 note that the piecemeal approach to harmonisation of contract law to date is not perceived as effective.
\item \textsuperscript{58} B. Lurger, ‘The Social Side of Contract Law and the New Principle of Regard to Fairness’, in A. Hartkamp, \textit{Towards a European Civil Code}, n 1 above, 22, in which she prefers contracting parties, manufacturers and consumers alike, to be termed customers to avoid a sectoral (and thus consumer-only) development in contract law.
\end{itemize}
substantive differences.59 These can easily lead to forum shopping which has traditionally operated as a barometer of legal a system’s attractiveness and efficiency.60 As a matter of principle, Europe should avoid encouraging divergences in national law, where such differences lead to either blatantly different remedies or could lead to inequality of protection between citizens and customers in Member States.61 Attention has been drawn to this phenomenon in various Community reports.62 Eliminating differences between national rules on damages would be one way of counteracting this.

Further justification for an aligned approach to damages can be derived from general principles of Community law: the Treaty is built on general principles of freedom of contract commonly recognised in all Member States. It is this very freedom that constitutes one of the main pillars of European economic activity, as expressed in further legal notions such as the inviolability of contractual agreements (pacta sunt servanda) and the role of contractual freedom upheld by Article 81 EC. These principles contribute to the realisation of equality in contractual choice within the single market. Such contractual choices include the availability of an equivalent, effective remedy in cases of breach.63

Other well-established legal precepts and common rules add to the subject’s potential for greater coherence: the need for predictability of legal outcome

59 Some empirical research was undertaken on behalf of the Commission within the study by von Bar / Drobnig, n 45 above, 22–23, involving the dispatch of questionnaires within the EU to representative associations, companies, consumer groups and legal advisors. Further, Joint Comments of the Study Group on European Contract Law and the Lando Commission, n 20 above. The 205 Clifford Chance study is reported with further references to previous Commission studies in Vogenauer / Weatherill, n 8 above.


62 Joint Comments of the Study Group on European Contract Law and the Lando Commission, n 20 above; Report on Implementation of Package Travel Directive, n 57 above; and not least by AG Tizzano in Case 168/00 (Leitner), n 51 above, para 33.

and legal certainty in case of breach of contract. This is supported by Europe’s existing limitations on forum shopping in its rules of compulsory jurisdiction and recognition of judgments, alongside rules governing applicable law. Since Europe has created conditions ensuring equal access to the market place, its next step could be to provide for greater predictability of contractual results, by adopting an aligned approach to economic fairness and an assessment of performance interest in the case of breach.

This was the logic behind the uniform international rules of contract drafted to regulate cross border commercial contracts. The Convention on the International Sale of Goods (CISG) has gone a long way in aligning the rules governing international sales law in the majority of Member States, including damages. Making CISG provisions and decisions available have contributed to maintaining coherency in its operation and interpretation.

The need for consistency of remedies and results has been taken up by groups of academic observers and practitioners alike and the multifarious divergences at national level reported in various studies. As with uniform inter-

64 The ECJ in Case 344/04, n 2 above, paras 64 ff, 68.
65 Reg 44/2001 OJEC 2001 L 12.
66 Convention of Rome on Law Applicable to Contracts OJEC 1988 C 27/01, Art 3 (choice of law); Art 5 (consumer contracts); in the absence of choice or compulsory rule, the law applicable is that of place of performance, Art 4. See the new Draft Regulation on Law Applicable to Contracts COM(2005) 650 final of 15 December 2005.
67 This is settled at least in relation to damages for breach of Community law by Member States: only European and not national rules on economic loss are applicable, see joined Cases 6/90 and 9/90 Francoovich [1991] ECR I-5357 (ECJ); Case 48/93 Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame and others [1996] ECR I-1029 (ECJ); for breach of Art 81, Case 453/99 Courage Ltd v B. Creeban [2001] ECR I-06297 (ECJ).
68 United Nations Convention on Contracts for the International Sale of Goods (11 April 1980) 1489 UNTS 3 (CISG); twenty Member States are party to CISG; Art 74 CISG: ‘damages for breach consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss at the time of the conclusion of the contract, in the light of the facts and the matters of which he then knew or ought to have known, as a possible consequence of the breach’. The Secretariat to the UN Commission on International Trade Law (UNCITRAL) operates a system of disseminating information on CISG case law and arbitral awards on all UNCITRAL legal texts (CLOUT).
national sales law, European directives were not designed to replace national rules\textsuperscript{70} but to facilitate the cross-border freedom in par with economic freedom.\textsuperscript{71} Surprisingly, the law of damages has found only occasional general reference in individual contract law directives.\textsuperscript{72} Access to contractual remedies has not yet been perceived as a corollary to market integration and contractual coherence. This approach should be altered.

3. Diversity of Interests and Remedies in Contract Law

Contract law is deeply rooted in traditional perceptions of rights, remedies and their relationship to one another. Choices of remedies for non-performance in most jurisdictions range from the primary or subsidiary nature of specific performance in maintaining the contractual interest,\textsuperscript{73} to choices relating to modification, termination and / or damages for breach.\textsuperscript{74} Generally speaking, an award of damages involves an appreciation of the contractual interest that reflects the ultimate loss.\textsuperscript{75} Certain areas of contract law have acquired a degree of precision in determining contractual interest and remedies

\textsuperscript{70} Art 4 CISG regulates questions of validity of contracts and property rights to national, not uniform law.
\textsuperscript{71} Art 7 CISG requires the international character of the Convention to be respected in its interpretation and application; Recital 6, Dir 1999/44/EC OJEC 1999 L 171/12 on certain aspects on the sale of consumer goods refers to non-conformity as being the greatest problem in sales law.
\textsuperscript{72} Art 4 Dir 1999/44/EC refers only to the pursuit of remedies as governed by national law; Art 14 Dir 85/374/EEC on product liability leaves contractual liability untouched by its provisions. Fourth Dir 2000/26/EC OJEC 2000 L 181/65 on insurance against civil liability in respect of motor vehicles, see case law on contributory negligence, Case 537/03 Candolin et al v V. Pohjola [2005] ECR 000, judgment of 30 June 2005.
\textsuperscript{73} See Cohen / McKendrick, n 44 above, xxix–xli; in Germany, the right to damages retains a subsidiary character in spite of § 280 I BGB, see § 281 I (damages after notice to perform); § 437 I (sales law, damages listed after performance in the hierarchy of remedies); in French law too, damages have a subsidiary character, see Y.-M. Laithier, ‘Comparative Reflections on the French Law of Remedies for Breach of Contract’, ibid, 103, 113.
\textsuperscript{74} See Cohen / McKendrick, n 44 above; for details of French law, see Laithier, ibid (n 73 above).
\textsuperscript{75} D. Friedmann, ‘Performance Interest in Contract Law’ (1995) Law Quarterly Review 628-684, argues that the concept of reliance interest was based on a wrong perception made by Fuller and Perdue in their seminal article on the subject of performance interest (L. Fuller / W. Perdue, ‘The Reliance Interest in Damages’ (1936) 46 Yale Law Journal 52, 373); moreover, the existence of the reliance theory in German law has contributed to its continued credibility. For an overview of the German law of contractual damages, see von Bar / Drobnig, n 45 above, 65; further, Coester-Waltjen, n 55 above, 152–153.
with time: this applies particularly to construction law, sales law and employment law.\footnote{Case 152/84 \textit{M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)} [1986] \textit{ECR} 1986 (ECJ), Case 271/91, n 50 above.}

Damages are subjected to further variables where contractual remedies are discretionary in nature or in the hands of the parties themselves in the form of self-help rules.\footnote{These usually take the form of pre-agreed liquidated damage clauses. There are legal controls on the validity of such clauses (eg for German law § 309 BGB) and eg in English law whether they constitute (invalid) penalty clauses, see \textit{Philips Hong Kong Ltd v Att-Gen Hong Kong} [1993] BLR 41; under French law, courts are allowed to adjust these clauses under Art 1152 Code Civil, see Laithier, n 73 above, 121.} As a result, a degree of uncertainty persistently prevails with remedies,\footnote{Remedial choice may be in the hand of the debtor and not the creditor exclusively eg the disproportionality test in Art 3(3) Dir 1999/44, as transposed in § 439 III BGB for Germany.} even where individual contractual rights themselves appear clear. This depends not only on whether remedies are discretionary but whether and, if so, which remedies have been agreed between parties \textit{ex ante}: in some circumstances a different remedy may be imposed by the court \textit{ex post}, after hearing the dispute.\footnote{This might cause a court to make an award of damages rather than grant an injunction.} Flexibility remains the mark of contractual remedies in practice.

While comparative scholarship has contributed to an understanding of preferences attached to contractual remedies in different jurisdictions, no single overall approach to remedies exists. Nevertheless, there are growing calls among scholars for simplification of remedies in contract law by adopting a unitary approach to damages. Supporters of this unified approach rely to a certain extent on a critique of the reliance theory,\footnote{Fuller / Perdue, n 75 above, 373.} vocating simplicity in remedies on the basis of the expectation interest in the search for a reliable and certain prospect of damages. Despite the criticism that unificationists have reaped for their over-rigid perceptions of contextual analysis of contracts and disregard for the multiplicity of contractual remedies,\footnote{Notably R. Kreitner, ‘Multiplicity of Remedies’, in Cohen / McKendrick, n 44 above, 24 ff.} their attempt to extract remedies from conceptual overload is relevant here: the achievement of legal certainty was one of their principal aims. Contract Law in the EU is suffering from the very same \textit{malaise} and is criticised by scholars for this. Providing clear rules on damages within Community law could ease the current dichotomies: it would increase predictability, legal certainty and ensure uniform application of the law with equivalent socio-economic effect in all
Member States. Not least, it would be subject to uniform interpretation by the ECJ. In due course, this could lead to a unified substantive rule on the type and scope of damages in question.

4. Obligation in Contract or Tort

One further particular variable between jurisdictions deserves some mention. Damages may well be assumed as a general, in some systems, even an automatic remedy. Patterns of liability may deviate, depending on whether the obligation in question is governed by contract, tort or both. Further variables exist. Different responses to time limits are evident: some jurisdictions regard these matters as procedural, others as substantive issues. Common law jurisdictions in particular tend to categorise time limits as procedural, others such as Germany see them as substantive matters.

The role assumed by fault in establishing liability is a further variable. Some legal systems see contractual liability as strict, others require fault. England adheres to the strict liability school of thought, it being generally irrelevant why the breach occurred. In German law there is a fault-based system of liability with a general presumption of fault. French law has a fault-based system with a refined case law distinction as to whether the contractual obligation is for a specific result (obligation de résultat) or to using best endeavours (obligation de moyen). Liability for breach of the former is exonerated only if the breach is attributable to an event outside the debtor’s control, whereas liability for breach of the latter is exonerated only if the debtor’s fault attributed to the breach is not proven.

82 Von Bar / Drobnig, n 45 above, 189 ff.
83 Ibid, 178 ff.
84 Ibid, 178: Scotland and England diverge in relation to limitation by virtue of differing statutory provisions, where Scotland sees the right as substantive, England as procedural. Prescription rules also (excluding personal injury) lead to different outcomes.
85 See von Bar / Drobnig, ibid, 187. Where such differences interfere with intra-community trade, Art 65(c) could provide a basis for community action under the Community competence in cross-border procedural matters, see below 23–24. cross reference to conclusion.
86 Ibid, 54–68.
89 See Coester-Waeltjen, n 55 above, 148–149.
90 Von Bar / Drobnig, n 45 above, 148–149; Laithier, n 73 above.
The final and most notable divergence is the rule of strict division or non-cumulation (non-cumul) of contractual and tort obligations in French law. This effectively forces aggrieved parties to seek a remedy within the specific obligation: unlike those jurisdictions that allow claims for breach of duties in contract and in tort to be conjoined,91 French law leaves no choice to the claimant.92

Each of these individual issues is a matter of complexity of its own. Detailed studies have greatly increased towards their comparative understanding. At the same time, such studies have (on occasion) revealed that differences are more apparent than real.93 Spain, it appears, is the only EU country not to distinguish between pecuniary and non-pecuniary loss, whether in tort or in contract.94 This brings us back to the question of whether such divergences constitute justification enough for a harmonised or unified approach to the law.

5. Will Uniform Solutions Provide an Answer?

Uniform law has one inherent advantage over national rules that are merely similar. Its very rationale is to reduce diversity and ensure uniformity in operation and interpretation. From the little empirical research available, there is some support for the view that current divergences within the law of obligations have a negative impact or interfere with intra-community trade.95 In the particular instance, the validity of continued demarcation of concepts for contract and tort law within the EU is questioned.96


92 In relation to dommage moral, however, French law has been more ready than other jurisdictions to concede awards for emotional distress, irrespective of which obligation the claim is based on, von Bar / Drobnig, n 45 above, 104.

93 Von Bar / Drobnig, n 45 above, ‘Somewhat simply put, one tends to find a narrow tort law system combined with a wide contract law system and vice versa.’

94 Ibid, n 45 above, 189, 193. Rules governing international jurisdiction can lead to even further different classifications of obligations, see German Federal Supreme Court, BGH 28.11.2002 in relation to Art 5(1) Judgments Convention (contractual promise formulated as a claim in competition law treated as tort for purpose of convention).

95 Von Bar / Drobnig, n 45 above, 459; Vogenauer / Weatherill, n 8 above, 835.

96 Von Bar / Drobnig, n 45 above, 29, 462, ‘We consider it highly probable that the dichotomy of contract and tort law liability generates special information costs’; ibid 461 ‘Why should each European legal system have to cope with different concepts of damage?’.
There are numerous international conventions regulating contractual liability in the sphere of commercial and non-commercial trade and transport in operation within Member States. There is also a marked tendency for the Community to create its own uniform rules of law in many of these fields that are governed by international treaty. One of the most controversial uniform systems of contractual liability introduced in the EU in recent years is the liability of air carriers for compensation to passengers caused by delay, an area already governed in part by the Montreal Convention on Unification of Rules of Carriage, to which the Community acceded in 2001.

The Montreal Convention includes actions for damages against air carriers in cases of passenger delay. Over and above this regime, the Community introduced its own system of contractual liability for air carriers in 2004 with a system of fixed categories and levels of compensation payable for delay. The validity of this regulation was questioned within the context of a recent preliminary ruling. The judgment is valuable for various reasons, not least for its views on both the function of damages in the sense of civil liability and compensation for non-material loss, classified as passenger assistance. In his Opinion to the Court, AG Geelhoed affirmed that the Community was not precluded by the terms of the Montreal Convention from creating an additional system of compensation for passengers. The new Community regime created a statutory duty on airlines to provide compensation and assistance.

97 Eg Paris Convention on Liability of Hotel Operators (1962); Athens Convention on the Carriage by Sea (1974); Montreal Convention on the Unification of Rules of International Carriage by Air (1999); UN Convention on the Liability of Operators of Transport Terminals in International Trade (1994); Convention concerning International Carriage by Rail, (1980); European Convention on Civil Liability for Road Accidents (1974); European Directives have been passed in relation to insurance against civil liability for use of motor vehicles, see n 69 above.

98 The Community may itself accede to international conventions under Art 300 EC. Primary Community law conforms to Convention law unless reservations have been made, Case 181/73 Haegemann v Belgian State [1974] ECR 449 (ECJ), para 5; Case 12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719 (ECJ). Convention law, however, overrides secondary legislation, see Case C-61/94 Commission v Germany [1996] ECR I-3989 (ECJ).

99 Reg 261/2004 establishing a system of common rules on compensation and assistance to passengers OJEC 2004 L 46/1.

100 Art 7 Reg 261/2004, ibid, has a sliding scale of compensation depending on degree of inconvenience suffered, measured against a formula that includes distance travelled. Arts 6 and 8 cover other forms of assistance including re-routing.
over and above claims that were admissible under the Montreal Convention.\textsuperscript{101}

In other words, the Advocate General confirmed the existence of various types and regimes of liability, one of which was the Community’s own (strict) system of statutory compensation for inconvenience caused by delay. The availability of defences under the Montreal Convention did not detract from the validity of the Community’s compensation regime.

This example shows that a Community-own liability regime can go far towards achieving consistency within Europe and \textit{vis à vis} the trans-national legal environment.\textsuperscript{102} In the particular instance, Community-wide rules were prescribed that ensured predictable and fair compensation for passengers within Europe.\textsuperscript{103}

\textbf{IV. Conclusion}

The approach to harmonisation of contract rules by the EU has been structural in essence and not remedy-orientated in content.\textsuperscript{104} A bundle of directives has focused on methods of ensuring effective transactional positions throughout Europe.\textsuperscript{105} Damages have by and large been excluded from their ambit, or when addressed, only in general abstract terms. In some cases, Member States have merely been required to ensure some form of compensation.\textsuperscript{106}

\textsuperscript{101} Opinion of AG Geelhoed delivered on 8 September 2005 in Case 344/04, n 2 above, para 51: ‘To my mind it is obvious that such a statutory obligation is not the same as civil liability for damage caused by delay (in the sense of loss occurring as a result of the delay) under the Montreal Convention’.

\textsuperscript{102} Under Art 18 Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331, a convention has to be interpreted in accordance with general principles of customary international law, including good faith. Art 31 Vienna Convention governs the interpretation of rules of international law; see also Art 31 Vienna Convention on the Law of Treaties between States and International Organisations 1986 ILM (1986) 543 53.

\textsuperscript{103} Quantum is a matter of fact to be proved in the individual instance with the result that it cannot be seen as a measure of economic equality. The latter can be achieved only through rules of law governing the type and scope of damages.

\textsuperscript{104} Dir 1999/44/EC, n 36 above. The Commercial Practices Dir 2005/29/EC OJEC 2005 L 149/22 creates no separate system of remedies within what is otherwise a structure for regulatory supervision at national level.

\textsuperscript{105} Dir 1999/44/EC, ibid, imports rights of withdrawal, replacement, repair, contractual guarantees and warranty rights in particular into the law of sales.

\textsuperscript{106} Under Art 5(1) Dir 90/314/EEC on travel package, ‘Member States shall take the ne-
This enquiry was started with a view to evaluating whether deviations between national rules on the law of damages could have a negative impact on not only contractual behaviour within the single market, but in situations of breach also lead to inconsistencies in treatment between customers, that in turn create conditions of contractual unfairness and inequality within the EU. Within this context, the question was raised whether independent treatment of damages as a general remedy on a sectoral basis is a feasible way of ensuring similar appreciation of damages within the Member States in future. A parallel area of enquiry related to the ends the current European contract law dialogue should serve in the longer term. In line with the first enquiry is a second issue of whether more Europeanisation in the law of damages is an objective in itself.

The current constitutional phase of integration within the EU demonstrates new patterns of norm-finding or law-making, particularly in the development of non-hierarchical trans-national networks. Such networks, of which the internet is the best-known example, have created self-constituted forms of international governance. Such cooperation – it has been argued – seeks to create modes of consensus – rough consensus – from which rough guidelines and subsequently running codes may emerge.\textsuperscript{107} If such a comparison can be legitimately extended to the field of private law in Europe, it is conceivable that the output from legal networks materialise in the guise of new rules for the Community. Networking within Europe has already seen the development of non-binding prototypes for codes within PECL and UNIDROIT.\textsuperscript{108}

In transposing this analogy to the mechanics of networking in Europe, the Common Frame of Reference (CFR) could be seen to denote the phase of rough discovery. Once completed, it might in turn lead to the development of an optional instrument,\textsuperscript{109} in which consensual interaction rather than hard-core law-making occupies a central role (rough guidelines). What happens thereafter remains a matter of conjecture: there is neither agreement about the use of a rough code nor that it should replace Europe’s systems of private law.\textsuperscript{110}

\textsuperscript{107} Calliess, n 9 above, 178 with further references; Haagsma, n 16 above.


\textsuperscript{109} Option 2 Commission Communication, n 4 above.

\textsuperscript{110} ‘Manifesto’, n 12 above; HL paper 95, n 5 above.
The Community is working towards achieving coherency in contract law. Where a measure of Community law confers a right to damages, then the exact content of this right must be specified to avoid inconsistencies occurring at Member State level. There is a perceptible need for clear rules specifying the type and scope of damages prescribed under Community law. The choice of individual legal instrument will depend on the area of Community policy or activity addressed. Unravelling complexities in the law of damages and establishing legal certainty cannot and should not be relegated to the definitional content of a thesaurus alone.

Over and above this, the Community can have recourse to other legal powers. Article 65 EC allows Community measures to be taken to counteract market interferences caused through conflicts of law. It further permits measures to ensure effective cross-border cooperation and access to justice. The empirical research referred to on cross-border contracts pinpoints the market interferences caused by divergences in the law of obligations. Measures based on these provisions are clearly justified.

At the current stage of integration in Europe, the need to ensure greater fairness and equality of treatment for individual customers and commercial interests is paramount. Greater consistency in the law should lead to conceding social justice at an operative level. It would be a further step in the EU towards ensuring effective civil justice. As AG Tizzano succinctly put it in his opinion in *Simone Leitner*:

“There is a demand for the Community to intervene in this field (of damages) in response to the discrepancies, if not, the flagrant inequalities, resulting from what has been referred to as real assessment chaos.”

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111 These should be based on a maximum level of protection under Art 153(3) EC. A high level of high consumer protection is required for harmonisation measures under Art III-172 Treaty on European Constitution (Art 95 EC).

112 Regulations have an inherent advantage over directives in that they limit divergences in transposition and are generally used in areas of common policy, eg Reg 261/2004 n 99 above on common rules for compensation and assistance to passengers.

113 Art 65(b) EC permits measures to be taken that promote the compatibility of rules concerning conflicts. As noted, the conflict of laws can lead to differing classifications of obligations between Member States, n 84 above. Art III-269(2) Treaty on European Constitution lowers the entry point for judicial cooperation measures.

114 Art 65(c) EC permits measures to be taken that eliminate obstacles to good functioning of civil proceedings, which could arise where divergences in the law emerge by reason of differing classification in Member States as either procedural or substantive, n 85 above.

115 AG Tizzano, n 48 above, para 33.
In the face of clear calls for legislative action in an area where competence issues pale in comparison to market inequalities and interferences caused by divergent remedies, it is high time that the Community respond to this demand.