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International Property Law and European Legal Integration

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Introduction

We are witnessing transformation of the world's legal systems through acceleration of processes of internationalisation or globalisation, fuelled in large part by rapid innovation in digital communication and computing technologies and expansion of international trade.

This paper is a work in progress toward a larger work that will examine the emergence from these processes and unification of an identifiable international property law. I am concentrating on the European legal systems. In the past they have had a formative influence on the legal systems of the world and they continue to draw interest in all of the world's legal families. They appear to be finding convergence most rapidly. If the ambitions of leading scholarly groups succeed, harmonisation of the European property law systems will contribute to acceleration of the process that I am seeking to describe.

First, what do I mean by "international property law"? I first became aware of the surprising extent and rapidity of international convergence in the area of property law me when I studied the spread of land title registration concepts and concluded that one might describe an *international model of land title registration*, of which the Torrens system is one example.² Further investigation reveals clearly that many aspects of property law are swept into a strong internationalisation phase. This is perhaps most obvious in the area of intellectual property, with the object of controlling the international appropriation of valuable ideas, innovations, technologies and art. In this work I am concerned with pressures toward convergence of law with respect to less obvious forms of property, movable and immovable property.

My object is neither to celebrate nor to castigate this process, but rather, simply to understand it. Like processes of globalisation themselves, the pressures toward convergence probably cannot be halted. Indeed, in some respects they afford welcome opportunities in the field. Most importantly, understanding of the overall process will advance our capacity to deal with negative aspects.

The internationalisation of systems of property law also beckons us to return to reflection on this mysterious civil law institution of private property and the diverse interests that one may hold in it. This exclusive, or at least privileged access to a resource recognised by society, directly enforceable against others with whom we have no other legal relationship, amounts to a unique form of civil law public power. Although converging, there are discrete but important differences in expression of the western liberal property concept. An understanding of the broader process could allow us the opportunity to guide emergence of the international form toward the most suitable for global society and environment in light of challenges that we can foresee. In other words, although no one has control over the basic process, deeper understanding of it might well reveal intelligent choices about the way international property law is emerging.

² M Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003, Introduction, further developed in M Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245.

Globalisation and Convergence in Civil Law

Integration of the world's economies has been stimulated by the rapid development and spread of communication and transportation technologies, and facilitated by removal of impediments to trade, investment and capital flows (economic globalisation). The Bretton Woods conference in 1944 (United Nations Monetary and Financial Conference), which became the platform of the post-war financial system was partly stimulated by widely perceived failure of the pre-war international system to achieve equitable international terms of trade. It spawned the General Agreement on Tariffs and Trade (GATT), the International Monetary Fund (IMF) and the International Bank for Reconstruction, and later the World Bank, which added impetus to integration. Accelerated international circulation of ideas, language and culture (globalisation in the broader sense) has advanced in parallel, with the United Nations system adding its stimulus to the internationalisation of concern about issues ranging from health and poverty to environmental degradation. The growth of the trans-national corporation, formation of the World Trade Organisation and the transition of Socialist economies are further chapters in this process.

Throughout this period the mutual recognition, harmonisation, integration and international production of law and legal systems has been interconnected with each step and chapter. From foundation of the International Telegraph Union in 1865³ and the Universal Postal Union in 1874,⁴ law has been present in the facilitation, formation and the unification of standards, leading in turn to recognition and harmonisation of private law in those areas most closely affected. The latter half of the 19th century saw broad recognition of Comparative Law as a discipline. The first volume of the *Zeitschrift für vergleichende Rechtswissenschaft* was published in 1878.⁵ The Paris Congress was held in 1900. The International Institute for the Unification of Private Law, now UNIDROIT, was first established in 1926.⁶

International Bodies and the Drive to Uniform Law

It might be said that few of these developments are within the field of Property Law, and instead are centred on international sale of goods and trade. Again, the different classifications of areas within the legal discipline that are employed in different legal systems come into consideration. However, the objective of a sale of goods transaction is of course to effect a disposition of a proprietary interest in the goods.⁷

³ International Telegraph Convention, 17 May 1865 – now the International Telecommunications Union.

⁴ Treaty of Bern, 9 October 1874.

⁵ For historical background to Comparative Law see M Reimann & R Zimmermann, *The Oxford Companion of Comparative Law*, Oxford University Press, 2006, Part I. See also A Peters & H Schwenke, "Comparative Law Beyond Post-Modernism" (2000) 49 *International and Comparative Law Quarterly* 800.

⁶ For historical background to unification of law, see R David, "The International Unification of Private Law", *International Encyclopedia of Comparative Law*, Vol 2, Chp 5.

⁷ See, for example, the former Sale of Goods Act 1893 (UK), Part II - Effects of the Contract and Part III - Performance of the Contract, now respectively Parts III and IV of the Sale of Goods Act

As will be seen, international developments in the field of trade have great relevance with respect to securities over movables as well as ownership of them. Certainly within Europe, these developments are also having ramifications with respect to securities over immovable property and, especially following the Global Financial Crisis [GFC] of 2010, in other parts of the world as well. Thus, taking an inclusive international approach, we might note the following global developments that have contributed to the emergence of international property law –

- Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964)
- Convention providing a Uniform Law on the Form of an International Will (Washington, D.C., 1973)
- Hague Convention on Recognition of Trusts (1985)
- UNIDROIT Convention on International Financial Leasing (Ottawa, 1988)
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)
- Convention on International Interests in Mobile Equipment (Cape Town, 2001)
- Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001)
- UNIDROIT Principles of International Commercial Contracts (2004)⁸
- Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (Luxembourg, 2007)
- UNIDROIT Model Law on Leasing (2008)

Possibilities opened up by Information and Communication Technologies [ICT] for the practical registration and tracking of valuable movable property, such as vehicles, railway rolling stock⁹ and so forth, have led to widespread adoption of registers and registered securities. UNIDROIT reforms led to creation of an international register for aircraft,¹⁰ and satellites are now on the agenda.¹¹ Conventionally, possession has

1979 (UK). The importance of the earlier legislation is that it was also adopted in most Common Law countries.

⁸ Art 3.3 of the UNIDROIT Principles 2004 provides an interesting example of the relationship of sales of goods to property in them –

(Initial impossibility)

- (1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
- (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

This is interesting because the article contemplates that entitlement to dispose of the assets will be acquired at some time other than the time of conclusion of the contract. The important thing is that the relevant party is able to “make title” to the asset when required by the contract.

⁹ UNIDROIT News (2010) 15 *Uniform Law Review* 150. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (Luxembourg, 2007).

¹⁰ Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 2001).

¹¹ UNIDROIT News (2009) 14 *Uniform Law Review* 240 (b) and 252. D A Panahy & R Mittal, “The Prospective UNIDROIT Convention on International Interests in Mobile Equipment as Applied to

played a very important role in title to and securities over movables, as well as the causes of action available to regain them. The move to international registers of movable property utilising digital technologies, grounded in uniform international private law, is a clear example of international convergence of law driven by globalising pressures.

Harmonisation of Contract Law

The internationalisation of property law has been led to a large extent by the unification or harmonisation of contract law, as was evident above with respect to UNIDROIT.

A distinction is drawn between hard law and soft law approaches to harmonisation of law. Hard law approaches are generally legislated, such as domestic implementation of the Vienna Sale of Goods Convention¹² or European Union Consumer Law Directives that introduce a common standard to be implemented by EU Member States. Soft law harmonisation involves development of a harmonised body of principles on which international private contracting parties may draw in their agreement as a form of choice of law. An example is the *Principles of European Contract Law* [PECL] developed by the Commission on European Contract Law.¹³ The objective of providing harmonised principles for cross-border contracts within Europe is only one purpose. There is also evidence in the publications that the PECL were conceived as preparatory toward a European code and resembling the US *Restatement of the Law of Contract*, stripping away differences in language, terminology and concepts and arriving at a “common core” of shared principles.¹⁴

Probably most harmonisation projects experience a tension between harmonising the existing principles of national systems and seeking to re-align the body principle in ways that resolve current and emerging challenges¹⁵ – second nature to most jurists. However, the PECL and similar efforts toward harmonisation have tended to have distinct but limited objectives, leading to a patchwork of differing principles with varying degrees of applicability – deeply frustrating to most jurists – and inevitably

Space Property” (1999) 4 *Uniform Law Review* 303. Current Working Draft of a Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on Matters Specific to Space Property (1999) 4 *Uniform Law Review* 564.

¹² United Nations Convention on Contracts for the International Sale of Goods [CISG] developed by the United Nations Commission on International Trade Law (UNCITRAL) and adopted at Vienna in 1980. As an Australian example of domestic implementing legislation, see Sales of Goods (Vienna Convention) Act 1987 (Victoria).

¹³ See O Lando & H Beale (eds), *Principles of European Contract Law, Parts I and II*, Kluwer, The Hague, 2003, and O Lando, E Clive, A Prüm & R Zimmermann (eds), *Part III*, Kluwer, The Hague, 2003. Hugh Beale notes that the PECL was a parallel project commenced by those involved in the UNIDROIT project, led by Professor Ole Lando of the Copenhagen Business School. With this in mind it is not surprising that the PECL was seen by its authors as a European version of the UNIDROIT Principles and many of the articles in the two sets of principles are almost identical: H Beale, ‘European Contract Law: The Common Frame of Reference and Beyond’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 116, 117.

¹⁴ H Beale, *ibid*, 117-118.

¹⁵ Beale notes that this was the case with the PECL: H Beale, *ibid*, 119.

drawing calls for comprehensive rationalisation through consolidation, if not codification.

Legal Integration in Europe

European legal systems have historically for most national legal systems in other parts of the world been *the source*, in the case of colonising legal systems such as the Common Law, or a *source* of inspiration, in the case of voluntary reception or transplantation of European codes, such as the German Civil Code,¹⁶ and the Dutch Civil Code.¹⁷ The internationally emphasised distinction between Common Law and Civil Law systems of course originates in Europe. The world continues to observe developments in European legal systems with great interest. Harmonisation of the civil law of Europe, embracing a harmonised property law, would be a development of the greatest importance.

Integration of the private and commercial law fields of the national legal systems of Europe appears to be accelerating. In 1989 the European Parliament made its first call for preparatory work for a European civil code to commence. In 2004, following much scholarly activity,¹⁸ the European Commission called for the composition of a *Common Frame of Reference* that would assist it to review existing directives in the field of consumer protection and provide a toolbox in the drafting of new legislation in private law fields, with the ultimate aim of finding a rational, common direction out of fragmented state described above. A network of excellence, led by the Study Group on a European Civil Code obtained research funding and has now completed the *Draft Common Frame of Reference*, with all appearances of a draft code of unified European contract law.¹⁹

In the course of preparing the *Draft Common Frame of Reference* the interconnectedness of private law has logically compelled its authors to extend further beyond contracts and obligations into Property Law. Passage of title in the sale of goods led to treatment of securities over movable property and now on to acquisition and loss of possession and ownership generally. A massive, multi-volume comparison of the law concerning movable property in all of the European Union member states, the *National Reports on the Transfer of Movable Property in Europe*, was completed earlier this year and recently capped by a comparative analysis with draft uniform principles in the monumental work, *Acquisition and Loss of Ownership of Goods*. A uniform style of mortgage, the *Euro Hypothec*, was first proposed in the early 1990s and seems likely again to be advocated. An international model of land title registration is already the most pervasive land title model.

¹⁶ See Raff (2003), above note 2, 16-24.

¹⁷ *Burgerlijk Wetboek* of 1 October 2008, which has been very influential in Russia and Eastern Europe. For a German translation, see F Nieper & A S Westerdijk (ed), *Niederländisches Bürgerliches Gesetzbuch*, Kluwer Law International, The Hague, 1996. For an English translation see H-C S Warendorf, R Thomas & I Curry-Sumner, *The Civil Code of The Netherlands*, Kluwer, 2009.

¹⁸ Such as development of the PECL, introduced above.

¹⁹ Further discussion of the *Draft Common Frame of Reference* may be found below in text following note 160.

The trajectory of these developments is toward accelerating and more intense integration of private law in Europe, which has implications internationally. Their momentum is constrained only by the limited powers of the European Union to implement a unified model and the reluctance of a small number of Member States to move beyond national models. The emerging unified model of private law will nevertheless be very influential for jurisdictions anywhere that are considering review and reform of their private and commercial law. Legal systems around the world that have been inspired by European models will also find themselves considering the new unified European solutions to emerging problems as options in their own deliberations. The European developments thus have the potential to strengthen greatly the powers of international legal convergence that many have already observed at play.

Property as a Fundamental Right

The European Convention for the Protection of Human Rights and Fundamental Freedoms²⁰ [ECHR] is pivotal in the protection of human rights in European states. The main protection of rights of property is set out in Article 1 of the First Protocol in the following terms –

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.²¹

Article 8 is also highly relevant to protection of values generally associated with residential and personal²² property –

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *Brumărescu v Romania*²³ the European Court of Human Rights applied Article 1 of Protocol 1 to a case emanating from expropriation of private property under Romanian socialism. Interestingly, the relevant taking of property was found to have occurred when a decision of 1993 of the Romanian Supreme Court of Justice, in

²⁰ Rome, 4th November 1950. Available at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>

²¹ ECHR, First Protocol (Paris, 20th March 1952), Art 1.

²² Personal property in the sense of personal belongings, rather than movable property or chattels.

²³ (1999) 33 EHRR 35 – Application 18342/95 (judgment delivered, 28 October 1999. For a legal-ethnographic study of this case see F M Zerilli & M Dembour, ‘The House of Ghosts: Post-Socialist Property Restitution and the European Court’s Rendition of Human Rights in *Brumărescu v Romania*’ in M Dembour & T Kelly, *Paths to International Justice – Social and Legal Perspectives*, Cambridge University Press, New York, 2007, 189.

which Brumărescu's title to former family property was recognised, was re-opened and quashed by the Supreme Court of Justice in 1995 in breach of the principle of *res judicata* in respect of a final judgment that had been executed, thus infringing the guarantee of fair trial.²⁴

The European Union is proud of the European tradition of liberal rights –

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law²⁵

Article 6 of the Treaty on European Union links the values of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms –

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The European Court of Justice accepted the protection of property under Article 1 of the First Protocol to the ECHR as a fundamental right within the European Union²⁶ even before proclamation of the Charter of Fundamental Rights of the European Union.²⁷ The rights set out in the EU Charter strongly reflect those in the ECHR. Echoing Article 1 of the First Protocol to the ECHR, Article 17 of the EU Charter sets out the right to property –

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair

²⁴ Article 6 ECHR. Zerilli & Dembour (2007), above note 23, 192-194. The Supreme Court of Justice changed its approach to cases arising from expropriation of urban land following pressure from the President of Romania: *ibid*, 195-196.

²⁵ EU Treaty, Preamble.

²⁶ S van Erp & B Akkermans, 'European Union Property Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 176.

²⁷ Charter of Fundamental Rights of the European Union (proclaimed by the European Parliament, Council of Ministers and the European Commission on 7 December 2000, taking effect with entry into force of the Treaty of Lisbon on 1 December 2009), accessed at OJ 2010/C 83/02, available at <http://eur-lex.europa.eu>.

compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

European Private Law

A distinction is drawn between *European Union private law* and *European private law* more generally; the former focusing on the measures of the European Union that are legislative in nature and the case law emerging from the European Court of Justice, while the latter is the European civil law tradition more generally,²⁸ finding expression today in each of the civil law systems of the European states which together constitute a greater whole. However, attempts to clarify the distinction between EU private law and European private law generally tend to obscure the point that the catalytic role of initiatives of the EU that touch private law and the convergence of European civil law generally are at the same time synergistic and manifestations of the same underlying globalising tendency.

Within Europe differences between the private law systems of the European states have historically been emphasised. In their articulation of the legal families approach in Comparative Law, for example, Zweigert and Kötz identified only geographical legal families of Europe, apart from one general Asian legal family, which they seem to have considered almost impenetrable to European legal analysis.²⁹ The European legal families have of course exercised great influence on the legal systems of the world. However, the point remains that viewed from other parts of the world, the European systems have very much more in common than separating them.

Historically, this has been the case since well before the Enlightenment. A common law of Europe, the *ius commune*, came together through the progressive reception of Roman law, from rediscovery of Justinian's *Digest* late in 11th century Italy,³⁰ which stimulated a new and rich era in Italian jurisprudence. The first university in Europe was founded at Bologna in 1129 and Irnerius founded there a law school where the famous legal Glossators, particularly Bulgarius, Azo and Accursius, developed and debated interpretations of the classical Roman law texts.³¹ Heirbaut and Storme remind us, however, that Roman law made substantive impact on European legal systems from the late 15th century.³² This is supported by study of the deepening

²⁸ K Riedl, *Vereinheitlichung des Privatrechts in Europa – Wissenschaftliche Initiativen im Prozess der Privatrechtseuropäisierung*, Nomos Verlag, Baden-Baden, 2004, Einleitung; C Twigg-Flesner, 'Introduction: key features of European Union private law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 2-3.

²⁹ K Zweigert & H Kötz, *Introduction to Comparative Law*, 3rd ed (trans & ed T Weir), Clarendon Press, Oxford, 1998.

³⁰ E D G Hall (trans and ed), *Glanvill*, Nelson, 1965, xvi. Between 529 and 535 AD the jurists of the Eastern Roman Empire in Constantinople under the Emperor Justinian produced the *Corpus Iuris Civilis*, comprising the Code [*Codex*], the Digest [*Digesta*] or Pandects [*Pandectae*], and the Institutes [*Institutiones*]. A range of reforming legislation was also produced: the *novellae leges*: G Dulckeit, F Schwarz & W Waldstein, *Römische Rechtsgeschichte*, 8th ed, C H Beck, München, 1989, 303–9.

³¹ *Ibid*, 316–19.

³² D Heirbaut & M E Storme, 'The Historical Evolution of European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 20, 22-23. A formal milestone is provided in this dating by "official

influence of Roman law on development of the City Codes of Hamburg, for example,³³ although in an international port city reception undoubtedly would have occurred earlier and more quickly than in other areas.³⁴

The historical emergence of a European *ius commune* is today advanced in favour of initiatives further to develop European private law into a new European *ius commune*³⁵ – sometimes described as the *re-Europeanisation* of private law.³⁶

English Common Law and the *Ius Commune*

There has been long standing resistance to, or at least an effort to minimise the impact of evidence that Roman law also had influence on common law and equity in England. This stems perhaps from the 16th and 17th centuries when an autochthonous common law was asserted against a legacy attributed to the Norman yoke and the church, and perhaps the law, of Rome. It could be that this was a “cover story” for a reform and rationalisation of the common law system.³⁷ However, scholarly contact, at least, commenced early. In the 1130s an Anglo-Norman clerk, Arnulf of Seez, became the first of whom we have record to study civil law in Italy.³⁸ In 1145 the Roman Law scholar Lombard Vacarius of Bologna was taken to England by Theobald, Archbishop of Canterbury. Strangely, four years later King Stephen prohibited the teaching of Roman Law.³⁹

Ironically, a work of the 13th century, whose apparent author was described in the 17th century by Thomas Hobbes as “... the most authentick Author of the Common Law”,⁴⁰ has emerged as the first major infusion of Roman law in England. The treatise *De Legibus et Consuetudinibus Angliae*⁴¹ was an attempt to reconceptualize and rationalize English law within the Roman law framework. Standing as a great

reception” of the legal principles of the Holy Roman Empire into Germany by decree in 1495: § 3 Reichskammergerichtsordnung of 1495. G Köbler, *Deutsche Rechtsgeschichte – ein systematischer Grundriß* (4th edn, Franz Vahlen, München, 1990), 155–6.

³³ M Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003, Chapters 2 and 3.

³⁴ Reinhard Zimmermann has referred to the 16th century as the time when Roman law became the *ius commune* in German areas: R Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, Juta, Cape Town, 1990, x.

³⁵ A view perhaps first advocated in R Zimmermann, ‘Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit’ *Juristenzeitung*, 1992, 8.

³⁶ K Riedl (2004), above note 28, 18.

³⁷ M Raff, ‘Matthew Hale’s Other Contribution – Science as a Metaphor in the Development of Common Law Method’ (1997) 13 *Australian Journal of Law and Society* 73.

³⁸ R C van Caenegem, *The Birth of the English Common Law*, 2nd ed, Cambridge University Press, Cambridge, 1988, 100. See further J L Barton ‘The Mystery of Bracton’ (1993) 14 *Journal of Legal History* 1; J F Winkler ‘Roman Law in Anglo-Saxon England’ (1992) 13 *Journal of Legal History* 101; T Wallinga ‘Symon Vicentinus: Quaestiones in C. 2.3.1’ (1993) 14 *Journal of Legal History* 1; and F De Zulueta & P Stein, *The Teaching of Roman Law in England Around 1200*, Selden Society, London, 1990.

³⁹ Hall, *Glanvill*, above note 30, xviii.

⁴⁰ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, (1681), (ed J Cropsey), University of Chicago Press, 1971, 74.

⁴¹ Bracton, *De legibus et consuetudinibus Angliae* [*On the Laws and Customs of England*], (ed G E Woodbine; ed & trans S E Thorne) Harvard University Press - Selden Society, 1968-1977.

academic achievement in the first half of the thirteenth century, it attempted to reform substantive law of the day, drawing upon contemporary Italian commentators such as Azo dei Porci, Tancred, and Raymond de Penafort. The first translator of the treatise, S E Thorne, demonstrated persuasively that the original text was most probably written in the 1220s by William de Raleigh, a clerk of the eminent judge Martin de Pateshull.⁴² De Raleigh rose to the bench on de Pateshull's retirement in 1229. The treatise was revised and reduced in size in the 1250s by Henry de Bratton (Bracton), who had probably been a clerk under the patronage of de Raleigh. Bracton became a Royal Clerk in 1240 and was appointed judge *coram rege* in 1247.⁴³

Thorne's research of the authorship and reforming impetus of *De Legibus* is supported by Hyams' comprehensive study of the feudal land tenure villeinage.⁴⁴ Hyams has shown that *De Legibus* adopted Azo's formulation of the Roman law concept of serfdom with the effect of making a villein free against all the world except his lord and making the land tenure of villeinage alienable. The result was that a free peasant could acquire a villeinage without becoming a villein, except as against his lord, and dispose of it again. By the late 1230s there was a series of cases in opposition to this view but the treatise retained it, even through later revision. The reform was to the advantage of free peasants but not villeins, who could not safely acquire a free tenement without their Lord's support.⁴⁵ With regard to the treatise's reforming re-conceptualisation Hyams concluded "... the best explanation seems to be that it represents the views espoused by certain royal justices of Henry III's minority and denied by others."⁴⁶

Thorne concluded that the author of *De Legibus* cannot be dismissed as an incompetent Roman lawyer, or as an English lawyer dutifully recording English law largely constituted of Roman law; "... he was a trained jurist with the principles and distinctions of Roman jurisprudence in mind."⁴⁷ Even when identifying common law as a source of law, the author appears to have had Roman jurisprudence in mind. He identified the sources of law as (1) natural law – that which God taught all living things, or instinct,⁴⁸ (2) the *jus gentium* – that Natural Law common only to men;⁴⁹ (3) Civil Law – the statute or custom of a particular city;⁵⁰ (4) custom, and (5) the *jus non scriptum*. The conception of the *jus non scriptum* advocated in the treatise *De*

⁴² See generally, P Brand, 'The Date and Authorship of *Bracton*: a Response' (2010) 31 *Journal of Legal History* 217, 241-244. Dr Brand's research supports the earlier conclusions of S E Thorne.

⁴³ *De Legibus*, above note 41, Vol I, xiii-ii.

⁴⁴ P R Hyams, *Kings, Lords and Peasants in Medieval England*, Clarendon Press, Oxford, 1980, Chp 8. With respect to a reforming impetus in the treatise, it is also supported by Holdsworth: W S Holdsworth, *A History of English Law*, 7th ed, Methuen, London, 1956, Vol I, 87 and 326.

⁴⁵ Hyams (1980), *Ibid*, 87-109.

⁴⁶ *Ibid*, 100.

⁴⁷ Thorne, *De Legibus*, above note 43, Vol I, xxxiii.

⁴⁸ *De Legibus*, f 3b.

⁴⁹ *Ibid*, f 4.

⁵⁰ *Ibid*.

Legibus echoed that found in the earlier treatise *Glanvill*⁵¹ but also exhibited important modification –

... it will not be absurd to call English Law *leges* though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law.⁵²

Custom was distinguished as rules approximating laws to be proved by those who observed them. Roman law did not make this distinction between custom and *jus non scriptum*.⁵³ It appears to have been an innovation of the treatise.

The authors of *De Legibus* sought to place English Law upon a new intellectual plane, inspired by the ecclesiastical Latin tradition. The ancient principles of the *jus non scriptum* derived force of law through approval in their use in courts of law. Custom became a fact to be proved. The *jus non scriptum* was elevated to the rationality of the *leges* enforced by other lands. Centralisation of legal administration was crystallising under Henry III.⁵⁴ It would have been assisted by a coherent unified framework such as provided by the treatise. Interest in the rationalization attempted by the treatise, achieved through reflection on Roman law, faded with the ecclesiastical jurists, whose disappearance was assisted by the Royal Writ of 1292 of Edwards I⁵⁵ directing that 'apprentices' should receive their legal education in the courts.⁵⁶ Yet by distinguishing custom from substantive rules of *jus non scriptum* a source of positive law had been recognised, to be drawn upon when the common law would be epitomised some three hundred years later.

In the history of international relations it has often been remarked that the formative influence of the volume of everyday peaceful transactions is generally overshadowed by the drama and suffering of wars that reshape maps and constitutions. Similarly, the most meaningful engagements of the common law with the emerging continental *ius commune* between the 13th and 17th centuries probably took place in the ports of Hull, London, Antwerp, Rotterdam Hamburg and Bremen, through communications about canonical law between England and Rome, and in the universities of Oxford

⁵¹ *Glanvill*, above note 30. The treatise *Glanvill* was a practical collection and exposition of writs capping the institution of the Anglo-Norman writ system in the last years of the reign of Henry II (1154-1189 reign). There was reference to the phenomenon of unwritten law in the Prologue of *Glanvill* –

Although the laws of England are not written it does not seem absurd to call them laws - those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince - for this also is a law, 'what pleases the prince has the force of law'.

In the time of the treatise a doctrine of *res judicata* was adopted though it was not clearly defined. A record of the King's court (*curia regis*) could not be denied but the judgments of other courts could be disputed by those who were present and understood the plea. However, Lewis concluded that there was no doctrine of binding precedent: I E Lewis, 'The History of Judicial Precedent I' (1930) 46 LQR 207, 209.

⁵² *De Legibus*, f l.

⁵³ *Digest* Pt I Bk I Tit III, 32(1) and *Institutes* 1.2.9.

⁵⁴ Reign: 1216-1272.

⁵⁵ Reign: 1272-1307.

⁵⁶ T F T Plucknett, *A Concise History of the Common Law*, 5th ed, Butterworths, 1956, 217.

and Cambridge where Roman law was taught from the 13th century. Nevertheless, the next seismic shift in relations between English common law and the continental *ius commune* occurred in the period that might have been the most formative for modern common law – the 17th century.

17th Century English Contact with the *Ius Commune*

The 17th century was the political and philosophical crucible from which the modern Common Law system emerged – in essence, a nascent form of the doctrine of binding precedent or *stare decisis*, including a distinction between *ratio decidendi* and *obiter dictum*.⁵⁷ Many great legal figures of the century, such as Ellesmere, Bacon and Hale, made no secret of their admiration of legal developments on the continent. Radical groups of the English Revolution and Cromwellean Commonwealth pressed for an alternative to the Common Law system, and particularly Equity, embracing codification. Intellectuals with Puritan backgrounds, such as Milton,⁵⁸ Hale and Locke, had connections with or admiration for the Protestant provinces of The Netherlands and William of Orange. Hale had considered becoming a soldier under the Prince of Orange before choosing a legal career and entering Lincoln's Inn.⁵⁹ Locke fled to The Netherlands in 1683 and returned in 1688 with the wife of William of Orange following the Glorious Revolution. Scotland's connection was yet stronger and for a good part of the century Scotland and England shared the same monarch.

In addition to effectively leading the Protestant cause in Europe, the United Dutch Provinces were in the 17th and 18th centuries centres of trade, science and education. Dutch legal science attracted students from all over Europe. The registers of enrolled students⁶⁰ and graduates⁶¹ of the University of Franeker allow us some insight into academic travel between The Netherlands and Britain. In respect of foreign enrolments, Franeker and Groningen were the smaller universities, beside Leiden and Utrecht. Franeker was however a centre for Puritan thought and exile⁶² and the University of the prominent jurist Professor Ulrich Huber.⁶³ Between 1593⁶⁴ and 1720, the enrolments of 56 English, 41 Scottish and three Welsh students were recorded. With respect to law students, there were four English and 19 Scottish students. Most of the students were studying theology, medicine or general

⁵⁷ See generally, M Raff, 'Matthew Hale's Other Contribution – Science as a Metaphor in the Development of Common Law Method' (1997) 13 *Australian Journal of Law and Society* 73 and S A E Martens, 'Die Werte des Stare Decisis', *Juristenzeitung*, 2011, 348.

⁵⁸ See generally, A Beer, *Milton – Poet, Pamphleteer and Patriot*, Bloomsbury, London, 2008.

⁵⁹ G Burnett, *The Life and Death of Sir Matthew Hale*, Shrovesbury, 1682 (Rothman Reprints, 1972), 5-6. Presumably Prince Frederick Henry of Orange.

⁶⁰ S J Fockema Andreae & J Meijer (eds), *Album Studiosorum Academiae Franekerensis (1585-1811, 1816-1844)*, T Wever, Franeker, 1968.

⁶¹ J Meijer (ed), *Album Promotorum Academiae Franekerensis (1591-1811)*, T Wever, Franeker, 1972.

⁶² E Mijers, 'Scottish Students in The Netherlands 1680-1730' in A Grosjean & S Murdoch, *Scottish Communities Abroad in the Early Modern Period*, Brill, Leiden, 2005, 301. Mijers describes the Dutch universities as effectively a sixth Scottish university.

⁶³ Ulrich Huber (1636-94), *Heedensdaegse Rechtsgeleertheyt* (1686), *The Jurisprudence of My Time* (trans & ed P Gane) Butterworths, Durban, 1939.

⁶⁴ A student's place of origin and discipline were first recorded in 1593.

philosophy. The numbers of English students peaked earlier, 1593 to the 1660s, while the Scottish students peaked later, 1650-1720. Although these numbers do not make an overwhelming case, they are nevertheless surprising. Mijers points out that the number of Scottish students enrolled, let alone the number graduating, was a small proportion of the numbers attending or visiting the Dutch universities and there seems to be no reason why the explanations for this would not also apply to English students. For example, with respect to law students, because the Scottish Faculty of Advocates had its own entry examination, graduation in The Netherlands, or even enrolment were unimportant.⁶⁵ Presumably the same applied with respect to the Inns of Court in London.

It is difficult to trace obvious influence of the 17th century continental *ius commune* in England, however, there is a lot of circumstantial evidence which has been accepted by writers of great calibre. Grotius' master piece *De jure belli ac pacis* [Law of War and Peace] went into seven editions in English by the end of the 17th century. Indeed, Matthew Hale's life-long friend Sir John Vaughan CJ quoted Grotius' "... excellent work de jure belli ac pacis ..." in *Thomas v Sorrell*.⁶⁶ Heineccius' *Elementa iuris civilis* was used as a textbook in the Universities of Halle, Pavia, Bologna, Krakau and Oxford.⁶⁷ Just as the authors of the Bracton Treatise *De Legibus* had found inspiration in the Civil Law for their systematisation of Anglo-Norman law,⁶⁸ 17th century English reforming jurists such as Hale could also demonstrate great scholarship through reflection upon the continental tradition and this had real impact on the shape of English law. Holdsworth concluded –

Hale appears to have originated the idea - which he had no doubt adapted from the Institutes – of grouping the law round the rights of persons, the rights of things, wrongs and remedies. Whatever may be alleged against the scientific character of this arrangement, it does introduce into the treatment of the law some method; and Blackstone proved that it was a method round which the law of his day could be grouped.⁶⁹

Blackstone claimed Hale's work in *The Analysis of the Law*⁷⁰ to be the most scientific and comprehensive analysis of common law made to that time, and adopted it as the basis of his *Commentaries*.⁷¹

The connection of English Common Law to the continent might also be tested through the great resemblance of Common Law principles to those that formed the *ius commune* as represented by Roman-Dutch law – in Property Law for example, the prominence of *seisin* or *gewere* and possession in general, and the almost identical use

⁶⁵ Mijers, above note 62, 314.

⁶⁶ (1674) Vaughan 330, 338.

⁶⁷ R Zimmerman, R Zimmermann, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit' *Juristenzeitung*, 1992, 11.

⁶⁸ See text above, following note 40.

⁶⁹ W S Holdsworth, 'Sir Matthew Hale' (1923) 39 *Law Quarterly Review* 402, 421.

⁷⁰ Matthew Hale, *The Analysis of the Law*, J Walthoe, London, 1713 (facsimile edition, D S Berkowitz & S E Thorne, Garland, London, 1978)

⁷¹ Holdsworth, above note 69. See also B J Shapiro, 'Law and Science in Seventeenth Century England' (1969) 21 *Stanford Law Review* 727, 729.

of maxims still employed in law and equity today, such as *nemo dat quod non habet* and *qui tempore prior est, potior est jure*.⁷²

To me it is thus clear that, at least until nationalisation of private law systems in the 19th century,⁷³ the “splendid isolation”⁷⁴ of the English Common Law from the European *ius commune* has been largely illusory in history. The rapid emergence of a new European private law will inevitably draw in the Common Law. At the same time, Common Law ideas have already made very significant contributions to emerging European Private Law, such as the judicial style of the European Court of Justice [ECJ].

The European Union is the major player in European legal integration and its involvement in private law issues has over the past 10 years become the centre of much attention and activity, with potential ramifications for all of the national legal systems of Europe.

EU Private Law

The European Community became one of the pillars of the European Union under the Treaty of Maastricht. The three-pillar structure was abolished and the European Community absorbed into the European Union with conclusion of the Treaty of Lisbon in late 2009.⁷⁵

The EU's powers are limited to those specifically conferred on it.⁷⁶ It does not have a general power to regulate the European internal market⁷⁷ or a definitive head of legislative competence, or even a relevant direct power, in the field of private law.⁷⁸ Instead, EU influence on the formation of a European private law has generally worked through other EU policies that have sought primarily to effect other change

⁷² See for example J A Lokin, F Brandsma & C Jansen, *Roman-Frisian Law of the 17th and 18th Century*, Duncker & Humblot, Berlin, 2003, esp 104-109. One might also draw attention to resemblance to Civil Law principles highlighted by the influential apparent judicial codifications found in the judgments of Donaldson LJ in *Parker v British Airways Board* [1982] 1 QB 1004 (lost goods) and Danckwerts J in *Re Ellenborough Park* [1956] Ch 131 (easements).

⁷³ Specifically, development of the Austrian, French and German national Civil Codes.

⁷⁴ A term I believe coined by van Caenegem that has now entered general parlance in literature on European private law: R C van Caenegem, *European Law in the Past and the Future – Unity and Diversity over Two Millennia*, Cambridge University Press, Cambridge, 2002, 21.

⁷⁵ C Twigg-Flesner, 'Introduction: Key Features of European Union Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 1.

⁷⁶ The *principle of conferral*: Art 5 Treaty on European Union, see below, note 80.

⁷⁷ Art 2 Treaty on the Functioning of the European Union, see below, note 80; European Court of Justice in *Germany v. Parliament and Council* (Case C-376/98), §83. J M Smits, 'European Private Law and the Comparative Method' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 29, 37.

⁷⁸ By way of contrast the German Federal government has power to legislate with respect to private law by virtue of the *Grundgesetz* [German *Constitution*].

and carried with them, almost coincidentally, elements of private law or had other impact on private law. These have included⁷⁹ –

- implementation of aspects of the Treaty relevant to competition law;
- contribution of case law of the ECJ⁸⁰ has contributed significantly to the emergence of a European private law;
- adoption of numerous specific EU measures in pursuit of a European common internal social market which also have relevance for private law, particularly in the fields of consumer law and the free movement of goods, persons and services,⁸¹ and
- pursuit of an agenda for harmonisation of the EU's own legislation and that of its member states, undertaken primarily in support of the European internal market.⁸²

In this paper I am mainly interested in the last point; implementation of an agenda toward harmonisation of the EU's legislation and that of its member states with respect to the civil law. Before embarking on this study, we should note some variation in the terminology used in connection with this theme between the terms “harmonisation of laws” and “approximation of laws” of the Member States.

The TFEU employs the term, “approximation of laws” in the following areas –

- i. measures concerning crime, coordination of law enforcement, and the mutual recognition of judgments in criminal matters (Art 67 TFEU);

⁷⁹ C Twigg-Flesner, 'Introduction: key features of European Union private law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 1-2.

⁸⁰ The preliminary reference procedure of the ECJ is provided for in Art 267 Treaty on the Functioning of the European Union [TFEU] concluded at Lisbon on the 13th December 2007, formerly Art 234 Treaty of the European Community [EC]. The texts of the TFEU and the Treaty on European Union [TEU] referred to in this paper may be found in the Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, Vol 53, 30 March 2010 (2010/C 83/01) - <http://eur-lex.europa.eu/en/index.htm> (consulted 14 July 2011).

⁸¹ Art 3 TEU and Arts 3 & 4 and 26 & 27 TFEU.

⁸² Articles 26 and 114 TFEU. Art 114 TFEU was formerly Art 95 of the Treaty of the European Community [EC].

Art 95 EC [Art 114 TFEU]. Readers will be aware that the legislative *European measures* are divided into EU *Directives* and EU *Regulations*. An EU *Directive* directs a legislative outcome to be achieved by the member states and leaves it to them to choose the 'form and methods' that will achieve the result in their national legal systems: Art 249 EC [Art 288 TFEU]. An EU *Regulation*, on the other hand, applies directly in the Europe Union without the need for specific steps to be taken at a national level to implement it. A good example is of an EU Regulation touching private law is the Denied-Boarding Regulation (261/2004/EC), establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights: see generally, A Johnston & H Unberath, 'European private law by directives: approach and challenges' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 85 and 90-91, and C Twigg-Flesner, 'Introduction: key features of European Union private law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 1, 3-4. The traditional position is that Directives do not create rights between private parties, so, unlike Regulations, cannot have horizontal direct effect: Johnston & Unberath, *ibid*, 85.

- ii. judicial cooperation in civil matters with cross-border implications based on the principle of mutual recognition of judgments and of decisions in extra-judicial cases (Art 81 TFEU);
- iii. judicial cooperation in criminal matters, again, based on the principle of mutual recognition of judgments and judicial decisions (Art 82 TFEU);
- iv. directives to establish minimum rules in the definition of criminal offences and sanctions in an area that has been subject to harmonisation measures, where the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in that area (Art 83 TFEU);
- v. the specific head of power for the approximation of the laws of Member States, for the establishment and functioning of the internal market (Arts 26, 114 and 115),⁸³ and
- vi. measures, procedures in treaties and the approximation of provisions laid down by law, regulation or administrative action in pursuit of the objectives of promotion and harmonisation of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion (Art 151 TFEU).

The TEU and TFEU employ concepts of “harmony” between laws or “harmonisation” of policies or laws in the following areas –

- i. operational needs in defence (Art 45 TEU);
- ii. the effective implementation of a Union policy in an area that has been subject to harmonisation measures may require approximation of the criminal law and regulations of the Member States, leading to directives that establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned (Art 83 TFEU);
- iii. legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition (Art 113 TFEU);
- iv. following a harmonisation measure the need might emerge to maintain national provisions, or to introduce new national provisions, or to notify the Commission of on-going public health problems and take provisional measures (Art 114 TFEU);
- v. specifications for the production of Euro coins (Art 128 TFEU);
- vi. employment and improved living and working conditions, and of social systems (Art 151 TFEU);
- vii. promotion of harmonious development through Union actions leading to strengthening of its economic, social and territorial cohesion (Art 174 TFEU);

⁸³ The forerunner of the power in Art 114 TFEU for the approximation of the laws of Member States was included as Art 100 the original Treaty of Rome, concluded on the 25th March 1957. The power is discussed further in text below, following note 101.

- viii. harmonisation measures for environmental protection should allow provisional measures by Member States (Art 191 TFEU);
- ix. common commercial policy contributing to harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers (Art 206 TFEU); and
- x. the rules and practices governing use of statistics in areas within fields of competence of the European Central Bank (Art 5.3, Protocol No 4 to the TFEU).

However, in addition to these specific usages of concepts of harmonisation, the TEU and TFEU expressly exclude harmonisation in the following situations –

- i. the EU has competence in areas and under conditions specified in the Treaties to carry out actions that support, coordinate or supplement the actions of Member States without superseding their competence in those areas, but legally binding acts adopted in pursuit of these must not entail harmonisation of Member States' laws or regulations (Art 2 TFEU);
- ii. the Union may support action by Member States to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation but this excludes any harmonisation of the laws and regulations of the Member States (Art 19 TFEU);
- iii. with respect to immigration policy, Union measures to provide incentives and support for action by Member States to promote the integration of third-country nationals must not include any harmonisation of the laws and regulations of the Member States (Art 79 TFEU);
- iv. measures the Union may take to promote and support the action of Member States in the field of crime prevention exclude any harmonisation of the laws and regulations of the Member States (Art 84 TFEU);
- v. incentive measures adopted by the Union to encourage cooperation between Member States and to support their action in the field of employment must not include harmonisation of the laws and regulations of the Member States (Art 149 TFEU);
- vi. the Union must support and complement the activities of the Member States in wide ranging fields related to employment but measures to be adopted exclude any harmonisation of the laws and regulations of the Member States (Art 153 TFEU);
- vii. the Union must contribute to the development of education and the promotion of European sporting issues but incentive measures exclude any harmonisation of the laws and regulations of the Member States (Art 165 TFEU);
- viii. the Union must implement a vocational training policy but any measures to be adopted exclude any harmonisation of the laws and regulations of the Member States (Art 166 TFEU);

- ix. the Union must contribute to the flowering of the cultures of Europe but incentive measures exclude any harmonisation of the laws and regulations of the Member States (Art 167 TFEU);
- x. while ensuring a high level of human health protection in the definition and implementation of all of its policies and activities, and taking action toward improving public health and preventing physical and mental illness and diseases, the Union may adopt incentive measures designed to protect and improve human health and measures with the direct objective of protecting public health with regard to tobacco and the abuse of alcohol, however, these measures exclude any harmonisation of the laws and regulations of the Member States (Art 168 TFEU);
- xi. the Union must contribute to ensuring the conditions necessary for the competitiveness of the Union's industry exist through the policies and activities it pursues under other provisions of the Treaties and through specific measures in support of Member State action, excluding any harmonisation of the laws and regulations of the Member States (Art 173 TFEU);
- xii. in order to conclude a European space policy, with the aim of promoting scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union must establish necessary measures, excluding any harmonisation of the laws and regulations of the Member States. (Art 189 TFEU);
- xiii. the Union must establish specific measures to complement actions within Member States to achieve the objective of complementing Member State action in the tourism sector, excluding any harmonisation of the laws and regulations of the Member States (Art 195 TFEU);
- xiv. the Union must establish measures necessary to help encourage cooperation between Member States toward improving the effectiveness of systems for preventing and protecting against natural or man-made disasters, excluding any harmonisation of the laws and regulations of the Member States (Art 196 TFEU);
- xv. the Union must by means of direct regulations establish measures necessary to ensure the common interest in effective implementation of Union law by the Member States which is essential for the proper functioning of the Union, including support of the efforts of Member States to improve their administrative capacity to implement Union law, but excluding any harmonisation of the laws and regulations of the Member States (Art 197 TFEU);
- xvi. the Union must in direct regulations adopt measures defining the framework for implementation of the common commercial policy, and a range of competences are conferred to achieve this and its promotion externally, but the exercise of these competences must not affect the delimitation of competences between the Union and the Member States, nor lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude harmonisation (Art 207 TFEU);
- xvii. where action by the Union proves necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set

out in the Treaties, but the Treaties do not provide necessary powers, the Union must adopt appropriate measures, however, they must not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation (Art 352 TFEU);

- xviii. the Union and Member States are to promote fundamental social rights through objectives such as improved living and working conditions, with the aim of their harmonisation while maintaining a course of improvement (Art 151 TFEU). To this end the Commission must encourage cooperation between Member States and facilitate the coordination of their action in all social policy fields, particularly in relation to employment, labour law and working conditions, and occupational health and safety, among other things. To achieve this, the Commission must act in close contact with Member States by taking a range of research and policy initiatives (Art 156 TFEU). A Declaration on Art 156 annexed to the final act of the conference that adopted the Treaty of Lisbon sought to confirm that the policies described in the article fall essentially within the competence of the Member States and Measures taken by the Union should provide encouragement and promote coordination in complementary ways, serving to strengthen cooperation and not to harmonise national systems.⁸⁴

One might note that while there is no clear power in favour of EU leadership of the harmonisation of European private law there is no clear provision against it. The question of whether “approximation” and “harmonisation” of laws have the same meaning finds no clear answer. After examining the positive powers supporting “approximation” and “harmonisation” one might have gathered that harmonisation takes place at a policy level, and approximation of laws might be a tool for that. For example, as outlined above, Article 83 of the TFEU refers to the harmonisation of a policy area, requiring in turn approximation of the criminal law and regulations of the Member States in order to achieve effective implementation. However, after considering the 18 areas of specific exclusion of the harmonisation of law, it is not possible to view this as a consistent line of demarcation, and the more likely conclusion is that the terms are now almost interchangeable.

This conclusion is largely confirmed by consideration of corresponding terms employed in other European languages. The multi-lingual thesaurus of the European Union⁸⁵ offers the concept of “approximation of laws” in German as *die Angleichung der Rechtsvorschriften*, in French as *le rapprochement des législations*, and in Italian as *il ravvicinamento delle legislazioni*.⁸⁶ Unfortunately the expression “harmonisation of law” is not included, however “harmonisation law” is offered in German as *harmonisierender Rechtsakt*, in French as *loi d'harmonisation* and in Italian as *legge*

⁸⁴ *Declaration on Article 156 of the Treaty on the Functioning of the European Union*, Declaration 31, Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, which may be found in the Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union, above note 80.

⁸⁵ *EuroVoc - Multilingual Thesaurus of the European Union* has been consulted for this purpose: <http://eurovoc.europa.eu/drupal/>

⁸⁶ *Ibid*, “approximation of laws” (concept 2897).

di armonizzazione.⁸⁷ Before concluding that this further supports a strong differentiation between the concepts of “approximation” and “harmonisation” we should note that the expression “harmonisation law” means a law or other instrument [der Rechtsakt] of the Union intended to achieve harmonisation, rather than harmonisation of the laws of Member States. The expression “harmonisation of standards” on the other hand yields in German *die Angleichung der Normen*, in French *l’harmonisation des normes*, and in Italian *l’armonizzazione delle norme*.⁸⁸ Use of the same German word for both harmonisation and approximation is significant. It is not unusual for one word to signify different concepts in German, just as it is not unusual in English, with nuance gained from context. A famous example is *das Recht*, signifying both right and law. However, in this situation, if it is intended to make strong differentiation between the concepts of “approximation” and “harmonisation”, *die Annäherung* could have been used for “approximation”.⁸⁹ While *die Angleichung* means “approximation” or “alignment” as well as “harmonisation”,⁹⁰ *die Vereinheitlichung* has stronger correspondence to “unification” – presumably “harmonisation” means something else, or, as suggested, is used as a more general term that could embrace approximation, an alignment of outcomes or unification. While presenting its view in *European Parliament v. Council of the European Union*⁹¹ that the concept of “harmonisation” in the forerunner of Article 114 TFEU is a broad one, counsel for the European Commission has clearly used “approximation” and “harmonisation” interchangeably.⁹² This appears to have been adopted by counsel for the Parliament and the Council and drew no comment from the bench.

Article 352 TFEU provides a supplementary head of power not specifically directed to harmonisation of law⁹³ –

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

Article 352 goes on to exclude Measures that “... entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation.”

⁸⁷ Ibid, “harmonisation law” (concept 7366).

⁸⁸ Ibid, “harmonisation of standards” (concept 3648).

⁸⁹ Indeed, Bericht A5-0384 / 2001 des Europäischen Parlament, *Über die Annäherung des Zivil- und Handelsrechts der Mitgliedstaaten*, employs “die Annäherung” as the equivalent of “approximation”.

⁹⁰ In the German edition of the TFEU, “die Angleichung” is used as the equivalent of “approximation” in Art 114 of the TFEU or Vertrag über die Arbeitsweise der Europäischen Union: *Amtsblatt der Europäischen Union*, 30th March 2010 – C-83.

⁹¹ (C-436/03).

⁹² Ibid, § 27.

⁹³ S Weatherill, ‘Competence and European Private Law’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 67. Art 352 TFEU was formerly Art 308 of the European Community Treaty (“EC Treaty”) – in this discussion references are generally to the relevant article of the TEU or TFEU alone. Until Lisbon, see above note 80, this article was restricted to action in “... the course of the operation of the common market”.

Clearly there are many obstacles to deploying this head of power for the purpose of harmonising European private law –

- action by the Union should prove necessary judged within the framework of the policies defined in the Treaties
- the measure must be in pursuit of one of the objectives set out in the Treaties
- the Treaties must not provide the necessary powers, and how does one determine what they are?
- special procedural steps are required.

In *European Parliament v. Council of the European Union*⁹⁴ the ECJ had to decide whether forerunners of Article 352 or Article 114 TFEU were the appropriate heads of power under which to create a Regulation establishing the new trading form, the European Cooperative Society. The laws of Member States recognising cooperatives were to remain in place but a cooperative also registered under the Union law could operate throughout Europe regardless of where it was founded, and merge with societies in other States, among other advantages. The Court concluded that Article 114 would be an inappropriate basis for this Measure because it would not result in harmonisation. As there was no other available power, the supplementary head of power in Art 352 was the appropriate basis.

Weatherill notes that one way forward for the EU in the rationalisation of European private law would be to develop an 'optional instrument' – “... a set of contract law rules existing alongside longstanding national rules and available by choice to contracting parties.”⁹⁵ But Weatherill goes on to point out that Article 114 TFEU “... would seem unable to provide a valid foundation for such a measure, most pertinently because this would not be harmonisation of national rules but rather the creation of a new EU-level set of rules.”⁹⁶ On the other hand, he suggests,⁹⁷ development of a European contract law, or private law generally, might not be demonstrated to be necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties as required by the express terms of Article 352 TFEU.⁹⁸

It follows that the most likely path for a European Commission wishing to promulgate, or at least to stimulate a general European Union private law would be to consider its options under the power for the approximation of the laws of Member States, which is encompassed in Articles 26, 114 and 115 TFEU.⁹⁹ To rely on the head of power in Article 114 it must be shown that Measures for the approximation of laws of Member States must have as their object the “establishment and functioning of the internal market” in pursuit of Article 26. The Union would have to be able to demonstrate that the internal market is really hampered by differences among national systems of private law, such that the divergence distorts competition among actors located in different countries.

⁹⁴ (C-436/03).

⁹⁵ S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 67

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ In text above at note 93.

⁹⁹ Introduced above, in text at note 83.

In *Germany v. Parliament and Council*¹⁰⁰ the EU had sought to harmonise the laws of Member States concerning advertising and sponsorship with respect to tobacco by banning them throughout the EU.¹⁰¹ The ECJ noted that the measures for which power is accorded by Article 114 TFEU¹⁰² must be intended to improve the conditions for the establishment and functioning of the internal market but the power is not a general power to regulate the internal market. The internal market is characterised by the abolition of all obstacles to the free movement of goods, persons, services and capital and comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.¹⁰³ A measure adopted on the basis of Article 114 TFEU "... must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market." The ECJ asserted that mere disparity between national rules and abstract risk of obstacles to the exercise of fundamental freedoms or the distortions of competition liable to result would be insufficient to justify the choice of Article 114 TFEU as a legal basis¹⁰⁴ - "... in considering whether [Article 114 TFEU] was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the [Union] legislature."¹⁰⁵ The ECJ conceded that harmonising measures adopted on the basis of provisions of the Treaty may also impact on areas for which there is no power of harmonisation,¹⁰⁶ however, they may not be used as a legal basis for circumventing an article expressly excluding harmonisation.¹⁰⁷ The ECJ went on to acknowledge that measures seeking to prevent the emergence of *future* obstacles to trade resulting from multifarious development of national laws, so-called "preventive harmonisation",¹⁰⁸ may validly be based on Article 114, "... [h]owever, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them."¹⁰⁹ The Court tested the Directive beside these principles and found it did not meet them.¹¹⁰

¹⁰⁰ Above, note 77.

¹⁰¹ Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9).

¹⁰² Formerly Article 100a of the EC Treaty.

¹⁰³ *Germany v. Parliament and Council*, above note 77, §§ 82 & 83.

¹⁰⁴ *Ibid*, § 84. More recently confirmed in *R v Secretary of State for Health and National Assembly for Wales; ex parte Alliance for Natural Health* (Cases C- 154/04 and C-155/04) § 28 (prohibition on trade in food supplements containing certain vitamins or minerals).

¹⁰⁵ *Ibid*, § 85.

¹⁰⁶ *Ibid*, § 78.

¹⁰⁷ *Ibid*, § 79. See also *R v. Secretary of State; ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01), §§ 58-91 (manufacture, presentation and sale of tobacco products).

¹⁰⁸ S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 63.

¹⁰⁹ *Germany v. Parliament and Council*, above note 77, § 86; *Spain v. Council of the European Union* (Case C-350/92), § 35 (*supplementary protection certificates* for intellectual property in medicinal products).

¹¹⁰ Stephen Weatherill reports that the directive annulled in *Germany v. Parliament and Council*, above note 77, was re-made on a different basis (Directive 2003/33/EC), which satisfied the test

When a Measure based on Article 114 TFEU has withstood testing beside the principles described above, the ECJ has been prepared to examine it further in light of the *principle of subsidiarity* –

... in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹¹¹

In *British American Tobacco*¹¹² the ECJ concluded that the principle of subsidiarity does apply to approximation measures under Article 114 TFEU because the provision does not confer exclusive competence to regulate economic activity in the internal market – it confers competence to improve the conditions for establishment and functioning of the internal market.¹¹³ In this case, could the objective of the proposed action be better achieved at Community level or by the Member States? As the objective of the Directive was to eliminate barriers raised by differences between Member States' laws, regulations and administrative provisions, it was clear that it could not be sufficiently achieved by the Member States individually and called for action at Community level.¹¹⁴

The ECJ has also been prepared to examine a Measure promulgated under Article 114 TFEU in light of the *principle of proportionality* –

... the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

This issue was also raised in *British American Tobacco*.¹¹⁵ It was argued that a ban laid down in the Directive on the use of descriptors in relation to tobacco products, such as low-tar, light, ultra-light and mild was disproportionate, particularly in its application to established trade marks. Less restrictive measures could have achieved the same objectives. The ECJ recounted that in judicial review of a Directive beside the principle of proportionality, the Union must be allowed a broad discretion in areas that involve political, economic and social choices, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.¹¹⁶ The ECJ found that the Directive did not offend the principle of proportionality. For

related to the internal market when challenged in *Germany v. Parliament and Council* (Case C-380/03).: S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 63.

¹¹¹ Art 5 TEU. See also the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, Protocol No 2, in the Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union, above note 80, 206.

¹¹² Above, note 107, §§ 179-184.

¹¹³ *Ibid*, § 179.

¹¹⁴ *Ibid*, §§ 181-182.

¹¹⁵ Above, note 107, §§ 116-141. See also the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, Protocol No 2, above note 111.

¹¹⁶ *Ibid*, § 123.

one thing, the descriptors were liable to mislead consumers and the Directive required presentation of objective information.¹¹⁷

Whether, in light of these qualifications of Article 114 TFEU, the Union has requisite power to promulgate a measure harmonising European private law depends in large measure on the sufficiency of arguments and evidence to support its object as "... the improvement of the conditions for the establishment and functioning of the internal market." It is clear that there is a viable European internal market without harmonised contract law, or more broadly, private law. However, aspects of unharmonised law within the market exert prejudicial effects on the internal market project –

- a major barrier is posed to the capacity of a business to develop a unified trading strategy for all of the EU, particularly where selling contracts, such as insurance or mobile telephone phone contracts, is the main activity of the business.¹¹⁸ The cost of adapting to the individual systems of private law of the member states is in effect a non-tariff barrier to trade.¹¹⁹
- national rules of private law with mandatory application, that is from which there is no contracting-out, impose costs on cross-border trade in obtaining legal advice on where and how the laws vary between states that will fall more heavily on consumers and on small and medium-sized enterprises (SMEs).¹²⁰
- business itself expects the Union to be involved in contract law, with almost two-thirds of European businesses experiencing 'some' (51 per cent) or even large' (14 per cent) obstacles to cross-border trade between Member States associated with diversity between national laws and 83 per cent regarding the idea of harmonised contract law favourably.¹²¹
- with Union Directives and Regulations applying in the 27 different legal environments of the Member States, it is a strong likelihood that application of the same principles of EU law will lead to different legal outcomes on the same facts in at least some of the 27 court systems and this must be an impediment to completion of an internal market based on the principles espoused by the EU,¹²² beside consumer protection and competitiveness – particularly considering potential for forum shopping and the far larger numbers of cases that EU citizens will not take to the ECJ.

¹¹⁷ Ibid, § 138.

¹¹⁸ S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 68.

¹¹⁹ C Twigg-Flesner, 'Introduction: key features of European Union private law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 15.

¹²⁰ S Weatherill, 'Competence and European Private Law' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 58, 68.

¹²¹ Weatherill, *ibid*, 68-69; with respect to the survey citing S. Vogenauer and S. Weatherill (eds.), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, Oxford, 2006.

¹²² Art 3 TEU. See *Netherlands v. European Parliament and Council (C-377/98)*.

Levels of Harmonisation by Directive

Directives that seek to achieve harmonisation of the law of Member States are classified according to the level of harmonisation sought –

- *Minimum harmonisation* – A minimum level of rules must be implemented in all Member States. A Member State may nevertheless create more restrictive legislation that goes beyond the Union measure in the same policy direction.¹²³ By ensuring a “lowest common denominator” of legislative standards, there is at least a reduction of threat to operation of the internal market, by facilitating cross-border trade and movement, and preventing a “race to the bottom”.¹²⁴
- *“Total”, “full” or “maximum” harmonisation* – These measures seek to “cover the field”,¹²⁵ that is, introduce a comprehensive regulatory net that leaves no freedom for a Member State to regulate the same field to a different degree.¹²⁶

¹²³ An example is provided by the ECJ case of *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt* (Case C-441/04) in which Austria had enacted a complete prohibition of door-to-door sales of silver jewellery, going further than Council Directive 85/577/EEC of 20 December 1985 for protection of the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), which sought to partially harmonise the rules on consumer protection with respect to certain marketing methods: *A-Punkt Schmuckhandels GmbH*, *ibid*, § 10. The national law remains subject to other principles in the Treaty. In this case the ECJ found the principle of free movement of goods not infringed by prohibition of one method of selling silver jewellery which, nevertheless, could still be imported from any other country: *ibid*, §§ 12-19.

¹²⁴ A Johnston & H Unberath, ‘European private law by directives: approach and challenges’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 85, 87-88.

¹²⁵ An expression drawn from Australian Constitutional Law.

¹²⁶ An interesting illustration is provided by *Commission v. France* (Case C-52/00). The ECJ found that EU Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products sought to “... achieve, in the matters regulated by it, *complete harmonisation* of the laws, regulations and administrative provisions of the Member States”: *ibid*, § 24 (my emphasis). The French Government's view that the French legal system already provided a higher level of protection was therefore not to the point. France could not depart from the rules which the Directive laid down.

One option for a Member State is to seek *derogation* of obligations under the harmonising measure. The main example is Art 114 (4) TFEU, which allows a Member State to deem it necessary to maintain national provisions on grounds of major needs related to issues set out in Art 36 (public morality, public policy or public security; protection of health and life of humans, animals or plants; protection of national treasures possessing artistic, historic or archaeological value; protection of industrial and commercial property) or relating to the protection of the environment or the working environment. Art 114 (5) TFEU also provides a ground of derogation, allowing a Member State to deem it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment. The Commission must approve or reject the national provisions involved within six months of notification of the attitude taken by the Member State pursuant to Arts 114 (4) or (5). That the ECJ construes these opportunities to seek derogation narrowly is demonstrated by its appellate decision in *Land Oberösterreich and Austria v. Commission* (Joined Cases C-439/05 P and C-454/05 P), in which it upheld the Commission's rejection of Austria's notification under Art 114(5) of a national law banning GMOs in derogation of Union Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, holding that a Member State seeking derogation does not have a right to be heard by the Commission in the course of decision making: *ibid*, §§ 34-45. Johnston and Unberath note that “... successful attempts by Member States to rely upon [Arts 114 (4) and (5) TFEU] have been neither frequent nor frequently successful”: (2010), above note 124, 88.

Since 2002 the Commission has viewed full harmonisation more favourably, in order to minimise variations in rules across the EU that might create fragmentation of the internal market to the detriment of consumers and business.¹²⁷

- “Menus” and options in implementation – This approach conceives an agreed Directive in which options concerning implementation with respect to refined points are left to Member States, which might or might not be identical or even equivalent in substance.¹²⁸

The Scope of a Rationalising Approximation Measure

Despite or perhaps in view of the obstacles explored above, that would stand in the way of a major legislative initiative by the EU to harmonise the private law of the Member States, there has been an accumulation of important but less dramatic Union initiatives.

The most important EU initiatives that have stimulated a catalytic effect in European private law have been the reform and harmonisation of consumer law. Christian Twigg-Flesner describes this as “a pathfinder function”.¹²⁹ In this area of law, the Union has over the years initiated a large number of incremental measures, leading to concern about inconsistencies between the Union’s various Directives, as well as how these reforms are to be absorbed into the civil law of the Member States.

There is concern that the fragmentary approach of Directives of a functional nature with narrow scope, or a highly fragmented outcome at Union and national level, described as *legal Pointillism*,¹³⁰ will have adverse impacts on the coherence of private law. This is well illustrated by the Directive on the internal market in electricity (2003/54/EC). Annex A of the Directive sets out an extensive list of additional measures undertaken for the protection of the electricity consumer, which are intended not to operate with detriment to other Union rules on consumer protection, and particularly those on distance selling and unfair terms in consumer contracts. These provisions are clearly fragmentary in nature and also illustrate the reach of EU legislation into other fields of law, with potential impact on private law systems, sector by sector.¹³¹

Union Directives intended to harmonise an area of law also have so-called “spillover effects” in national legal systems that spread beyond the targeted area. The national courts were formerly obliged to interpret national law so far as possible consistently with Union legislative measures, however, this does not appear to have carried over into the post-Lisbon text of the treaties. Nevertheless, the working of Union initiatives

¹²⁷ Johnston & Unberath (2010), above note 124, 88, quoting from Commission Communication on Consumer Policy Strategy, 2002-6, COM (2002) 208, 12-13.

¹²⁸ Johnston & Unberath (2010), above note 124, 89-90.

¹²⁹ C Twigg-Flesner, ‘Introduction: key features of European Union private law’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 8.

¹³⁰ Riedl (2004), above note 28, 19, attributing the expression to Kötz.

¹³¹ A Johnston & H Unberath, ‘European private law by directives: approach and challenges’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 90.

into domestic law has implications for the coherence of earlier readings of the state of national private law with a cumulative effect of extending influence of law emanating from the Union level.¹³² The sectoral approach means that EU influence occurs inconsistently in terms of reach and the pace of implementation.

A further constraint on the form that an EU solution could take is found in the lack of horizontal effect of a Directive,¹³³ requiring it to be implemented through the legal systems of the Member States, with all the variation of those systems. The obvious alternative is to develop a comprehensive solution in the form of a Regulation, or Regulations.¹³⁴

Concern that the EU standards of consumer protection should be integrated into private law in a rational, coherent and internally consistent way, rather than suffering the status of a “legislative add-on” to the traditional bodies of law of member states, which have very likely preserved ideological perspectives of earlier eras, was a major stimulation to calls for development of the *Draft Common Frame of Reference* [DCFR], discussed below.¹³⁵ Many highly regarded European jurists see the logical solution to all of these widely recognised problems in development of a European Civil Code, and see the DCFR as the first tangible step toward it.

A European Civil Code?

It would be difficult to pin down when academic discussion of codification at the European level commenced. Apparently stimulated by the first call by the European Parliament, made in 1989, for the preparatory work for a European Civil Code to commence,¹³⁶ a broad ranging book of eminent essays on the topic was commenced in 1991 and published in 1994.¹³⁷ On the 6th May 1994, the European Parliament passed a second resolution on *Harmonisation of Certain Sectors of the Private Law of the Member States*.¹³⁸

Work of the Commission on European Contract Law on the *Principles of European Contract Law* [PECL] has been mentioned above.¹³⁹ The legal service of the

¹³² Formerly, Art 10 EC Treaty: A Johnston & H Unberath, ‘European private law by directives: approach and challenges’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 85, 96.

¹³³ See above, note 82.

¹³⁴ A Johnston & H Unberath, ‘European private law by directives: approach and challenges’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 85, 99-100.

¹³⁵ In text below, following note 160; J M Smits, ‘European private law and the comparative method’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 29, 37.

¹³⁶ Resolution A2-157/89 on *Action to Bring into Line the Private Law of the Member States*: OJ 1989 No C158/400.

¹³⁷ A S Hartkamp, M W Hesselink, E H Hondius, C E du Perron & J B M Vranken, *Towards a European Civil Code*, Ars Aequi Libri, Nijmegen, 1994, Preface, v.

¹³⁸ Resolution A3-329/94 on *Harmonisation of Certain Sectors of the Private Law of the Member States*: OJ 1994 No C205/518.

¹³⁹ In text above, note 13.

European Commission supported this work initially, morally and financially. When it curtailed financial support, publication of the third volume of the PECL was made possible by private funding.¹⁴⁰

In 1999 the Study Group on a European Civil Code was founded by Professor Christian von Bar of the University of Osnabrück. Professor von Bar had been a member of the Commission on European Contract Law. The study group has involved many researchers from universities in many of the EU Member States, who have produced restatements on many topics such as –

- specific contracts, such as sales, services, commercial agency, distribution and franchise,
- personal securities, such as guarantees and indemnities,
- tort, and
- unjust enrichment.¹⁴¹

With specific reference to Property Law, members of the group have published Principles of European Law on –

- lease of goods,¹⁴² and
- transfer of title to goods,¹⁴³

and publication is anticipated in the near future of Principles of European Law on –

- proprietary security over moveable property,¹⁴⁴ and
- trusts.¹⁴⁵

Behind the publication on transfer of title to goods,¹⁴⁶ and no doubt behind other publications as well, stands work of amazing calibre that sets out the law of the Member States in a consistent format, ripe for comparison.¹⁴⁷

¹⁴⁰ H Beale, 'European Contract Law: The Common Frame of Reference and Beyond' in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 120. Beale notes in particular the generous provision of funds by Professor Reinhard Zimmermann, Director of the Max-Planck-Institut für ausländisches und internationales Privatrecht, from the *Leibnitz Prize* awarded to him by the Deutsche Forschungsgemeinschaft.

¹⁴¹ Beale (2010), *ibid*, citing www.sellier.de/pages/en/buecher_s_elp/europarecht/454.principles_of_european_law.htm

¹⁴² K Lilleholt, A Victorin, A Fötschl, B R Konow, A Meidell & A B Torum, *Principles of European Law - Lease of Goods*, Sellier, Munich, 2007.

¹⁴³ B Lurger & W Faber, *Principles of European Law - Acquisition and Loss of Ownership of Goods*, Sellier, Munich, 2011

¹⁴⁴ U Drobnig, *Principles of European Law - Proprietary Security in Movable Assets*, Sellier, Munich (anticipated in March 2012).

¹⁴⁵ S Swann, *Principles of European Law – Trusts*, Sellier, Munich (anticipated in May 2012).

¹⁴⁶ B Lurger & W Faber (2011), above note 143.

¹⁴⁷ With respect to *Acquisition and Loss of Ownership of Goods* for example, above note 143, see W Faber & B Lurger (eds), *National Reports on the Transfer of Movables in Europe*, Sellier, Munich: Vol 1 – Austria, Estonia, Italy, Slovenia (2008); Vol 2 – England and Wales, Ireland, Scotland, Cyprus (2009); Vol 3 – Germany, Greece, Lithuania, Hungary (2011); Vol 4 – France, Belgium, Bulgaria, Poland, Portugal (2011); Vol 5 – Sweden, Norway and Denmark, Finland,

It could hardly be said that an ambition of the Study Group on a European Civil Code to lay the intellectual and academic foundations for the drafting of a European Civil Code is surprising or unexpressed.¹⁴⁸

Another group led by Professor Giuseppe Gandolfi of Pavia published a Preliminary Draft of a *European Contract Code* in 2007.¹⁴⁹

In 2001 the European Parliament voiced a third call for the preparatory work for a European Civil Code to commence¹⁵⁰ in response to a Communication from the European Commission setting out its approach to the question of the harmonisation of European private law.¹⁵¹ In that Communication the Commission explained its attitude to harmonisation as follows –

The approximation of certain specific areas of contract law at EC level has covered an increasing number of issues. The EC legislator has followed a selective approach adopting directives on specific contracts or specific marketing techniques where a particular need for harmonisation was identified.¹⁵²

It noted interest in a broader approach and declared its interest in receiving views about current problems and the range of possible solutions –

whether the proper functioning of the Internal Market may be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts. Also the Commission is interested in whether different national contract laws discourage or increase the costs of cross-border transactions. The Communication also seeks views on whether the existing approach of sectoral harmonisation of contract law could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures.¹⁵³

The Commission proposed the following non-exhaustive list of possible solutions –

- To leave the solution of any identified problems to the market.
- To promote the development of non-binding common contract law principles, useful for contracting parties in drafting their contracts, national courts and arbitrators in their decisions and national legislators when drawing up legislative initiatives.

Spain (2011); Vol 6 – The Netherlands, Switzerland, Czech Republic, Slovakia, Malta, Latvia (2011).

¹⁴⁸ Cf Beale (2010), above note 140, 119.

¹⁴⁹ Not surprisingly, known as “the Pavia Group”. Beale (2010), above note 140, 117, citing G. Gandolfi (ed.), *Code Européen des contrats: avant-projet*, Giuffrè, Milan, 2007.

¹⁵⁰ Resolution C5 - 471/2001 on the Approximation of the Civil and Commercial Law of the Member States: OJ 2002 C 14OE/538, Report A5 - 0384 / 2001 (M. Lehne) (English) pp 16 – 29, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/Lando/StellungnahmeKommission4_24Sept01.doc.

¹⁵¹ Communication of the European Commission to the European Parliament and Council of 11th July 2001 concerning European Contract Law: COM (2001) 398, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/literature/Lando/engelski398_Communication_of_theCommissionJuly01.doc

¹⁵² Communication, *ibid*, Executive Summary.

¹⁵³ *Ibid*.

- To review and improve existing EC legislation in the area of contract law to make it more coherent or to adapt it to cover situations not foreseen at the time of adoption.
- To adopt a new instrument at EC level. Different elements could be combined: the nature of the act to be adopted (regulation, directive or recommendation), the relationship with national law (which could be replaced or co-exist), the question of mandatory rules within the set of applicable provisions and whether the contracting parties would choose to apply the EC instrument or whether the European rules apply automatically as a safety net of fallback provisions if the contracting parties have not agreed a specific solution.¹⁵⁴

The fourth option was regarded as a proposal of comprehensive legislation at the EU level, to which the UK government objected in any form. There was, however, broad agreement that there were problems to be resolved with respect to inconsistency between national laws and the implementation of Directives in the Member States. It was considered that Union legislation is fragmentary and inconsistent and its quality should be improved.¹⁵⁵ The second option, further development of common contract law principles, or the so-called “Restatement Option”, also found objection from the UK Government on grounds that further convergence of national laws is undesirable.¹⁵⁶

After outlining extensively the calls to date for greater harmonisation of European law and the problems the present situation is causing, the Resolution of the European Parliament¹⁵⁷ requested the Commission to pursue further consolidation and development of harmonisation of the civil law on the basis of what is now Art 114 TFEU.¹⁵⁸ The Parliament also recommended a 10 step Action Plan toward approximation of civil and commercial law, on the basis of expert advice, including –

- building a database of national law in pursuit of option two of the Commission’s Communication – essentially a restatement of the civil law of the Member States, including personal securities, transfer of title to and financial securities over movable property, and law of trusts,
- in light of in-depth expert advice, to consolidate and codify the existing EU law and policy in the field,
- advancement of comparative analysis and development of common legal concepts and solutions within academic education and the curricula of the legal professions, as well as the dissemination of EU law in legal circles of practice and commerce,
- application of common legal concepts and solutions and legal terminology throughout the EU institutions that play roles in law making and application, and
- creation of a body of legal principle of the contract law of the EU that draws upon the of common legal concepts and solutions developed in the other initiatives.¹⁵⁹

¹⁵⁴ Ibid.

¹⁵⁵ Beale (2010), above note 140, 120-121.

¹⁵⁶ Ibid, 120.

¹⁵⁷ Above, note 150.

¹⁵⁸ Resolution, *ibid*, Part III § 13.

¹⁵⁹ *Ibid*, Part III § 11.

The European Commission developed its *Action Plan on a More Coherent European Contract Law*²⁵ in 2003,¹⁶⁰ calling for two initiatives – (i) review of existing EU legislation and (ii) development of a unified body of civil law principle, the *Common Frame of Reference* [CFR]. The CFR would be a “toolbox” for the Commission in its review of existing and the development of new legislation. Although the Commission has left the idea of a codification as a distant reflection, or at best an ‘optional instrument’ that parties could adopt for cross- border transactions,¹⁶¹ it has not in any way prejudiced or ruled out that direction either.

Possible participants in the research of the CFR were already identified in the 2001 Resolution of the European Parliament.¹⁶² A number of groups formed a “Network of Excellence” and obtained funding.¹⁶³ The Study Group on a European Civil Code prepared the *Draft Common Frame of Reference* [DCFR],¹⁶⁴ with participation of –

- a network of stakeholder experts [CFR] established by the Commission to engage with the academic researchers in regular workshops, and
- working groups of experts from Member States.¹⁶⁵

As a prospective code of contract principles it is directly comparable with the UNIDROIT Principles of International Commercial Contracts (2004).¹⁶⁶

From the point of view of Property Law, the DCFR is more relevant than the UNIDROIT principles because it sets out principles concerning leases of goods,¹⁶⁷ acquisition and loss of ownership,¹⁶⁸ securities over movables¹⁶⁹ and trusts,¹⁷⁰ as well as more general principles concerning title to goods within a sale of goods framework, such as the principle concerning impossibility referred to above.¹⁷¹

¹⁶⁰ COM (2003) final, OJ 2003 C63/1, reaction to which was followed up in 2004 by *European Contract Law and the Revision of the Acquis: The Way Forward*: Communication from the Commission to the European Parliament and the Council of 11 October 2004, COM (2004) 651 final (generally referred to as *The Way Forward*), Introduction. Riedl notes that in the course of development of this Communication a conference of the European Parliament and the Commission was held in Brussels on the 28th April 2004, on the theme ‘A Common Frame of Reference for a more coherent European Contract Law’: Riedl (2004), above note 28, 21-22.

¹⁶¹ Beale (2010), above note 140, 121.

¹⁶² Resolution, above note 150, Part III § 12.

¹⁶³ Beale (2010), above note 140, 122.

¹⁶⁴ C von Bar & E Clive (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Full Edition*, Sellier, Munich, 2009.

¹⁶⁵ Beale (2010), above note 140, 122.

¹⁶⁶ See M J Bonell & R Peleggi, “UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: A Synoptical Table” (2009) 14 *Uniform Law Review* 437.

¹⁶⁷ DCFR, Book IV, Part B

¹⁶⁸ Ibid, Book VIII.

¹⁶⁹ Ibid, Book IX.

¹⁷⁰ Ibid, Book X.

¹⁷¹ Art 3.3 of the UNIDROIT Principles 2004, above note 8, corresponding to § II – 7.102 of the DCFR.

There is great capacity for these developments to draw property principles into the international crucible of harmonisation and convergence. This is illustrated by the work of Professors Brigitta Lurger and Wolfgang Faber preparatory to development of European principles concerning property in movables.¹⁷² The DCFR has been referred to as the “academic CFR”, apparently in anticipation of the “political CFR”. The question is thus a very limited one; whether the Commission will adopt the DCFR, let alone the question of a European codification. The Parliament supports the program very broadly and the Council supports the DCFR within its limited aims as a legislators’ toolbox. Will it ever be adopted as an optional instrument? In context of other globalising pressures within Property Law, regardless of clear reluctance on the part of the Commission, I estimate that we are indeed witnessing the early stages of a European codification.

Convergence in Other Areas of Property Law

Will a European codification embrace Property Law and, if so, to what extent? In addition to the politics and technical constraints respecting European harmonisation of law, the situation with respect to Property Law by what is now Art 345 TFEU,¹⁷³ which provides –

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

This provision has been interpreted narrowly by the ECJ to guarantee member states authority to deal with concentrations of ownership, in the sense of competition regulation, and other assets, rather than principles of substantive law.¹⁷⁴ In *British American Tobacco*¹⁷⁵ the ECJ said in relation to this Article –

... it must be borne in mind that according to that provision the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. That provision merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights ...

Art 345 has not, for example, prevented creation of an EU Directive that requires the return of cultural objects from purchasers in other Member States, although the domestic property law of that state provides in the circumstances that title to the object would have vested in the *bona fide* purchaser, with “far-reaching consequences in the property law systems of the Member States.”¹⁷⁶

Union level reforms aimed at contract law obligations often have implications for Property Law also, as noted above. Van Erp and Akkermans draw attention to the

¹⁷² W Faber & B Lurger, above notes 143 and 172.

¹⁷³ Above, note 80.

¹⁷⁴ S van Erp & B Akkermans, ‘European Union Property Law’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law*, Cambridge University Press, Cambridge, 2010, 173.

¹⁷⁵ Above, note 107, § 147. See also explanation in text following note 112.

¹⁷⁶ van Erp & Akkermans (2010), above note 174, 176, citing Directive on the Return of Cultural Objects from other Member States (93/7/EEC).

EU Late Payment Directive,¹⁷⁷ which upholds the effect of retention of title clauses in the legal systems of Member States that have not recognised this form of security.¹⁷⁸

The Directive on Financial Collateral Arrangements¹⁷⁹ regulates certain relationships between banks and other large financial institutions. It has two main effects on proprietary securities involved in transactions within those relationships –

- It requires that all legal systems within the EU recognise a transfer of title (ownership) by way of security, in which the title to an item of financial collateral (asset) is transferred to another party, not with the intention of transferring full ownership or title, but rather to provide security for payment of a claim.¹⁸⁰
- Plain security arrangements are also dealt with, in which one institution grants a proprietary security right to another institution to secure payment of a claim – title remaining with the grantor institution and a proprietary right granted to the grantee institution to obtain satisfaction from the security object in the event of failure to perform. The Directive thus departs from the general law of securities in that the holder of the security over the financial collateral may now keep the object of the security in case of default, rather than having it sold and gaining satisfaction from the proceeds of sale. Also, upon repayment the holder of the security may now return like objects under the Financial Collateral Directive, rather than the specific object over which the security was originally granted. Both these deviations must now be recognised by the legal systems of all EU Member States.¹⁸¹

To this extent, the Directive achieves a level of harmonisation.

I have mentioned Property Law aspects of the DCFR above,¹⁸² namely, leases of goods,¹⁸³ acquisition and loss of ownership,¹⁸⁴ securities over movables¹⁸⁵ and trusts,¹⁸⁶ as well as more general principles concerning title to goods within a sale of goods framework, such as the principle concerning impossibility referred to above.¹⁸⁷

¹⁷⁷ 2000/35/EC.

¹⁷⁸ van Erp & Akkermans (2010), above note 174, 176-177. Retention of title clauses are recognised in the common law, known also as *Romalpa clauses*: *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. The Regulation dealing with cross-border insolvency procedures (1346/2000/EC) preserves retention of title clauses in the situation of cross-border insolvency within the EU: van Erp & Akkermans, *ibid*, 177-178.

¹⁷⁹ 2002/47/EC.

¹⁸⁰ van Erp & Akkermans (2010), above note 174, 179, who note that a transfer on these terms is recognised in continental Civil Law systems as *fiducia cum creditore* and in the Common Law systems as a general law mortgage.

¹⁸¹ van Erp & Akkermans (2010), above note 174, 179.

¹⁸² C von Bar & E Clive (2009), above note 164.

¹⁸³ DCFR, *ibid*, Book IV, Part B

¹⁸⁴ *Ibid*, Book VIII.

¹⁸⁵ *Ibid*, Book IX.

¹⁸⁶ *Ibid*, Book X.

¹⁸⁷ Art 3.3 of the UNIDROIT Principles 2004, above note 8, corresponding to § II – 7.102 of the DCFR.

Van Erp and Akkermans have also noted the difficulty of separating contract law from other areas of private law,¹⁸⁸ and the same could be said, perhaps with even stronger conviction with respect to property law. Also, "... it lies in the nature of property law that elements convert themselves in an overall system."¹⁸⁹ For example, Property Law principles concerning movable property tend to be reflected also in the principles concerning land. Perhaps it is through these intertwined connections within the civil law that reform of one part resonates in other parts of the body of civil law.

The forces of convergence have brought European private law to a point of inter-system connection where rationality requires the introduction of a cohesive supranational system. A strong need is perceived to maintain rational connections to property principles in the course of harmonising contract law. Ramifications of harmonisation work for the DCFR have thus extended to Property Law issues, starting with transfer of title to goods, then leases and securities over goods. The replication of property principles with respect to different forms of property, and the ambiguity of distinctions between those forms, now draws into question securities over land, which will in turn raise questions with respect to title to land. This is illustrated by calls for a uniform European security over land – the *Euro Hypothek*.

Euro Hypothek

There has been advocacy for a harmonised form of European security over land, now referred to as the Eurohypothek, since the 1966 report of the European Commission, *The Development of a European Capital Market*.¹⁹⁰

The present proposal is to use a form of security exemplified by the German and Swiss *Grundschild* as the basis of the new international security.¹⁹¹ The advantages of this form are that the *Grundschild* is available to secure claims beyond liquidated claims, it remains in place when the sum secured by it is repaid and it can be assigned to another creditor by registration or by assignment of a certificate – the *Grundschildbrief*. A land owner may also grant a *Grundschild* to him- or herself and then assign it to the creditor when a loan is obtained.¹⁹²

Thus, the international adoption of this form of security would, it is argued, open a wider European market of credit providers to consumers and business, who could

¹⁸⁸ van Erp & Akkermans (2010), above note 174, 181.

¹⁸⁹ Ibid, 182.

¹⁹⁰ Explained at length by S van Erp, 'Security Interests: A Secure Start for the Development of European Property Law' in M Hinteregger & T Borić (eds), *Sicherungsrechte an Immobilien in Europa*, LIT Verlag, Wien, 2009, 3-5 and 11-12.

¹⁹¹ See O M Stöcker, *Die "Eurohypothek" - zur Bedeutung eines einheitlichen nicht-akzessorischen Grundpfandrechts für den Aufbau eines Europäischen Binnenmarktes für den Hypothekarkredit*, Duncker und Humblot, Berlin, 1992, and T Josipović, "Die Harmonisierung der Immobiliarsicherheiten: Die Eurohypothek – Modell zur Integration des Hypothekarkreditmarkts der EU" in J Basedow, O Remien & M Wenckstern, *Europäisches Kreditsicherungsrecht – Ulrich Drobnig zum 80. Geburtstag*, Mohr Siebeck, Tübingen, 2010, 71.

¹⁹² § 1191-1198 BGB.

take advantage of more competitive interest rates through use of land as security.¹⁹³ It would also allow the full security potential of a portfolio of properties located across different EU countries to be drawn upon when seeking credit. On the side of the banking sector, the role of international failure of confidence in Mortgage Backed Securities [MSBs] as a cause of the GFC of 2010 recommends an international standard in the form of mortgage securities even as an optional form of security within domestic legal systems.

It can be seen that a strong argument could be raised that the absence of a uniform financial security over land inhibits the formation of an internal credit market for the EU and even infringes the guarantee of free movement of capital.¹⁹⁴

Trusts

Harmonisation and diffusion of principles relating to trusts has also been evident. Some legal systems not within the Common Law legal family have long exhibited functional equivalents to the English trust, such as German *Treuhandeigentum*. I have noted above that trusts are recognised in Book X of the DCFR.¹⁹⁵

The adoption of the trust concept in other legal systems, such as the People's Republic of China,¹⁹⁶ Luxemburg and France has been stimulated by a number of factors. In addition to the influence of the Hague Convention on the Law Applicable to Trusts,¹⁹⁷ in Luxemburg¹⁹⁸ and France¹⁹⁹ the international capital market was also a persuasive factor.

¹⁹³ S van Erp points out that cross-border mortgage lending is not very popular in the European, with a 2004 survey showing that only 1% of all transactions concerned a cross-border sale of immovable objects: van Erp & Akkermans (2010), above note 174, 180, citing European Opinion Research Group, *Standard Eurobarometer 205/Wave 60.2 — Public Opinion in Europe: Financial Services — Report B* (Brussels: European Communities, 2004), 58.

¹⁹⁴ The free movement of capital is one of four freedoms guaranteed by the EU Treaties. See for example Art 26 TFEU –

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

and Art 63 TFEU –

Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

¹⁹⁵ In text above at note 170.

¹⁹⁶ The Trust Law of the People's Republic of China, adopted at the 21st Meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on April 28, 2001 (Order of the President No. 50).

¹⁹⁷ Hague Convention on the Law Applicable to Trusts and on their Recognition (concluded 1 July 1985), available at www.hcch.net/index_en.php?act=conventions.text&cid=59

¹⁹⁸ F Pfeiffer, "What Luxembourg's capital markets have to offer" (2003) 22 *International Financial Law Review* 63.

¹⁹⁹ *Loi n°2007-211 du 19 février 2007 instituant la fiducie*. See J Szejmonneck, "Die fiducie im französischen Code civil" (2010) 18 *Zeitschrift für Europäisches Privatrecht* 562.

Developments have taken place rapidly in the Common Law systems with respect to implied trusts, meaning resulting and constructive trusts recognised by the courts to arise from particular circumstances concerning property. These might arise in a remedial setting.²⁰⁰ In other words a court concludes that title to an asset registered in the name of one party actually should be shared, or transferred to achieve restitution of an unjustified enrichment.²⁰¹ The concept of unjustified enrichment imported into cases such as *Peters v Beblow*²⁰² has itself been drawn from the US Uniform Commercial Code [UCC], in turn drawn apparently from §§ 812-822 of the German Civil Code thanks to Karl Llewellyn.

Land Title Systems

I have argued that an international model of *real folien* land title registration system has emerged and is the globalising influence.²⁰³ Most recently, the People's Republic of China has adopted land title registration and India and Hong Kong are in the process of doing so.

Connected to this process is recognition of the point that the resemblance of German and Torrens systems of land title registration is due, on one hand, to historical reception of essential principles of the Hamburg-Hanseatic land title registration system into South Australian Property Law in 1858 through the work of the Torrens reform group at that time,²⁰⁴ and on the other hand, to prevalence of North German land title registration ideas behind the drafting of the German Civil Code and the first Land Title Register Statute.²⁰⁵ So the essential principles of the two most virulent international land tenure systems on the planet are connected historically as well as conceptually.

States in Transition

The transition of members of the Socialist legal family to western liberal constitutionalism and social market economies has brought a range of issues. Property was an emblematic theme for Socialist legal systems built on Marxian ideologies. The translation of Socialist use rights and other interests into liberal property concepts has thus been a challenge in their transition. Deeper study of the history of the Soviet legal model suggests that civil law systems generally will be much weaker in states that adopted the Soviet model, with repercussions for the priority to be accorded reform initiatives in the course of transition from top-down

²⁰⁰ See for example *Muschinski v Dodds* (1985) 160 CLR 583.

²⁰¹ See for example *Peter v Beblow* [1993] 1 SCR 980.

²⁰² Ibid.

²⁰³ M Raff, *Private Property and Environmental Responsibility – A Comparative Study of German Real Property Law*, Kluwer Law International, The Hague, 2003.

²⁰⁴ M Raff, "Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems" (2009) 30 *Adelaide Law Review* 245.

²⁰⁵ Grundbuchordnung of 24.3.1897 (RGBl. I S. 139) [Land Title Register Statute – GBO]. See Raff (2003) above, note 203, 62-63.

state law enforcement models to horizontal citizen-to-citizen approaches that typify the civil law.²⁰⁶

Former East Germany is now seamlessly a part of the modern German nation.²⁰⁷ Other formerly Socialist states now within the European Union [EU] are very successfully stepping across, although challenges no doubt remain.²⁰⁸ Not all these States have resolved restitution and compensation claims. East European states outside the EU have challenges not experienced by those within it.²⁰⁹

Yet more deeply challenged are formerly Socialist states of Asia and Africa. The problems of smaller and poorer states such as Laos and Cambodia appear much more subtle, beside the bounding economic success of China. The proposition that higher priority must be accorded the reinstatement of “horizontal law enforcement” through capacity and institution building in respect of civil law raises the question of whether civil law in the European sense had any prominence in the pre-Socialist systems of these states and how resilient local functional or cultural equivalents might have been during their Socialist eras.²¹⁰

There are in addition Socialist states that simply eschew the proposition of liberalisation, such as North Korea, Burma and Cuba.

Conclusion

In this paper I have presented a view of the impacts of globalisation and the convergence of law that it brings, with respect to private law and specifically Property Law. We have seen that Property Law has been internationalising generally through the effects of the cross-border transactions, and the UNIDROIT initiatives are a good illustration of this.

Renewed recognition of a body of European civil law and accelerating legal integration of the Europe Union provides an example of convergence tendencies.

²⁰⁶ M Raff & A Taitlin, “Trials of the Civil Law in the Early Soviet Union - Socialist Civil Law in Comparative Perspective”, conference paper presented at the Biennial Conference of the Australasian Association for Communist and Post-Communist Studies, University of Sydney, 30th January 2009 and M Raff & A Taitlin, “Private Law in the Shadow of Public Law – A Legacy of 20th Century Marxism and the Soviet Legal Model” conference paper presented at the XXIVth World Congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 18 September 20, forthcoming in *Archiv der Rechts- und Sozialphilosophie*.

²⁰⁷ M Raff & A Taitlin, “The 1989 Fall of the Soviet Legal Model - Transformation of Civil Law and Privatisation in the GDR in Context of Eastern Europe” paper presented at the EU sponsored *Europe Twenty Years after the Fall of the Berlin Wall: Overcoming “East and West” – International Conference*, Victoria University, Wellington, New Zealand, 4 November 2009

²⁰⁸ M Raff, “One Summer in Gdansk – Poland’s Leadership in Transition from the Socialist Property Model” (2010) 16 *Humanities Research* 69.

²⁰⁹ See for example, T Borić, *Eigentum und Privatisierung in Kroatien und Ungarn – Wandel des Eigentumsrechtssystems und Entwicklung der Privatisierungsgesetzgebung*, Verlag Österreich, Wien, 1996, and M Powlakić, “Sicherungsrechte an Immobilien in Bosnien und Herzegowina” in M Hinteregger & T Borić, *Sicherungsrechte an Immobilien in Europa*, LIT Verlag, Wien, 2009.

²¹⁰ A review of these questions with respect to the Russian legal system is undertaken in M Raff & A Taitlin, “Socialist Civil Law in Comparative Perspective – Looking Back to the Twentieth Century” forthcoming in *Review of Central and East European Law*.

Review of the historical background of the European *ius commune* places the Common Law as a variation within that tradition. Solutions to the sectoral fragmentation of EU legislation that touch private law are also contributing to further development of *ius commune* or modern body of European private law. The DCFR is the latest high point in that process.

There is a strong body of opinion that a European codification of private law is the ultimate answer. There are however also doubts about the powers of the EU to do so as the EU Treaties stand at present. Reservations have been expressed about codification, or even harmonisation of private law, as a solution, principally by the UK. Accordingly, while the European Commission works forward with great caution, leadership has been taken up by academic study groups, seeking ways forward, first in the harmonisation of European contract law and now working on into law relating to movable property. The members of the study groups are drawn from all over Europe, including the British Isles.

Land title registration is the fastest spreading land title system. Development of a uniform European financial security over land – the *Euro Hypothek* – could well import into the field of real property law the pressures toward unification that we have seen with respect to movable property, just as development of the Prussian mortgage book system led to full land title registration in much of Germany.²¹¹ In the era of digital databases and Geographic Information Systems [GIS], interconnection of national title registers is more likely than consolidation.

Initiatives to rebuild the private law systems of some European states in transition from socialism have been very drawn out – the Czech Republic is frequently cited. The drive to develop national Civil Codes is understandable in 20th century pre-socialist terms, however, in view of the drive behind moves toward integration of private law, it's an approach that seems out of context. A pan-European approach would assist states in transition within and outside the European Union to modernise their civil law systems. This is particularly the case in respect of areas that were not or were barely recognised under socialist legal systems, and which are important for future economic growth, such as financial securities over movable and immovable property. Faster progress toward the harmonisation of these areas within the EU could well prove to be the most significant contribution that could be made to development of the legal systems of states in transition.

Ultimately, developments in European private law will be noted with great interest in all legal systems.

²¹¹ See further Raff (2009), above note 2.