II

(Preparatory Acts)

ECONOMIC AND SOCIAL COMMITTEE

Opinion of the Economic and Social Committee on the ‘Communication from the Commission to the Council and the European Parliament on European contract law’

(COM(2001) 398 final)

(2002/C 241/01)

On 11 July 2001, the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned communication.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 26 June 2002. The rapporteur was Mr Retureau.

At its 392nd Plenary Session on 17 and 18 July 2002 (meeting of 17 July), the Economic and Social Committee adopted the following opinion by 114 votes to 3, with 3 abstentions.

1. Towards a globalisation law?

1.1. International trade law must be considered in the context of the globalisation of trade in goods and services. Its purpose is to regulate relations between the parties in international commercial or financial transactions or the cross-border provision of services. Commercial contracts are subject to this law, and may also be subject to certain specific conventions where they include one or more foreign elements. For instance, the 1980 Rome Convention (1) on the law applicable to contractual obligations, which consolidates the rules on conflicts between laws, is applicable in all Member States of the European Union.

1.2. This law, which is still not comprehensive, is the product of inter-state initiatives, such as the work by the United Nations Commission on International Trade Law (UNCITRAL), and private initiatives proposed by legal or commercial practitioners, academics or other experts in the form of studies and theoretical solutions, rules or voluntary principles or guidelines.

1.3. International trade law has been the subject of intensive research work, notably by the International Institute for the Unification of Contract Law (UNIDROIT, Rome), and at European level by the Commission on European Contract Law which, over the last two decades, has framed a set of principles and provisions aimed at unifying the principles and practices of the Member States of the Community, in particular ‘continental’ law and Anglo-Saxon common law, and by a commission of experts (some belonging to both commissions) which the Parliament has asked to produce a comparative study of national laws with a view to identifying the common principles of contract law in Europe.

1.4. The guidelines drawn up by these commissions of lawyers or professional organisations remain voluntary. They are part of a kind of supplementary lex mercatoria which can be of use to parties and judges. But in Europe recognition of these private ‘codes’ by national judges when interpreting contract clauses, clarifying the intention of the parties or settling disputes is a problem, while elsewhere, non-State law can be taken into account, as is the case, for example, under the Mexico Convention (CIDIP).

1.5. There is a certain contradiction between the principle of contractual freedom and the choice of law applicable by the parties, and the territorial reference law of the national judge, which encourages recourse to private arbitrators where

disputes arise. Although arbitrators reach decisions on the basis of the law, compulsory implementation of arbitration awards involves recourse to a national judge to enforce the decision. In other cases, in practice quite rare, national judges even have a power of review of arbitration awards, comparable with that of annulment, creating a further contradiction. One solution could be to enable national judges to use a unified European framework of principles and rules, if the parties wish, to interpret the clauses of the contract, or as supplementary provisions for ruling on obscure matters or those not foreseen by the parties.

1.6. It should be emphasised that important international conventions exist in this area, spearheaded by the work of UNIDROIT and framed in particular under the aegis of UNCITRAL.

1.7. The 1980 Vienna Convention on the international sale of goods, ratified by many States, including all of the Member States, (with the exception of the United Kingdom, Portugal and Ireland) is an extremely comprehensive supplementary reference that can replace national law if parties choose to use it to govern their relations. It is widely used in the worldwide trade in goods.

1.8. However, the Convention makes no reference to the pre-contractual phase with regard to the formation of a contract, and States ratifying it may opt not to be bound by specific sections (contractual formation, contractual effect). The core of the convention consists of the reciprocal obligations of the parties — who must be professionals — which limits its scope. It is important to note that consumer contracts are therefore not covered.

1.9. The sale of goods contract is one of the main types of contract in international trade. It is usually accompanied by one or more contracts of carriage (the majority of goods being transported by sea), and insurance contracts covering the goods transported, etc.

1.10. Services, particularly financial services, investments and insurance, are not covered by the United Nations conventions ratified and currently in force, despite initiatives by UNCITRAL, but a large body of soft law does exist in these areas. Rules on these matters are also being developed by the WTO and the case law of its dispute settlement body (DSB), although these apply only to States, and not to private individuals directly.

1.11. Licences and technology transfers, which are involved in some international contracts, are mainly covered by the World Intellectual Property Organisation (WIPO) conventions and the WTO’s TRIPS agreements on intellectual property rights related to international trade.

1.12. A code of international trade, universally applied and transcending legal systems and cultures, still remains a myth. Furthermore, given the low levels of ratification of the international conventions relating to substantive contract law issues listed in Annex II of the communication, there is clearly still a long way to go.

1.12.1. But it is undeniable that international traders feel the need for a universal, workable, stable, predictable framework to promote secure and fair transactions and compliance with the relevant provisions and principles of international public law contained in major international conventions and common law (general principles of law; procedural safeguards, principle of fairness in contracts, respect for human rights and core labour standards). Such a jus commun would certainly be consistent with the internationalisation of business and the contracts to which this business is subject.

1.13. Harmonisation at certain regional or sub-regional levels might seem easier to achieve as an alternative or stage towards a globalised economic law, which lacks a sovereign legislative authority or court comparable to national courts, although the existence of the WTO and its DSB, an international arbitration mechanism and the International Court of Arbitration of the International Chamber of Commerce (ICC) help to fill these lacunae.

1.14. The Committee would point out that the communication makes no mention of matters relating to contract law in the applicant States and possible problems of incompatibility. The Green or White Paper being prepared by the Commission should refer to the legal situation in these countries.

2. **Harmonisation of contract law in Europe**

2.1. **General considerations**

2.1.1. The existence of the Single Market makes harmonisation of contract law in the European Community seem more desirable still. For some twenty years, eminent legal experts
have worked to define a European contract law which reconciles ‘continental’ laws with what is commonly known as English common law, but which might, in view of the direct effect of European law and recent reforms and statute law, particularly with regard to the civil procedure and human rights, more properly be called the law of England and Wales — or English law, in the interests of simplicity. Northern Ireland differs in some respects, while Scotland has its own law and legal system (which is nonetheless subject to the higher authority of the judges of the House of Lords), and an independent Parliament with some legislative powers. Ireland also has its own system of common law, which is applied in the framework of a constitution.

2.1.2. As is the case in the United States, which has a Common Commercial Code (CCC) which serves as a reference for parties and judges, but where each State has its own law, there are legal differences within the United Kingdom. Unity of law is thus not an absolute requirement for a unified market in these two cases. Such a situation also exists within the Single Market, but without a uniform code, the role of which could be played in the future by Community legislation resulting from the work of the Commission, based on that of the Commission on European Contract Law and other commissions working in this area, on cross-border contracts concluded in the economic area covered by Community law.

2.1.3. With a single currency in the majority of its member countries and its Single Market, the Community economic area would indeed be well suited to the creation of a uniform contract law. But the Commission is unclear — and has asked our opinion — as to the feasibility and relevance of a European initiative on this key area of international trade law which, moreover, may have to be enlarged, to ensure that it remains consistent, to encompass a European law on contractual obligations (with possible civil and criminal liability aspects, in addition to contractual liability in certain instances of poor execution or failure to execute the contract, or clauses incompatible with public policy).

2.1.4. While taking account of existing law in the different countries concerned, including the applicant States, the Commission should be encouraged to create a unitary law applicable to all types of contract and to all contracting parties, including end users. A European contract law would be entirely justified for cross-border contracts.

2.1.5. It might also be appropriate to give priority to supplementing the existing universal law and European law, used as a starting point for the exercise, and to take account of the practices and standard contracts which are widely used by the parties in international contracts, in so far as much of intra- and extra-European trade is covered by common rules and contractual principles, and given that many companies operate in these two spheres.

2.2. Existing elements of a European contract law

2.2.1. The Committee wishes to point out that there is already a large body of Community legislation in the sphere of private law, detailed in Annex I of the communication, which tends towards harmonisation of national rules on contracts, both directly and in a more indirect manner. Annex III provides a structured overview of this body of law and of binding international commitments relating to contracts.

2.2.1.1. We might question whether the Community is competent to draw up a European contract law (understood in the wider sense of consumer law, law on commercial contracts and contract and tort law and the liability arising therefrom). But its obligations concerning the protection of consumer rights and its powers with regard to completion of the Single Market certainly give it a solid basis for proposing initiatives pertaining to cross-border contracts.

2.2.2. European consumer law is particularly advanced with regard to contracts concerning goods and services. It operates from a broad perspective, often extending from the bid through to civil contractual liability. The obligation on the seller to provide information (labelling, information), and product liability are specified. Consumer protection is now the subject of a substantial body of law, although shortcomings still exist in certain areas (e.g. consumer credit and home loans).

2.2.3. Contractual relations between professionals are covered in various national laws and European law, in certain specific circumstances, from the perspective of protection of the weakest party or the party that is financially dependent on the ‘principal’ of the contract. As in consumer law, the aim is to provide enhanced protection to a party deemed to be more vulnerable in order to ensure the equality between the contracting parties which is essential to the exercise of contractual freedom, a universal principle of contract law in liberal economies.
2.3. **Problems relating to the wording of legislation**

2.3.1. Such problems are commonplace both at Community and national levels. Legal texts may be the product of political consensus, their initial succinctness may be compromised by various amendments and their wording is not always sufficiently clear or specific.

2.3.2. At European level, the very nature of directives, which lay down the objective to be achieved, leave considerable latitude for Member States to use their own national legal notions and concepts which, in different legal systems, may have a different meaning. Texts are translated from and into different languages, each laden with its own legal culture, and compromises sometimes favour vague expressions which can be interpreted in different ways by national laws, which can work to the detriment of the desired harmonisation.

2.3.3. The sectoral nature of most Community texts could upset the harmony of each country’s domestic law if the amendments made by transposition resulted in badly co-ordinated sectoral rules being superposed in one area of the law. The wording of national law may encounter the same kind of problems as those faced by Community law (amendments, compromise, vague wording with the meaning left to readers and interpretation or assessment by judges).

2.3.4. Thus the burden of seeking the necessary coherence is left to legal theorists, professors in university lectures or compilations of guiding principles such as those drawn up by UNIDROIT and other ad-hoc bodies, and especially, in practice, to case law, which may be inspired by academic works.

2.3.5. Once a sufficient set of rules has been compiled, the legislative bodies within the parliamentary institutions should examine a branch or area of the law for consistency, with a view in particular to structuring and codification or simplification and to harmonising international, European and national rules on rules of origin, taking care to draft clearly, in order to make the law truly accessible to citizens, who are bound by the rule of nemo censitur (ignorance of the law is no defence), a principle which, when considered in relation to many pieces of legislation, looks like a real legal fiction. Each year, tens of thousands of pages are published in official journals. They may take the form of numerous amendments to previous texts where it would have been preferable to publish a new, consolidated version to enable the new law applicable to be more easily understood. The Committee has called repeatedly for legislation to be simplified in the interests of its users (1).

2.3.6. Recommendations or the exchange of information on good practice could also help improve the drafting of legislation.

2.3.7. With regard to contract law, it is the parties who are responsible for the clarity or obscurity of the clauses of a contract, at least for the non-mandatory clauses. At least one of the parties is responsible in the case of standard-form contracts. The directive on unfair terms in consumer contracts (2) put an end to a number of questionable practices in standard-form contracts in particular, which unfortunately are sometimes badly drafted using terms that the other party finds difficult to understand. Some clauses may be written in tiny print. Specific basic rules of form are needed to protect the weakest party.

2.4. **Similarities and differences between instruments and institutions**

These considerations offer further bases for reflection and action with a view to overcoming certain legal difficulties. They should be developed in a more consistent manner, either in connection with the publication of a White or Green Paper announced by the Commission, or in a legislative proposal at a later date.

a) **Unification**

— Treaties (unifying clauses: areas falling within the sphere of Community competence);

— regulations;

— decisions;

— ECJ (judgments and references for preliminary rulings);

— standard contracts and clauses.

b) Harmonisation

— Treaties (harmonisation clauses: areas of shared competence and pillars or areas of a primarily inter-governmental or national nature);

— directives with a direct or indirect effect on contract law (such as directives on liability for faulty goods or unfair terms in contracts);

— recommendations, resolutions;

— introduction into national law of foreign legal concepts (horizontal transfers), with the risk that incomplete transfer or concepts will not be properly understood, but superposed on national law rather than being properly integrated;

— international conventions (vertical transfers);

— proposals for international or regional standardisation: UNIDROIT, Commission on European Contract Law, offering consistent rules to which parties, judges and arbitrators can refer;

— the case law of international courts (few solutions in the case of private law as it mainly concerns inter-state law) and case law of European courts (CFI, ECJ, ECHR);

— legal writings, European conferences of legal experts, in-service training of legal and trade professionals;

— international arbitration (the ICC list, private experts’ practices); problem of the scope of arbitration case law, and access thereto in view of the fact that it is not published (it may also remain confidential if the parties so wish) and receives scant attention from legal writers;

— ‘Soft law’ (case law of the international organisations’ supervisory bodies, guides, compilations containing principles of international and regional intergovernmental and professional institutions with an influence on contractual provision, dispute settlement, etc.).


2.5. The Committee is concerned at the continued — not to say exponential — proliferation of legislation, sometimes of unnecessary complexity, which is a cause for concern for legal
professionals, firms (for whom this proliferation can result in substantial expense) and citizens who only have a partial knowledge of the existing law.

2.6. Increasing legislative intervention in contract law, in particular with regard to consumer and employment issues, is intended to supplement the public policy clauses that are common to contracts and relatively similar between Member States, in ensuring respect for the principle of equality between parties. This interpretation can also be applied to other types of contract where one party is in a situation of relative weakness or subordination in relation to the other, (the principal of the contract), such as sub-contracting, franchising or exclusive distribution.

2.7. The principle of equality is also a fundamental principle of primary law, which has served as the basis for numerous anti-discrimination laws and has had a marked influence on the gradual creation of a European contract law. It runs through the whole of secondary legislation and can constitute an additional justification for Community legislative initiatives.

2.8. With regard to European consumer law, the idea that consumers are in a subordinate situation in relation to sellers, (as principals of the contract) and must thus be provided with adequate protection runs, quite rightly, through all Community legislation.

3. Areas for further consideration and recommendations

3.1. As a result of globalisation, we are witnessing the development of a 'soft law', and dispute settlement mechanisms which are essentially private in nature and operate mainly between firms, but also sometimes between firms and States where international financial contracts are concerned. The 1980 Vienna Convention on contracts for the international sale of goods (CISG) offers a supplementary framework in a legal situation which is dominated by the 'will of the parties' (which in practice can express the interplay of market forces).

3.2. Contractor-legislators, within the limits, clearly, of privity of contract, also have a choice of judge (normally a quasi-judiciary arbitrator, who has the power to determine the legal position, and, less frequently, a judge operating in a framework of national sovereignty with the authority to take an enforceable decision, possibly leading to sanctions). These trends, largely regulated in a non-binding manner by the ICC, mainly concern transnational companies and are linked to the new international division of labour and the growth of trade, but increasingly also concern medium-sized firms in certain sectors of the economy (international finance, services related to new technologies, international brokerage, international consulting, etc.).

3.3. The moral and social values of any given country no longer have a place in reference law or supplementary legislation. These are increasingly giving way to the principles — more universal, less linked to a particular culture or society — of good faith and cooperation in the execution of contracts which only concern the parties, in what is a more individualistic and independent approach. The European principles of contract law drawn up by the ad-hoc commission are not based on a European economic and social public policy, which does nonetheless exist, and are not rooted in a sovereign framework, which only exists at European level to a limited extent.

3.3.1. A future European contract law should seek to avoid these pitfalls. It should make progress, while remaining firmly rooted in the legal principles of private law common to all Member States, European socio-economic public policy and the European social model. National courts should be given competence to supervise these contracts and settle disputes on the basis of European contract law.

3.4. SMEs and SMIs are increasingly familiar with standard document formats and international trade law, and are extending their use to their cross-border activities. Unnecessary intervention in these relations should be avoided, except to avoid possible abuse, and it is important not to create an excessive number of specifically European conditions, so as not to create obstacles to economic relations between European and non-European firms.

3.5. Creation of a uniform, general European contract law, for example by means of a regulation, a solution the Committee considers preferable in order to avoid disparities, could be a lengthy process and require further studies, but it should be based on the work already carried out by the various commissions and institutions referred to previously and on current international rules and practice.

3.6. Initially, in the medium term, if the parties so wished they could choose for their contract to be subject to European law. At a later stage, in the longer term, and after possible assessment and amendment, European contract law would become the common law, although parties could choose another law, thereby preserving the principle of contractual freedom.
3.7. A European contract law should cover the pre-contractual phase, the formation of the contract, the conditions of validity, fulfilment or non-fulfilment of the obligations, means of payment, etc. It would serve as a reference for subsequent legislative proposals having some bearing on contractual issues. In addition to the legal certainty it would create, its existence would also reduce some transaction costs.

3.8. While it would serve as a basis of legal principles and rules applicable to all contracts, the proposal for a European contract law should contain specific or more detailed provisions relating to certain contracts or consumer protection.

3.9. National judges must then settle disputes on the basis of this law if the parties have chosen to abide by the new European contract law in their contractual obligations.

3.10. Micro-enterprises and craft businesses, particularly those operating in a market almost exclusively limited to a local or regional area, above all lack the financial resources and specialised expertise necessary on those occasions when they wish to conclude cross-border contracts. Both for these businesses and for consumers, the choice of a European contract law, rather than their national law, would be an important guarantee in terms of legal certainty. A European law would enable them to plan their economic relations in the Single Market with greater legal certainty.

3.11. For consumers, the choice of a European contract law, rather than their national law, would be an important guarantee in terms of legal certainty in specific cross-border transactions where their national law would not necessarily apply.

3.12. Although the Committee fully endorses the Commission’s approach with regard to the exclusion of family and employment law, which is closely linked to legal tradition, history and the social structure in each of the Member States, it nonetheless considers that cross-border employment contracts should not be totally excluded from consideration, since they raise considerable problems of conflict between laws and/or jurisdiction. If they consider it appropriate, European employers’ and workers’ organisations could address and make proposals on this issue.


The President
of the Economic and Social Committee
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