Rösler, Hannes

Eliminating borders of national private law

Potentials analysis of EU private law, the CISG and the Principles

The European Legal Forum (E) 4-2003, 205 - 211

© 2003 IPR Verlag GmbH München
complete the bold move it has already begun in this area.

In order to reconcile the major differences in the copyright regimes of the Member States concerning the transfer of film rights with the Internal Market, it would be advisable to complement the harmonisation of the notion of film authorship by introducing the legislative transfer rules known in some Member States at the Community level.\textsuperscript{72} Statutory transfer presents itself as a compromise solution to avoid the difficulties for film production and exploitation arising from the application of the “creator” principle prevailing in most of the continental Member States. This is in the interest of all parties involved in the making of the film. Not only do they bundle the exploitation rights in the hands of the producers, but they also help to unify the legal relationships in the common exploitation market for cinematographic works in Europe – with the important advantage of legal certainty, which is indispensible for a functioning European film market. The Community-wide implementation of statutory transfer keeps EC lawmakers from having to decide between the two main regimes for copyright while compensating for the conceptual opposition between the copyright and droit d’auteur systems in an acceptable fashion. Such a harmonisation is also a particularly good idea in the context of the conflict of laws problem described above, as opposed to maintenance of the status quo – in any event as long as an approximation of copyright law remains in a holding pattern at the Community level.\textsuperscript{73} In this sense, the announced review of the general legal framework in the Member States for the drawing up of contracts in the film sector will hopefully recognise the need for extensive harmonisation in the future and take this matter seriously into account.

\textsuperscript{72} In this regard under German law, see Oberfell (supra note 10), at 189 et seq. To the same extent, see Poll (supra note 1), 302; Reupert (supra note 13), at 302 et seq.

\textsuperscript{73} In this regard, the result of efforts toward an EC regulation on the law applicable to non-contractual obligations (see Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, “Rome II”, of 22 July 2003, COM(2003) 427 final) remain to be seen.
tary transfer of state sovereignty. As was already the case with the European Coal and Steel Community (ECSC) dating from 1951, the European institutions have the power to make decisions, with their actions being reviewed, not by national courts, but instead by a single European court alone. The transfer of sovereign rights also manifests itself in another way: Unlike international conventions or conflict of law rules, an EC directive cannot be disposed of once and for all by means of unilateral denunciations or domestic measures. Conversely, the economic freedoms of the EC Treaty enjoy the status of subjective rights, the contents of which are often first clarified by way of a process of judicial discovery.

2. Origin of a community of peace, freedom and welfare

The impetus for a self-imposed and broad unification by force of law was less a product of the élan of a European movement than a transformation in the role of the nation in view of the two world wars that originated there and the brutality of fascism. Taking a lesson from the ill-fated peace settlement of the Versailles Treaty, the former adversaries wanted to create a new community of democracies that would prohibit discrimination in order to achieve peace and increase welfare to everyone’s benefit. On 25 March 1957, the original Member States “la[id] the foundations of an ever closer union among the peoples of Europe” with the signing of the Treaty of Rome, which established the EEC. This notion of cooperation had found expression in the so-called Schuman Plan of 9 May 1950, concerning the achievement of concrete and gradual political results through teamwork, which would in turn create an incentive on all sides to keep the peace. However, the plan also stated that “[t]he pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe”.

3. Transformations in the understanding of “Europe”

Those self professed Europeans of the first hour were stirred by their common suffering in the war. Fifty years ago, they saw purely a matter of war or peace in the creation of a European community that brought peace and welfare on the continent that had arguably experienced the greatest violence. There has been a shift in the meantime. The first generation bore the imprint of European politicians who had lived through war and fascism (and who were partly animated by the vision of a new European state). The new generation, however, is for the most part convinced that new, shared problems can only be resolved through joint effort. This understanding of the EU as a special purpose association predominates in the public mind as well. The individual states’ loss of power is accepted to this extent in order to seek a new economic and political meaning for the “old” continent in a transformed world of states. At present, the EU is often pigeonholed as a union of sovereign states, as Germany’s Federal Constitutional Court stressed in its 1993 Maastricht decision. However, the real (i.e. not just the desired) final result remains unclear (federation or confederation, or a mixture of both in a unique and innovative third entity, which – according to first indications – can only be understood on its own?).

III. Other efforts outside the EU to eliminate borders

1. Other institutions

Outside the structures of the EU and its predecessors, countless inter- and supranational organisations were set up on the European continent. Currently, the oldest regional system in Europe is the Council of Europe in Strasbourg (F), which was founded on 5 May 1949 and which today has 44 Signatory States. The Council devised the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which has been looked after since 1959 by the European Court of Human Rights (ECHR). As is the case with the ECJ, the rising number of complaints that have
been lodged – particularly from the countries of Central and Eastern Europe – is proof of the Convention’s success. At the international level, it also bears witness to the efforts to strengthen the judicial process in order to gain control over politics. Other organisations include the Organisation for Economic Co-operation and Development (OECD), founded in 1961; the Organization for Security and Co-operation in Europe; the World Trade Organization (WTO), born in 1994 as a successor to the General Agreement on Tariffs and Trade (GATT), itself established in 1947; and the European Free Trade Area (EFTA), which Union expansion has rendered quite meaningless, and with it the European Economic Area (EEA) as a cooperation between the EC and EFTA.

This network of multinational organisations has also led to pivotal changes in classic diplomacy. Bilateral diplomatic relations have rapidly lost their significance since innumerable decisions are made at international conferences both inside and outside the EU. National governments plan these with reduced participation of embassies and arrange things directly with one another in the preliminary stages. Furthermore, the above mentioned international organisations tackle diverse problems ranging from peace and disarmament, economic advancement and – particularly in the case of the Council of Europe and the ECHR – on the rule of law and respect for human rights and fundamental freedoms.

The idea of a union of states with the goal of free market cooperation goes beyond Europe, as evidenced by the North American Free Trade Agreement (NAFTA) and Mercosur. Also the new African Union (AU) explicitly adopts the EU as a paradigm. This cooperation between countries is a matter of institutional implementation of the globally ascertainable triumph of law and a reaction to market globalisation and the consequent restrictions on the options open to states. De-

25 In 1992, approximately 60 000 complaints were pending, FAZ of 9 July 2002, at 4.
24 Previously OEEC, founded in 1948.
23 Oppermann (supra note 7), para. 121 et seq.
21 General agreement on customs and trade.
20 The EEA States have information and consultation rights, e.g. in the run-up to enactment of EC consumer directives; for a Swiss perspective, see Brenner, in: H.R. Weber/Thüler/Zach (eds), Aktuelle Probleme des EG-Rechts nach dem EWR-Nein, Zurich (CH), 1993, at 91, 98, 118.
19 On the change in German diplomacy, see Röser, Die Botschaftsdiplomatie – Ein Einblick, [1999] Jura 220.
17 Such agreements should in this respect also be classified as part of European private law; see Basedow (supra note 27), [2000] 200 ACP 445, 456, 457.
16 RGBl. 1903, at 147 et seq.
15 RGBl. 1892, at 793 et seq.; apart from these agreements, there are e.g. the Warsaw Convention of 1929 on international carriage by air, the Berne Convention of 1961 regarding railroad transportation, the Athens Convention of 1974 relating to the carriage of passengers and their luggage by sea, and the Paris Convention of 1962 on the liability of hotel-keepers; on equality before the law on the ground of agreements under international law, Philipps, Erscheinungsformen und Methoden der Privatrechts-Vereinheitlichung – Ein Beitrag zur Methodenlehre der Privatrechts-Vereinheitlichung unter besonderer Berücksichtigung der Verhältnisse Westeuropäa, Frankfurt/M. (D) et al., 1965, at 21 et seq., for an overview of the forms, at 27.
13 Institut International pour l’Unification du Droit Privé; on this, Ravel, Zwei Rechtsinstitute für die internationalen privatrechtlichen Beziehungen, [1932] JW 2225, 2227 et seq.; as regards the other institute, he is referring to the Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht (Kaiser Wilhelm Institute for Comparative Public Law and International Law), the forerunner of the MPI in Hamburg.
principles for international commercial contracts appeared in the same year as the Lando commission’s “Principles of European Contract Law”;

36 36 further, both of the non-binding works resemble one another in terms of approach as well as in some substantive respects. The third part of the European principles has already been released, whereas the Bonell group has announced a 2004 publication date for its concluding second part. The five new chapters will address difficult questions concerning agency, rights of third parties, transfer of rights, set-off and limitation. Established usages also play an increasing role in the areas of private law affecting commerce, such as the Incoterms (International Commercial Terms) covering the law of transport which were published by the Paris-based International Chamber of Commerce (ICC), and regulations concerning documentary credits, definitions of clauses and terms, model contracts and other uniform rules. Transborder regions (e.g. near the Rhine River) are forming on the basis of economic interests that do not rely on support or regulations from Brussels. The trend will continue on the strength of this fact as well as improvements in trade and media technology. As a result, an intense discussion has emerged as to whether a lex mercatoria, including an international commercial jurisdiction, could emerge on the basis of the abovementioned regulations, or whether this has not in fact already taken place.

b) UN Sales Law Convention

The most important international treaty in the area of private law is the UN Convention of the International Sale of Goods of 11 April 1980 (CISG). In the meantime the CISG is valid law in 62 countries across the globe – in some cases with reservations regarding certain Art.s. It has thus made available into reefs as a separate, admittedly partial substantive law governing the international sale of goods (i.e. unified private international law).

In any event, the CISG is not even in effect in all EC countries, as the United Kingdom, Portugal and Ireland have not signed the agreement. Both parties to a contract for the sale of goods must have their place of business in different Contracting States (Art. 1(1)) and must not have effectively excluded the Convention’s application (Art. 6). Moreover, the CISG leaves broad sections of national private law untouched – notably the passing of ownership as well as the legal force of contracts, including the question of the effectiveness of clauses in the general terms and conditions that determine a national law by means of conflicts of law rules (Art. 4). Critical is the fact that contracts for the sale of goods which are solely in


The International Chamber of Commerce was founded in 1920 as “a businessmens’s League of Nations”.


On the current state of the dispute see the overview (with positive outcome) by Lando, in: Müller-Graaff (supra note 8), at 567 (575 et seq.; furthermore, de Ly, in: Hartkamp et al. (supra note 36), at 41 et seq.; U. Steyn, Lex mercatoria – Realität und Theorie, Frankfurt/M. (D), 1995; Weise, Lex mercatoria, Frankfurt/M. (D) et al., 1990, 1980, at 31 et seq.; Cordes, Was erwartet die (mittelalterliche) Rechtsgeschichte von der Rechtsvergleichung und anderen vergleichend arbeitenden Disziplinen?, [1999] ZEuP 544 et seq.; see also on legal approximation through legal practice and the methods for the creation of European contract law, Lando, Europäisches Vertragsrecht, in: Weyers (supra note 34), at 103 (111 et seq.) and on the important contribution of jurisprudence on the drafting of contracts, at 128, 132.

GBGL. 1989 II, at 588, 1990 II, 1699; GBGL. 1992 II, at 1477, signed by Germany on 26 May 1981, with ratification on 21 December 1989 and entry into force on 1 January 1991. The CIG has enjoyed greater success, since it – in contrast to the Hague Agreement of 1 July 1964 – only concerns trade (Art. 2); furthermore, the familiarisierung with the integrated rules on non-performance as it is known in England (Roiter/Tungler, Modalitäten der Ersatzleistung im englischen und deutschen Vertragsrecht, [2002] Jura 782, 783, 785), has in the meantime taken place.


According to German case law, the stipulation of German contract law alone does not suffice; instead, the choice of law under Art. 27 EGBGB is necessary specifically with regard to non-uniform German law – since the CISG also forms part of the German legal system.

tended for personal, family or household use – i.e. consumer sales – are factored out, in consideration of national consumer protection rules (Art. 2(a)). While the Hague Convention applies to private law sales contracts as a whole, the CISG renounces the inclusion of any consumer contracts whatsoever. At the same time, the fragmentary convention governs neither the validity of a contract and its provisions nor the effect that the contract may have on the property in the goods sold (Art. 4). Furthermore, the CISG does not apply to the non-contractual liability of the seller (Art. 5).

Naturally the CISG is taken into consideration not only in a direct way in the case of cross-border trade, but also – precisely because it, unlike EC law, does not apply to domestic cases – in an indirect way by leading to an interpretative cooperation and by functioning as a model for general amendments to national law that apply to purely intrastate transactions (e.g. modernising the law of obligations in Germany). To this extent, the idea of a purely national private law has been reduced to an illusion. However, it is striking how much the legal unification efforts discussed here were fashioned for the commercial field, thus leaving social protection and formal institutional aspects for the optimal implementation of legislation largely unnoticed – in contrast to the EC.

IV. Causes

The erosion of the illusion of an individual state orientated on a sovereign autarchy is thus incontrovertible. Nation-states are historically not without merits; after all only the nation-state allowed for the durable realisation of the monopoly on power and thereby the rule of law, as well as democracy, general education, and health care, that demand a strong sense of community and the consequential solidarity. Nation-states and national identity will thus not lose their justification for existence and their identification role for citizens in the foreseeable future. However, the individual’s nation-state becomes relativised as a benchmark due to the displacement of economics, politics and citizens from their spatially bound contexts. The meaning of the expression “nation and people” is losing footing in various social areas such as the economy, politics, science, art, public life, consumption and popular culture. At the same time, the country that is opening up gains discipline and is noticeably woven into a network of new creations and binding universal values. Rapprochement with transnational organisations in a no longer bipolar world order manifests itself even in the countries observing strict neutrality.

The best example is Switzerland, where 54.6 % of voters approved UN membership in a plebiscite held on 3 March 2002, making their country the 190th member of that organisation as of 10 September 2002. Moreover, seven bilateral treaties had entered into force between Switzerland and the EU as of 1 June 2002 under the principle of autonomous implementation of Community law.

In addition to the intention of a secular domesticisation of aggressive state powers, there are also other reasons for the pull towards the formation of higher ranking transnational organisations: These are to be found in the needs of an interdependent, structurally changed global economy, which is characterised not only by a digital network, and – problematically so – by a only partially developing global society, but also by a growing awareness of the minuteness, limitations and the worthiness of protection of the planet, its inhabitants and resources, which has contributed to a universal sensitivity propagated by the media that transcends national borders. The flipside is just as important – the adapting consumer interest in foreign products and cultural assets as well as the request for external news from the media. To this extent, there is a connection between human curiosity and the wish for a “better” life or higher living standards (which also means stronger and differentiated consumption according to needs in the face of increasing standardisation and brand orientation of consumer preferences) and global capitalism as well as the dissolution of national sovereignty resulting from this constellation. Loyalty to the national economy – the idea that the local economy must be promoted or that national domestic products are per se superior to foreign goods – increasingly plays an altogether subordinate role for the consumer. Precisely in the neutral role as consumer, people appreciably undermine the concept of nationalism. The consumer thus becomes one of the driving forces leading to the disintegration of the nation-state as well.

The trends towards internationalisation, immaterialisation and individualisation, coupled with worldwide standardisation in technology, business and law (e.g. for computer and communications technology, container shipping and air traffic) have led to serious denationalisations. The unifications

48 See also Schwenter, Das UN-Abkommen zum internationalen Warenkaut, [1990] NJW 622, 623.


52 This is also demonstrated by the emergence of transnational European private law with intra- and interdisciplinary relationships, on this, Rösler (supra note 35), [2002] KritV 392, 400 et seq.

53 See also Alfred Weber, Die Krise des modernen Staatsgedankens in Eu- ropa, Stuttgart (D), 1925.

54 On free movement of persons, air and land transport, trade in agricul- tural products, scientific and technological cooperation, public pro- curement and mutual recognition in relation to conformity assessment (published in OJ L 141 of 30 April 2002); further agreements, e.g. on Schengen, asylum, services and media are currently in preparation. In any event, the free trade agreement of 1972, OJ L 320 of 31 December 1972, at 189 et seq.

55 With regard to the digital rift (one of many), “citizen” is often distin- guished from “netizen”.


58 In this respect, the mere growth in consumption can hardly result in a sustained improvement of the labour market; on this, Kröger/Rösler, Grenzen und Chancen des Rechts zur Steuerung des Arbeitsmarktes, [2001] ZRP 473, 475.

59 In this regard, see, especially Remien, Denationalisierung des Privat- rechts in der Europäischen Union – Legislative oder gerichtliche Wege, [1998] ZIRV 116 et seq.; Werno, in: id. (ed.), L’Europeannation
taking place in spatial, material and personal dimensions as well as the new complexities’ arising from independently acting companies, groups and individuals that have detached themselves from a nationalised context — therefore lacking in a clearly definable address. — are both genuine challenges for national and supranational capacity of regulation and control. 59 In order to retain these capabilities, law in the “post-national constellation” must catch up with the present transnational realities in the economy and to a limited extent with individuals. 60 National institutions in their present form are thus to be critically scrutinised on the basis of this realisation. Consequently, in view of globally acting companies and international organisations, a democratic deficit becomes manifest. They elude state “paternalism” merely by changing their place of business. The EU would be in a position to act partly as a counterbalance: if constituted as a multi-level democracy, it could open up a real chance for citizens to participate in the extended areas of collective freedom and co-decision. This is thus unfounded to bemoan the loss of control on the level of the mighty nation-state, without acknowledging the emergence of possible models of cooperation associated therewith.

V. Concluding evaluation and future prospects

The paradigm of the European Community was formed and developed entirely in keeping with the notion of a “federation of free states” advanced by Immanuel Kant (1724-1804) in “Toward Perpetual Peace” as the foundation of international law and of a “league of nations (…) [that] would not have to be a state consisting of nations”. 61 At the same time, Kant emphasised the power of trade in creating bonds. Despite some setbacks, countries all over the world are cooperating in helpful ways governed by regulations and are able to find at least one common denominator in the opening of their markets.

This new form of state, borne by the spirit of trade, is marked by an acceptance of the loss of sovereignty, multilateralism, the preference for civil instruments in the pursuit of state interests and the primacy of increased prosperity. 62 In instances of a higher level of cooperation between states, it includes also socio-political cofactors. This reveals for the area of legal studies that isolationist tendencies are untenable 63 and private law does not have to be tied to the nation-state and the “Volksgeist.” 64 In the legal field (even outside of the relatively strict confines of the European Union) there are highly visible trends towards the tearing down of borders, which in itself portends an advance in the Union’s process of integration, despite the upcoming burdens of eastern enlargement and the proliferation of interests inside the EU.

The internal perspective of the nation is prised open — even without the pressure from the trade sectors that are increasingly orientated towards export. Tourism, private communications, science and education remove barriers and act as complements to the internationalisation of the economy and labour. This affects the values in general — as evidenced by the strengthening of universal principles of justice enjoying a superior status, such as human rights. From this emerge supranational structures, standards, and thus expectations of conduct. But what about their protection? In many cases principles of lex mercatoria falter on grounds of being legally not binding — just as happens with the principle works and large parts of international law. Numerous rules are put forward only as options, 65 which does not seem appropriate in sensitive areas where parties have an inferior market and bargaining position. Furthermore, it lacks a uniform interpretation and final instance of judicial review. This becomes clear in the CISG — for instance with the relevant question of what the obligation according to Art. 35(2)(a) should mean. Whereas in English common law the “merchantable quality” is promoted as a criterion, the Germanic legal systems tend to view “average quality” as the yardstick. A Netherlands arbitral tribunal has in turn advocated “reasonable quality” as a measure for determining whether there is conformity with the contract. 66

Once again the compulsory effect of Community law and of the ECJ’s aspirations for autonomous interpretation 67 reveal the strength of the EU, which overarches Member State legal traditions. 68 Its comparatively more advanced state of development owes precisely to the fact that the European efforts are not exhausted in the reduction of complexity (e.g. to

...
simplify the conclusion of crossborder contracts and pursuit of crossborder claims), but rather are culturally and historically founded on a bequeathed and sense-adding interpretation model of a Europe that can be further pacified by continued legal integration. This also applies to the EU’s eastern enlargement, which turns out to be a triumph over the wartime division of Europe along ideological lines at Yalta in February 1945.

The requirement in Art. 17 of the Brussels Convention of 27 September 1968 that agreements prorogating jurisdiction to the courts of a Member State be in writing is not fulfilled by the mere insertion of the pertinent clause in the general terms and conditions written on the back side of a form of one of the contracting parties; express reference to the terms and conditions containing the clause conferring jurisdiction must be made on both sides of the signed contract.

With respect to the new wording of Art. 17 of the Brussels Convention, evidence of prorogation in international trade in a form which accords with usages in that trade of which the parties are or ought to have been aware cannot be tied to the simple use of form contracts or standard conditions when the insertion of a clause conferring jurisdiction is a fixed practice in these terms and conditions.

Extract from the decision: “(…) Con il primo mezzo di cassazione, la ricorrente denunzia l’errore di dichiarazione della giurisdizione italiana, in relazione all’art. 360, primo comma, n. 1, c.p.c.

La sentenza impugnata avrebbe statuito la giurisdizione del giudice italiano basandosi su una pronunzia di questa Corte, emessa però in una controversia alla quale sarebbe stato applicabile il precedente testo novellato del’art. 17, la cui portata sarebbe diversa da quella indicata dalla Corte fiorentina.

Invero, gli ordini di acquisto trasmessi alla società attrice recheerbero, stampate sul retro, le condizioni generali di acquisto predisposte dalla società francese. (…) In forza della clausola contenuta nell’art. 11 delle indicate condizioni, ed ai sensi dell’art. 17 della Conv. Bruxelles, nel caso de quo il difetto di proroga sarebbe stato innegabile, perché la clausola avrebbe risposto pienamente all’ulteriore requisito stabilito dal citato art. 17, rivestendo una forma ammessa dagli usi del commercio internazionale e che le parti conoscevano o avrebbero dovuto conoscere. In tale contesto, contrariamente a quanto ritenuto dalla Corte di Firenze, non sarebbe necessaria una consapevole accettazione del patto di proroga della giurisdizione da parte dell’altro contraente.

Come sarebbe emerso in corso di causa, il rapporto di fornitura tra le parti si sarebbe articolato mediante l’invio, da parte del commercio internazionale e che le parti conoscevano o avrebbero dovuto conoscere. In tale contesto, contrariamente a quanto ritenuto dalla Corte di Firenze, non sarebbe necessaria una consapevole accettazione del patto di proroga della giurisdizione da parte dell’altro contraente.

Il requisito formale prescritto dalla Conv. Bruxelles dovrebbe considerarsi realizzato, perché il patto derogatorio della giurisdizione sarebbe stato inserito in un contesto di effettiva possibilità di conoscenza. In ogni caso, l’art. 17 della Conv. affermerebbe la validità dei patti di proroga conclusi in una forma ammessa dagli usi del commercio internazionale e che le parti conoscevano o avrebbero dovuto conoscere. Ai fini della validità conterebbe soltanto la conoscenza (o la conoscibilità) della forma con cui la clausola è stata inserita nel contratto, non quella del suo contenuto concreto. (…)