The Chancery Bar Lecture

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IS EUROPE AIMING TO CIVILISE THE COMMON LAW?

(Lord Mance)

Introduction

When it comes to constitutions and codes, the British can claim to have been generous to others – the results are still part of the Privy Council's regular fare. But our domestic experience is limited. The European Treaties, and the human rights and devolution legislation, are at most steps in the direction of a written constitution. Sir Mackenzie Chalmers' successes a century ago have not been repeated, for all the Law Commission's diligent drafting.

But in Europe the codifying instinct remains strong. And Europe now has important competences – bluntly, powers – in this field. I shall look at these, and consider their impact in two areas, one private international law, the other more far-reaching described by the acronym CFR. A brief introduction to the CFR will indicate the relevance of powers.

CFR stands for Common Frame of Reference. The obscurity has the usual diplomatic convenience. Still, it has aroused great suspicion, not just among common lawyers. Starting life as a young Siegfried, it seemed capable of taking on all comers. But, like Siegfried, it may not see old age; unlike Siegfried, it may not even achieve consummation at a European summit. I shall not continue the Wagnerian theme with references to Rhine inundation – save to say that they would be scare-mongering, and the project's main problem has been one of organisation and scope.

At its most ambitious, the project aimed at a harmonised statement of much if not all civil law - contract, tort, property and unjust enrichment. Its breadth was revealed in November 2005 by a researchers' outline, including as Books V Benevolent Intervention, VI Non-contractual liability, VII Unjustified enrichment, VIII Transfer of Movables, IX Security Rights in Movables and X Trusts. The first three books were already beginning to live up to their name, but all that appeared in the last four

was “To be completed”. All these heads have since been withdrawn. At its most innocuous, the project was described as a “toolbox” or “dictionary”, to assist in tidying up and improving the terminology and drafting of European civil legislation – past and future.

The project gives insight into the drive which the Commission can impart where it is persuaded of European utility. But it highlights the difficulty in a budding federal system of setting pragmatic limits to centralising idealism and giving real meaning to “subsidiarity”.

The project involves workshops to which are invited “stakeholders”, of whom I am one. The researchers - groups of academic lawyers from all over Europe - present work-product, mainly developed under independent academic programmes over many years. Stakeholders comment and make suggestions. Ultimately, around the end of 2007, a document should emerge – i.e. a code (though not described as such) or a dictionary or something inbetween. The final form depends on the Commission, although it is unclear how the final drafting will be done or by whom. The project is being promoted by the Health and Consumer Protection Directorate.

The work product comes from three linked academic groups: (1) the Study Group on a European Civil Code; (2) the Acquis Group[1], the *acquis* being what the Community has already achieved in legislation; and (3) the Project Group “Restatement of European Insurance Contract Law”. The head of the Study Group, and the dominant figure overall, is Prof. Dr. Christian von Bar, a highly distinguished and influential professor of comparative law from Osnabruck University[2], although there is prominent Englich representation in the person of Prof. Hugh Beale, of the United Kingdom Law Commission. But it is Prof. von Bar who has had the unjustified misfortune to be demonised in The European Journal. This is published by a think tank which aims avowedly at “pressing for a European Community of sovereign states

[1] More fully the European Research Group on Existing EC Private Law.

[2] His influence in England is I think evident in the German material deployed by Lord Goff of Chieveley in *White v. Jones* [1995] 2 AC 207, 263-4. I have also quoted him with great benefit: see *Raffeisen Centralbank v. Five Star General Trading LLC (The Mount Star)* [2001] EWCA Civ 68

and against federalism". Not surprisingly Baroness Thatcher is its patron. In its January edition Gawain Towler[3] wrote:

> "… the Community has already launched, without the slightest mandate or legal basis, a project for a "European Civil Code". This is being drawn up by a certain "Von Bar Group" with a grant of E4,400,000, given under the 'Cordis' programme, on an issue where a reference indicative framework would certainly be useful to aid comparison of national laws (along the lines of the 'restatements' in the United States). This unification project, in contrast, is preparing the destruction of the different national civil legislations in fields as diverse as contract law, liability law, family law and security law."

Prof. von Bar's long-standing vision has been to identify general principles underlying or acceptable to all domestic legal systems. There is, as the European Journal itself acknowledges, a precursor in the American Law Institute which prepares restatements of American common law. These have in turn led to the development and enactment of the Uniform Commercial Code in the great majority of the United States. Europe, with its variegated species of civil and common law systems, is not however comparable with the United States. Hence the difficulty.

Europe's powers

The European Journal also raises the question of powers – "competence" in European terminology, or Kompetenz in its German form. Community impetus for the CFR project goes back to Art. 1 of a 1989 Resolution of the European Parliament[4], which identifies the problem. Parliament by its Resolution:

> "Request[ed] that a start be made on the necessary preparatory work on drawing up a common European Code of Private Law, the Member States being invited, having deliberated the matter, to state whether they wish to be involved in the planned unification".

[3] Popping their Heads over the Parapet, January 2006, p.7. Mr Towler describes himself as Head of Media for the Independence/Democracy Group in the European Parliament (that is UKIP). I note that his article, which was principally about a European Court decision on criminal law, was picked up by Sir William Rees-Moff in the Mail on Sunday for 22 January 2006 under the heading "Wake Up! The European Union is stealing our freedom".

[4] A2-157/89 (OJ C 158. 26.6.1989) which was repeated in 1994 (A3-0329/94; OJ C 205, 25.7.1994)

"Unification" through "a common European code" and decisions by Member States about whether to be involved are in obvious tension. Commissioner Bangemann explained in 2003[5] :

> "While the Community has no direct power in terms of the EEC Treaty to intervene directly in the matters cited ….. Article 220 of the Treaty does permit Member States, where necessary, to enter negotiations with each other to make Conventions with a view to securing benefits for their nationals".

In short, the Community's core activity is to achieve an internal market comprising "an area without internal frontiers" characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital"[6]. It has no power *as such* to enforce harmonisation of whole areas of civil law. Further, the relevant wording of Article 220 (now Article 293) of the Treaty of Rome only covers negotiations to secure two matters

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals (i.e. no discrimination against foreigners);
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards (the basis for the Brussels Convention of 27 September 1968 on Civil Jurisdiction and Judgments).

In addition, in 1992 Baroness Thatcher ensured that the Treaty of Maastricht contained a new article 3b (now 5), introducing the principle of subsidiarity:

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and the objectives assigned to it therein.

[5] On 4 February 2003 (O.J. C32/7)
[6] Cf Articles 3(c) and 7a of the EC Treaty, now - since the Treaty of Amsterdam of 1997 – Articles 3(1)(c) and 14.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be **sufficiently achieved** by the Member States and can, therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is **necessary** to achieve the objectives of this Treaty."

Since then, however, the landscape has again changed. The Treaty of Amsterdam of 1997 acknowledges the principle of subsidiarity in its Recitals, but expands Community objectives to include "establishing an area of peace, freedom and justice" and maintaining and developing "the Union as an area of freedom, security and justice". By Article 61, the Council, in order to establish such an area progressively must "adopt ….. (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65; ….". Article 65 (formerly 73m) refers to measures being taken in such matters "having cross-border implications …. and insofar as necessary for the proper functioning of the internal market" and says that they "shall include" :

"improving and simplifying:

1. the system for cross-border service of judicial and extrajudicial documents;
2. co-operation in the taking of evidence;
3. the recognition and enforcement of decisions in civil and commercial cases ….;

(a) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction[7];

(b) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure in the Member States."

The application of this article is subject to important limitations:

[7] Under this article the Council substantially replaced the Brussels Convention by the new regime of Council Regulation 44/2001.

(a) First, the United Kingdom and Ireland insisted by Protocol that it would only be bound if it opted into the negotiations to adopt and apply any measures in the field of judicial cooperation in civil matters[8]. But in practice, the United Kingdom has shown itself a good European by opting in, and once it does this, it is bound by any resulting measure, unless its vote is crucial to a failure to obtain the necessary qualified majority to adopt the measure (in which case the measure can be adopted by the other states without United Kingdom participation). Current Commission proposals for a revised Rome I regulation on the law applicable to contractual obligations, a new regulation on jurisdiction and applicable law governing maintenance and a regulation on the law applicable to tort may test this willing approach.

(b) The language only permits measures in the field of judicial co-operation in civil matters having cross-border implications, insofar as necessary for the proper functioning of the internal market – the latter phrase one on which the United Kingdom insisted. Such language might be thought to place important limitations on the competence conferred on European institutions under Article 5.

(c) The listed matters with cross-border implications refer explicitly only to procedural, and not substantive law.

Lack of competence or power is not however a concept featuring large in Community jurisprudence. The listed matters with cross-border implications are "included" not exclusive. European bodies tend to attest to cross-border implications with somewhat formulaic ritualism[9]. So, the reality may be that the Community will see little obstacle to harmonising any specific area of substantive private law, where it asserts a need to do this, to fulfil "the aim of establishing progressively the internal market", and in that connection Article 100a stipulates that the Commission "in its proposals …. concerning health, safety, environmental protection and consumer protection will take

[8] And some other fields, notably border controls, asylum and immigration and police cooperation.

[9] A typical example is the Explanatory Memorandum to recent proposals for a new European Small Claims Procedure. This is not on its face an area with the strongest cross-border implications. The Commission simply asserts that "[p]rocedural law by its nature may have cross-border implications …. Small Claims litigation constitutes a matter having cross-border implications since – taking into account the development of the internal market – most economic operators and consumers will sooner or later be involved in such litigation abroad".

as a base a high level of protection". There is already Community acquis in the contractual field, all introduced with particular reference to article 100a (now 95). The Directives include:

- 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[10];
- 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts
- 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees[11];
- 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions[12].

The European Court is the ultimate arbiter of Community vires, but its approach has also been questioned. In the website of the current Austrian Presidency of the Council of Europe, this explanation is given for holding a conference in April on Subsidiarity and Proportionality: the role of Parliaments:

> "The principle of subsidiarity has been an integral part of EU primary law since the Maastricht Treaty (1992). It was designed - as a counterbalance to the ambitious internal market programme - to prevent Community law from encroaching upon national responsibilities more than is necessary. The case law of

[10] Justified by a recital that "… the laws of Member States relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply on other Member States"

[11] Justified by recitals that "the laws of Member States concerning the sale of consumer goods are somewhat disparate, with the result that national consumer goods markets differ from one another and that competition between sellers may be distorted" and that

> "the main difficulties encountered by consumers and the main source of disputes with sellers concern the non-conformity of goods with the contract; whereas it is therefore necessary to approximate national legislation, governing the sale of consumer goods in this respect, without however impinging on provisions and principles of national law relating to contractual and non-contractual liability".

[12] Justified by a recital that "heavy administrative and financial burdens are placed on businesses, particularly small and medium-sized ones, as a result of excessive payment periods and late payment", and that "the differences between payment rules and practices … constitute an obstacle to the proper functioning of the internal market".

the European Court of Justice has been very reticent on the subject of the principle of subsidiarity. Not least for this reason, there have been persistent doubts about the effective application and control of the principle of subsidiarity."

Only on one occasion has the European Court of Justice struck down European legislation as ultra vires. In its judgment of 5 October 2000 in Case C-376/98, the Court annulled a Directive purporting to ban all forms of advertising and sponsorship of tobacco products in the Community. Such advertising and sponsorship were largely national. The Court made what are on their face significant points on Community competence:

1. To construe the power to establish the internal market (under Articles 3(1)(c) and 14) as "vest[ing] in the Community a **general** power to regulate the internal market would …. be incompatible with the principles embodied in Article 3b (now Article 5) – i.e. **subsidiarity** (para. 83).
2. While recourse to article 100a (the high level of protection expected in matters of health, safety and consumer protection) "is possible to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws", "the emergence of such obstacles must be **likely** and the measure in question must be **designed** to prevent them." (para. 86).
3. Further, any distortion of competition (i.e. past or future) which the measure purports to eliminate must be "**appreciable**" (para. 106). The Court went on:

   "In the absence of such a requirement, the powers of the Community would be practically unlimited. National laws often differ regarding the conditions under which the activities which they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the **smallest** distortions of competition, would be incompatible with the principle, already referred to in paragraph 83 of

this judgment, that the powers of the Community are those specifically conferred on it."

We do not however find in these passages an explicit reference to necessity or proportionality, although the principle of subsidiarity should require it. Community action should be admissible only "if and so far as the objectives of the proposed action cannot be **sufficiently achieved** by the Member States" and "shall not go beyond what is **necessary** to achieve the objectives of this Treaty": Article 3b (now 5). And this might in turn be thought to require thorough cost-benefit analysis, before any step was justified at the European level.

American experience may however give a different lesson. In a speech in 1999[13], Justice Stephen Breyer identified four aspects to the inter-relationship of state and federal power: (1) State Overreaching (the intrusion of state power into an exclusively federal sphere), (2) Pre-emption (the principle whereby federal legislation within a federal sphere precludes inconsistent state legislation), (3) Basic Authority (the scope of federal and state power) and (4) State Autonomy (the allied question of the constitutional authority reserved to states). He referred to the last two as questions that "seem fundamental", but no longer are in practice. Due to basic choices about federalism more than half a century ago, during the New Deal, he said, they now have fairly easy judicial answers in the United States. The question which entity enacted which law had become primarily one for politically responsive bodies to decide. The judiciary rarely intervened to answer a question of Basic Authority in the negative. It was not surprising that states as the possessors of all residual powers had broad legislative powers. But, he went on

"… the federal government's broad legal authority reflects judicial rulings that have interpreted that authority broadly.

This expansion reflects the fact that the Constitution's grant of legislative powers to the federal government, i.e., to Congress, is broadly phrased. The Constitution explicitly provides Congress with all powers "necessary and

[13] The 1999 Judicial Studies Board annual lecture entitled "Does Federalism make a difference?".

> proper" to execute the power to "regulate" interstate commerce ["the Commerce Clause"]. And it specifically grants Congress the power to enforce the Fourteenth Amendment's insistence that no State deny any person "equal protection of the laws" or deprive any person "of life, liberty, or property without due process of law."[14]

Justice Breyer said that the expansion of United States federal power

> "…. also reflects several practical facts. In today's world of rapid transport, instantaneous worldwide communication, international commerce, and a mobile workforce, there are few local commercial matters that do not also affect interstate commerce."[15]

The expansion has not been wholly unrestrained. In 1995 and 2000 the Supreme Court struck down the Violence against Women Act and Gun-Free School Zones Act, both adopted on the basis of the Commerce Clause[16]. But last autumn's election of Chief Justice Roberts threw light on another more recent District Court case., which certainly met Justice Breyer's prediction. In *Riejo Viejo v. Norton*[17] the Commerce Clause was held to justify the protection of California's arroyo toad. The arroyo toad moves no more in any direction than a mile or two within California to its local mating ground. A federal environmental law was nonetheless held to justify an order for the removal by a hotel developer of a fence which would have restricted the toad's intra-state movement, on the ground that

[14] In Europe, at least during the current impasse regarding a European Constitution, authority in respect of matters involving life, liberty or property is largely reserved to Strasbourg and the European Court of Human Rights. However, the field of cross-border trade is important enough, particularly when accompanied by the aim of offering a "high level of protection" in matters of "health, safety, environmental protection and consumer protection" (article 100a).

[15] He went on: "At the same time, the widespread use of chemicals, metals, disposable materials, and the like, means that few commercial activities lack significant local health, safety, environmental, or consumer impact. Courts hesitate to deprive either federal or State governments of the authority to address problems that affect them. Hence, it is not surprising that our Court found that home-grown farm products in their totality did have sufficient effect upon interstate commerce to justify Congressional regulatory action, nor that it found racial discrimination could affect interstate commerce and travel sufficiently to justify a Congressional statute forbidding it, even by local restaurants."

[16] Struck down in *U.S. v. Lopez* 514 U.S. 549 (1995) and *U.S. v. Morison* 120 S.Ct. 1740 (2000).

[17] 323 F.3d 1062 (CADC 2003).

the hotel developer was engaged in inter-state commerce. For all the furore, one sympathises with the now Chief Justice Roberts' dissent[18].

Justice Breyer asked the pertinent question in relation to federal power:

> "Would the ECJ reach different conclusions? The language of the relevant treaties is broad, giving the EU authority to take action "necessary" to achieve "one of the objectives of the Community." Those objectives include freedom of trade, freedom of movement, protection of health, safety, and the environment, "a high level of employment and social protection" and an improved "standard of living." At the same time, Member States retain the power to regulate matters that affect their citizens. Given similarities of language and underlying economic realities, EU courts, like their American counterparts, may tend to answer "Basic Authority" questions "yes."'"

So, in Europe as in the United States, we may predict that future issues are more likely to arise in the first two areas identified by Justice Breyer - State Overreaching and Pre-emption. Has a state overreached itself by acting within a field where Europe has exercised exclusive power? Has Europe legislated, pre-empting state law-making in a particular area? We shall see such an issue in a moment in the recent Lugano judgment of the European Court of Justice.

Justice Breyer's conclusion was that the real balance in America between federal and state interests is achieved not by the law, but by political considerations:

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[18] He said: "The panel's approach in this case leads to the result that regulating the [harming] of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce ... among the several States."

His co-dissenting colleague also put it powerfully: "Once again, this Circuit upholds under the rubric of the interstate commerce power the regulation of "an activity that is neither interstate nor commerce...." *NAHB*, 130 F.3d at 1061 (Sentelle, J., dissenting). …. Under the *Lopez* analysis, Congress may regulate (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." …. The arroyo toad is not a channel of commerce nor is it in one. It is not an instrumentality of commerce, nor is it a person or thing in interstate commerce. The "[harming] " of that toad (especially by land preparation) does not have any substantial relationship to interstate commerce. The protection of a non-commercial, purely local toad is not within any of the *Lopez* categories."

> "Federal legislative officials, Senators and Members of Congress, being elected from States, are highly sensitive to those considerations. Hence the decision lying closest to the heart of the modern federalist legislative enterprise - the decision as to which entity enacts which laws - is primarily a decision for our elected officials, not for judges."

Lord Hope voiced a parallel thought in a purely domestic context in *Jackson v. Her Majesty's Attorney General* (the Hunting Act case) [2005] UKHL 56, para. 125, when he said:

> "In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey …. likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other."

Europe's problem may however be that its populations remain Eurosceptically attached to their individual national identities, but its institutions (particularly the Commission and Parliament) are composed of enthusiastic Europeans.

The European Court of Justice's recent Lugano opinion dated 7th February 2006 illustrates the broad view of federal jurisdiction taken by the Commission, the Parliament and the Court itself, supported by Germany, France and Italy, in opposition to the Council, supported by the United Kingdom and a majority of members states. The issue was in Justice Breyer's terms one of pre-emption. Did the Community have exclusive legal competence to negotiate a convention to replace the existing Lugano Convention with EFTA countries (Switzerland, Norway and Iceland) by a new Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters? Or did member states have shared competence with a corresponding right to join in negotiations and to give or withhold consent? The Court held that (1) cross-border impact and necessity for the proper functioning of the internal market are criteria relevant only to the validity of internal rules, (2) the validity of internal rules depends on their principal component, so (3) ancillary components may be valid even though by themselves they have no cross-border impact and are not necessary for the proper functioning of the internal market, and (4)

external competence (for example to conclude an international convention on jurisdiction with a non-member state) depends not on showing that the proposed external measure has any cross-border impact or is necessary for the proper functioning of the internal market, but merely upon whether it is capable of affecting any rule - principal or ancillary - made by the Community under its internal competence. So ancillary power derives from the principal internal component, and external competence can derive from the ancillary internal power. In Catch 22 reasoning the Court said that it would be no use for a member state to negotiate with a non-member state a convention which, by a so-called disconnection clause, expressly provided that it should not affect the applications of any pre-existing Community rules. On the contrary, that might "provide an indication that those rules are affected" (para. 130) and the question of competence had to be answered before any convention including such a clause was agreed (para. 154)[19].

Private International Law

The Lugano opinion is interesting for its heavy reliance on one of a recent trilogy of private international law cases under the Brussels regime, now largely subsumed within Regulation 44/2001 on civil jurisdiction and judgments. The cases are *Erich Gasser v. Misat* (Case C-116/02) [2005] 1 QB 1, *Turner v. Grovit* (Case C-159/02) [2005] 1 AC 101 and *Owusu v. Jackson* (Case C-281/02) [2005] QB 801.

There is not time to examine these cases in detail. If there is any justification at all for the veiled fear of my title, they come quite close perhaps to providing it. Each of them illustrates a civilian preference for clear-cut rules over any form of discretionary judgment. In each a purist civilian approach may be said to have prevailed over a more pragmatic, but minority common law approach. But in weighing the different approaches, it is fair to remember that the common law handles relatively small numbers of civil law cases compared to some other European systems. Simple, clear-cut answers have an added attraction in such systems. The common law in contrast

[19] More fully, the Court said:
"…. such a clause, the purpose of which is to prevent conflicts in the application of the two legal instruments, does not in itself provide an answer, before the agreement itself is even concluded, to the question whether the Community itself has exclusive competence to conclude that agreement. On the contrary, such a clause may provide an indication that that agreement may affect the Community rules".
In Joseph Heller's book Catch 22 kept Yossarian in the war because a concern for his own life proved that he was not really crazy, and to get out of combat you had to be crazy. The Lugano Opinion suggests to me that it may be almost as difficult to get out of the reach of Community's competence.

focuses, at least in the international legal centre of London, on large value cases, where tailor-made solutions can be crafted to meet individual circumstances. That is not in European vogue.

Taking the three cases in summary, in *Erich Gasser v. Misat* the Court held that, even where there was a clear choice of court clause (in favour of Austria in that case - in other cases it could be London), but one party, in clear breach, brought pre-emptive proceedings in another European jurisdiction (say Italy), the Austrian courts had to stay their hand unless and until the Italian court declined jurisdiction. As the newspapers proclaim daily and as the Strasbourg court knows to the disadvantage of its lists, the Italian courts can be very slow. But none of this makes any difference. A tactic described as the "Italian torpedo"[20] has been given the freedom of the sea.

In *Turner v. Grovit* the Court of Appeal injuncted Mr Grovit and two of his companies, Harada Ltd. trading as Chequepoint UK and Chequepoint SA of Spain from pursuing proceedings which had been commenced abusively in Chequepoint SA's name in Spain solely in order to oppress Mr Turner and frustrate his pursuit of prior English proceedings against Harada Ltd.. The injunction worked and I sat on the final chapter of this saga in the Court of Appeal. But the European Court held that this cannot happen again. No-one is permitted to do anything about such abuse, save the Spanish courts. That is of course where the English Court had found that Mr Grovit wanted to force Mr Turner to litigate in order to oppress him. While it is true that Mr Turner, if he had the money, could have applied to stay the Spanish proceedings under article 22 of the Brussels Convention (now article 28 of the Regulation) on the ground that they were related to the English, one may also ask how easily the Spanish court could sensibly judge that there had been an abuse with reference to English proceedings?

These two decisions were justified by the Court on the basis that there must be mutual trust between European jurisdictions. Perhaps the European Court should concentrate less on jurisdictional comity and more on the realities of international civil litigation

[20] Franzoni, *Worldwide Patent Litigation and the Italian Torpedo* [1977] 7 EIPRev. 382.

as they affect the individual parties[21]. It might remember Jacques Delors' words in a speech to the European Summit in 1994: "You cannot be a true idealist, without being a realist".

The third case, *Owusu v. Jackson*, is the one on which the Court relied in its Lugano opinion. The English claimant was injured diving into the seabed off the private beach of the Jamaican holiday villa that he had hired. He sued in England the English-domiciled person who had hired him the villa together with five other Jamaican defendants. Because of the claimant's English domicile, this was not the best case in which to seek to maintain the application of the common law doctrine of *forum conveniens*, and the judge at first instance dismissed an application to stay by the English defendant, on the ground that the Brussels Convention excluded it, and by the other defendants on the grounds that the whole litigation should take place in one jurisdiction[22]. The European Court upheld his view that the Brussels regime excludes the doctrine - at least in relation to claims based on Brussels grounds of jurisdiction. Whether the choice is between European states or between an European and any foreign state, the Brussels regime effectively trumps the common law. *Re Harrods (Buenos Aires) Ltd.*. [1992] Ch. 72 is no longer law.

Owusu rests on the general Brussels ground of jurisdiction that a debtor should be sued in his domicile. It is questionable whether this ground was meant to give claimants as opposed to defendants rights, and, more fundamentally, how far the Brussels regime was intended to embrace issues of competing jurisdiction not arising between two member states. Why should European law bring here litigants, if their natural expectation would be that the safety of a sand-bank off a Jamaican beach would be better and more appropriately determined locally in Jamaica?

Owusu was immediately redeployed by the European Court in its *Lugano* Opinion, paragraphs 143-146, as authority that the Brussels regime "contains a set of rules forming a unified system which apply not only in relations between Member States …. but also to relations between a Member State and a non-member country", so that

[21] See the interesting article on comparative philosophies by Trevor Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, ICLQ, Vol. 54, Oct. 2005, 813.
[22] Compare however *American Motorists Insurance Co. (AMICO) v. Cellstar Corporation and Anor* [2003] EWCA Civ 206 where the action was stayed against the main, non-European defendant.

the Community must have exclusive competence in respect of any similar unified system agreed with a non-member state. The *Lugano* opinion's emphasis on the unified nature of the rules established by both the Brussels and the proposed Lugano regimes leaves open an argument that a member state may still be able to conclude a limited one-off jurisdiction and judgments convention with a non-member state, e.g. Australia. But even this is not clear. Further, at paragraph 153 the Court appears to have interpreted *Owusu* as meaning that, even if there had been an exclusive jurisdiction clause in favour of Jamaica or the dispute had been not about the beach but the safety of a villa tenanted for the year, the defendant's English domicile would have trumped these factors – *although* in the case of an equivalent issue as to which of two member states had jurisdiction, say a claim covered by an exclusive jurisdiction clause in favour of Spain or concerning a Spanish tenanted villa, the dispute would have to be remitted to Spain. If that it is a right reading, it is a case of Europe trumping the world and not just common law principles such as *forum conveniens.*

The three cases I have mentioned all concern jurisdiction. The Community has already harmonised the principles determining the contractual proper law in the Rome Convention[23]. The present principles, carefully negotiated on the United Kingdom side by a team led by Sir Peter North QC, are from a common law viewpoint a satisfactory model. But the Commission has produced a draft revised version ("Rome I"), to be implemented as a Regulation. This is considerably less flexible in cases where there is no express choice of law. It displays the European enthusiasm for clear-cut, if apparently arbitrary, rules (e.g. the application of the law of a supplier's or carrier's habitual residence), as opposed to any form of value-based judgment. The test of the law with which the contract has the closest connection will be relegated to truly exceptional application. A raft of English authority would as a result be decided differently. Closely linked contracts (such as a debt and a guarantee, or the chain of contracts involved in issuing letter a of credit) could no longer be regarded as subject to a single law, and the applicable law could become highly counter-intuitive[24]. Not

[23] Given effect in the United Kingdom by The Contracts (Applicable Law) Act 1990.
[24] Decisions such as *Bank of Baroda v. Vysya Bank Ltd.* [1994] 2 Ll.R. 87, approved in *Marconi v.Communications Ltd.. v. PT Indonesia Bank Ltd* [2004] 1 Ll.r. 594, *Definitely Maybe Ltd. v. Lieberberg GmbH* [2001]1 WLR 1745 and *Bergmann v. Kenburn Waste Management Ltd.*. [2002] EWCA Civ 98 would all probably be decided differently..

surprisingly, there have already been strong objections from the City[25]. The Government has still to decide whether to opt in to the Rome I negotiations, with the strong risk, if it does so, that the United Kingdom will be bound by whatever finally emerges, even if it does not like this.

The modern impetus towards a harmonised substantive scheme

I return to the CFR. Whatever the problems about Community competence, the European Parliament's 1989 Resolution gave a huge stimulus to academic endeavour directed to the production of some form of civil code[26]. It is an area where, for civilian lawyers, modern European idealism and ancient history unite. The common law has pursued its own idiosyncratic path since Henry II, developing a case-law approach in which the practitioner has inevitably had the major influence. Civil law has traditionally been more open to academic influence and retains a memory of a golden era, not so long past, of a *jus commune* covering most of Europe.

Milton opened his Paradise Lost with the wish that a heavenly muse should sing of the "loss of Eden, till one greater man, Restore us, and regain the blissful seat". In that connection he hoped that the muse would "pursue things unattempted yet in Prose or Rhime"[27]. As Milton lived, so do some civilian lawyers. During the Roman Empire, Europe had a unified legal system, even though different rules applied to Roman citizens and others. Rules of private international law were unnecessary. One of the visions of the authors of PECL and of the von Bar Study Group has been that Europe

[25] The Financial Times also contained a critical article on 21st March 2006.

[26] In 1982 academic lawyers from lawyers from many European states, headed by Prof. Ole Lando on the Copenhagen Business School, combined to form a Commission on European Contract Law. Their work led ultimately in 1995, 1999 and 2003 to the three-part Principles of European Contract Law ("PECL"). Another group, the Academy of European Private Lawyers, was set up in 1990 in Pavia, headed by Prof. Gandolfi. It published in 2001 a draft European Contract Code in Italian, later extensively revised and published in an English edition by Prof. Harvey McGregor QC. In the early days of the English Law Commission, Harvey McGregor as a Law Commissioner had also prepared a draft intended to capture the essential requirements of both Scots and English law. In 1994 UNIDROIT[26] produced its Principles of International Commercial Contracts, recently restated and supplemented in a new 2004 edition. This has all been accompanied by copious academic writing, particularly in mainland Europe.

[27] More fully, he wrote:
"…… I thence
Invoke thy aid to my adventrous Song,
That with no middle flight intends to soar
Above th' *Aonian* Mount, while it pursues
Things unattempted yet in Prose or Rhime."

might return to such an era[28]. After the dark ages, civilian lawyers could for centuries fall back on the familiar Roman law texts in elaborating new doctrinal systems.[29]. This golden age evaporated around the end of the 18th century. With the age of reason came widespread moves towards individual national codification, then the French Revolution and the new Code, which Napoleon strove to export throughout Europe[30]. After his fall, individual nations, resisting Napoleonic uniformity, articulated their own *Volksgeist*, or "particular genius …. based on language, moral habits, customs and law"[31]. Ironically, it was academics, who played a major part in preparing these Codes and destroying the *jus commune*. But its vanished memory retains an allure.

Its re-creation in modern Europe would be an exercise of great scope and ambition. Tribonian, the advocate appointed by Justinian to head the commission preparing the Digest, had 1000 years of Roman law to encapsulate and - by the interpellations famous to Oxford law students (at least of my day) - to update[32]. The national codes which all over Europe succeeded the *jus commune* in the 19th century of course owed a general debt to Roman law, but were essentially exercises in establishing national legal identity. They fall into two broad camps, the Napoleonic, adopted in France and south Europe, and the Germanic adopted in Germany, Austria and Switzerland. The Napoleonic Civil Code of 1804 provides perhaps the closest analogy in any modern exercise of European codification, but it was only possible because of the revolutionary changes that had immediately preceded it. Even so, the drafters drew heavily on some existing customary and written law.[33], and its draftsmen did not have to try to marry entirely different legal traditions.

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[28] Cf their *Joint Response* to the European Commission dated 25th October 2001.

[29] The sequence of texts in the Digest and Justinian's Code gave rise to the Institutional System, based on the arrangement of Justinian's Institutes, and divided around a three-part division of the law's subject-matter into persons, things and actions, which was then also applied to other areas such as the law of nations, and itself in turn rationalised and enriched by natural law thinking in the seventeenth and eighteenth centuries. See Alain Wiffels, *A New Software Packaged for an Outdated Operating System*, essay in Van Hoecke and Ost, *The Harmonisation of European Law*, Hart Publishing 2000, at p.106-110.

[30] And for which (rather than for his victories) Napoleon remarked that he would be remembered, as William Blair QC and Richard Brent record in an informative article *A Single European Law of Contract?* [2004] EBLR 5.

[31] See Anthony Chamboredon, …. *For an Open Texture*, essay in op. cit. in Footnote 3, at p.69.

[32] There are academic articles (including by Alan Rodger and Tony Honoré) explaining how a commission, 11 of whose 17 members were practising lawyers, managed to complete the Digest in three years between 530 and 533.

[33]It has been described as "embodying the achievements of bourgeois, commercial society at the expense of the Church and the noble, land-owning classes": Civil Law Codification in The German-

The other great European Code, the German BGB of 1900, also created a new legal framework, but in this case on the basis of academic work that had taken place over the preceding century and longer. It was said of it by Ernst Zitelmann that "Rather than boldly anticipating the future, it prudently sums up the past". Although the BGB did not derive from any single existing legal system, it drew primarily on existing Roman and German law.[34]

The history of the CFR

The idea of CFR emerged from a process of statements, papers and consultations commencing in 1999 with a request by the Council of Ministers in Tampere for an "overall study" on the need to approximate the civil legislation of Member States "as regards substantive law …. in order to eliminate obstacles to the good functioning of civil proceedings". Here, therefore, we see the language in article 65 (considered earlier in this talk) apparently addressed to procedural improvements used to justify initiatives aimed at substantive harmonisation. The European Parliament returned to its theme that "greater harmonisation of civil law has become essential in the internal market"[35]. The Commission responded on 11 July 2001[36], stating:

> "The approximation of certain specific areas of contract law at EC level has covered an increasing number of areas. In the area of consumer law no fewer than seven Directives dealing with contractual issues have been adopted in the period from 1985 to 1999. ….."

Seven in fifteen years does not seem many, but the bathos was no doubt unintentional. After consultation, a Commission Action Plan in 2003[37] mooted the idea of a CFR to "provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like 'contract' or 'damage' and of the rules that apply, for example, in the case of non-performance of contracts" and, secondly, "to form the basis for further reflection on an optional instrument in the area

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speaking States of Northern and Central Europe, essay by Thomas H. Reynolds, published at http://www.llmc.com/civil_law_3.htm

[34] *European Legal History*, Robinson, Fergus and Gordon, paragraph 16.4.8.

[35] Resolution B5-0228, 0229-0230/2000, p.326 at point 28; OJ C 377, 29.12.2000.

[36] COM(2001) 398 final.

[37] 2003/C 63/01.

of European contract law." The development of "EU-wide general contract terms" was also floated, but has since been down-played.

Parliament and Council endorsed the idea[38], and the CFR was set in motion by a further Commission document dated 11 October 2004 "European Contract Law and the revision of the *acquis* - the way forward"[39] followed by a Call for Interest[40] likewise ostensibly related to the improvement of the *acquis*. The Commission was, under its research programme, to fund three years of work leading to a report by 2007 "which will provide all the elements needed for the elaboration of a CFR by the Commission". Stakeholders with technical expertise representing a diversity of legal traditions and economic interests would "provide detailed feedback and challenge to the academic researchers".

The CFR would "aim to identify best solutions, taking into account national contract laws (both case-law and established practice), the European *acquis* and relevant international instruments, particularly the UN Convention on Contracts for the International Sale of Goods Act of 1980" and "The structure envisaged for the CFR …. is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles could be required. Secondly, those fundamental principles would be supported by definitions of key concepts". Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR. A distinction between model rules applicable to contracts concluded between businesses (B2B) or private persons and model rules applicable to contracts concluded between a business and a consumer (B2C) could be envisaged.". Consumer and insurance contracts might be the subject of specific focus. An Annex set some general ideas as to what might be included under the heads of principles, definitions and model rules.

The CFR has from its start had a troubled existence. The Commission selected stakeholders from those responding to the Call for Interest, and has sought to

[38] The Council did so on the basis that, although "essential to the smooth and efficient functioning of cross-border transactions in the internal market", it would not constitute a legally binding instrument, and that researchers, lawyers and other stakeholders would participate in its preparation.
[39] COM(2004) 651 final.
[40] 2004/S 148-127525.

supplement them subsequently. English law is well-represented. But there are questions about the balance in the stakeholder group, though this can hardly be the Commission's fault. There are no London market insurance representatives. Scottish representation consists of a Dumfries and Galloway Council Trading Standards officer, wholly admirable in her field, but not perhaps fully representative of all Scotland offers. Obscurity about aim has continued. In opening the first general meeting, the Director-General for Health and Consumer Protection, Mr Robert Madelin, underlined that the CFR was not envisaged as an off-the-shelf system, but left unclear of what it might consist, and indeed even said that the stakeholders' input might reveal that there were "too few building blocks" to achieve it. There was much debate about why and whether the project was thought necessary and whether it was not in truth going to be a code in disguise, optional or otherwise. The Commission officer in day-to-day charge of the CFR, Dr Staudenmayer, disclosed that the researchers' work-product would draw heavily on PECL. He also explained that the research budget had been used in the absence of any other sufficient resource, but that this meant that the researchers had "academic freedom" regarding the product they produced.

In these circumstances the project has been both fascinating and frustrating. The workshops have offered a rare chance for detained discussion of legal principles with foreign practitioners. But the process has been problematic, and a sensible end-product doubtful. Workshops took place in no logical order[41]. Sections of work discussed were internally incomplete or referred to other unavailable sections or were not coordinated with other sections prepared by different researchers. Researchers were expected after each workshop to re-consider their draft and to justify expressly any refusal to meet points made by stakeholders, but it was unclear (a) how far the

[41] The original list for 2005 scheduled workshops in this order: service contracts, commercial agency, franchise and distribution, personal security rights, benevolent intervention, unjust enrichment law, insurance law (general part), notion/functions of contract, notion of consumer and professional, problems related to e-commerce, authority of agents, plurality of parties, contents and effects, sales contracts, pre-contractual obligations and conclusion, offer and acceptance, form, validity, unfair terms and main obligations. Even Tribonian, with all the institutional resources of Gaius, Ulpian, Papinian, Modestinus and Paulus to draw on, would have blanched. Each of these subjects was to be the subject of just one, perhaps exceptionally two, workshops - the whole area of personal security rights, encompassed in this jurisdiction by Sir Roy Goode's report; the areas of benevolent intervention and unjust enrichment, to which Lord Goff and Prof. Jones, the late Prof Birks and others have devoted whole books; the problems of e-commerce, which gave rise to huge problems in recent discussions at the Hague Conference on Private International Law on a world-wide judgments convention; the whole issue of agents' authority, the subject of many sections of Prof Reynolds' work.

stakeholders would have another opportunity to consider a revised draft and (b) how a final form of CFR would emerge.

One workshop which at least started with fundamentals took place on notion and functions of contract. But, perhaps not surprisingly, a proposed section on good faith was incomplete. How far common and civil lawyers could ever agree in this area remains to be seen. English law has of course many principles reflecting underlying conceptions of good faith (e.g. duress, misrepresentation, mistake), and Lord Steyn has argued that English law already pragmatically subscribes to the observance of reasonable commercial standards in the conclusion, interpretation and performance of contracts[42]. But English law avoids any explicit general principle of good faith, fearing the uncertainty. It appears to be a European article of faith to insert frequent general amplifications or qualifications of contractual rights and duties based on the requirement of good faith[43].

During the workshops, conspiracy theorists among stakeholders also noted work-product headed "Study Group on a European Civil Code". The Commission explained that the basic work done previously with independent funding by the von Bar group had to be acknowledged. But on 15th December 2005 another department, responsible for Justice and Home Affairs, reignited suspicion when it issued its proposal for Rome I[44]. Article 3, headed Freedom of Choice, provides in paragraph 2 that

> "The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or by the Community".

[42] Johan Steyn, *Fulfilling the reasonable expectations of honest men* (1997) 113 LQR 433.
[43] The equivalent general provision in the German Code – *Treu und Glauben* – is one to which German lawyers are said resort mainly in desperation, when other conventional arguments fail. But if good faith is understood as a fall-back to cater for truly exceptional cases, perhaps the risk of uncertainty is not so great. European law has already introduced into English contract law at least two references to good faith – cf the Unfair Terms in Consumer Contract Directive and the Commercial Agents Directive[43]. But in the former case the reference appears to add little if anything in the provision that "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" and in the latter case it appears in a specialised area where English law anyway recognises and enforces fiduciary duties.
[44] COM(2005) 650 final.

This would depart from the principle - accepted at common law[45] and under the Rome Convention to date[46] - that any contract must be governed by the law of an ascertained legal system[47]. Was this proof that the CFR may after all have been intended as a complete contractual code? The commentary would tend to confirms this, referring to UNIDROIT, "the Principles of European Contract Law or a possible future optional Community instrument". But a fairer view is that the initiative flowed from the hopeful idealism of the Joint Response made by the authors of PECL and the Study Group in 2001, and that the Commission was keeping all options open. It would of course require a bold lawyer to advise his clients to contract on the terms of a wholly untested code. But I have met one. At the first CFR workshop, one German lawyer said that this was his invariable practice – since no-one knew what the contract would mean in court, each party had the maximum incentive to settle any dispute!

The United Kingdom's presidency of the Council in 2005 marked a change of direction for the CFR. At a London conference[48], the Lord Chancellor stated his view that "the direction in which the CFR needs to travel is firmly towards cross-border co-operation and mutual recognition". This, he said, "inevitably involves a fundamental change of direction in the work". Commissioner Kyprianou[49] announced that it was intended "to clearly prioritise issues that are relevant to the consumer contract *acquis* and to a lesser extent also the other contract law related *acquis*". The Commission was not working on a Civil Code, but he added:

> "Finally, on the question on the legal form of the CFR, this issue is still open. In any case, the CFR would have to be binding for the EU institutions. I envisage that it could be the basis for a new deal between EU legislators. The Parliament, the Council and the Commission could agree to use a single toolbox to rationalise and improve the process of making EU laws.

The more focused the project however, the more likely of course that it will lead to some concrete product, and the more important that this should be sensible and

[45] Cf *Armar Shipping Co. Ltd. v. Caisse Algérienne d'Assurance* [1981] 1 WLR 207 (CA).
[46] Cf *Shamil Bank of Bahrain EC v. Beximco Parmaceuticals Ltd.* [2004] EWCA Civ. 19.
[47] Though this may sometimes consist in public international law, rather than national law: cf *Republic of Ecuador v. Occidental* [2005] EWCA Civ 1116.
[48] Fixed initially for 8th July, and after the bomb attacks rescheduled for 26th September 2005.
[49] Responsible for the EU's Health and Consumer Protection Directorate.

workable. This is particularly so, if it is to bind EU institutions and be used by the Court.

Like it or not, we must also realise that Europe is already developing autonomous conceptions of contract, in legislation and case-law, and there is a need for clarity and consistency. An early exponent of the appropriate approach was Advocate General Slynn as he was. Over 20 years ago, in *AM & S Europe Ltd. v. Commission*[50] he said:

> "It is unanimously admitted that the Court of Justice is not confined, when interpreting comparatively or completing Community law, to found its decision, for example, on the common minimum of the different national solutions, on the arithmetical average or on the solution adopted by the majority of the legal orders. The Court of Justice must weigh, appreciate and find the 'best' solution and the most appropriate to the concrete problem."

The Court was not bound to any particular national rule, whether the *secret professional* of French law or the legal professional privilege of English law, but would see whether there could be drawn from national laws, from diverse sources, a principle or concept (in that case legal confidentiality) which could become an integral part of Community law. In a later case, *Arcado v. Haviland* [Case 129/83) the Court gave an autonomous meaning to the conception in the Brussels Convention of "matters relating to contract", following Advocate Slynn's opinion, in which he said:

> "The Convention itself must be interpreted with reference first to the objects and scheme of the Convention and secondly to the general principles which stem from the corpus of national legal systems."

In other cases, the European Court has sought to address the nature of contract at the European level, identifying its core content as involving freely accepted or undertaken obligations[51]. Under European VAT legislation, "the supply of goods or services

[50] Aff. 155/72, Receuil, 1982, p.1610.
[51] *Soc. Handte* [1992] ECR I-3962 and *RéunionEuropéen v. Spliethoff* [1998] ECR I-6511.

effected for a consideration" is subject to VAT, but the concepts of "supply" and "consideration" are to be understood in an autonomous European sense[52].

The approach is similar to that which Roman law adopted when developing the *jus gentium* for non-citizens: it "addressed the problems of resolving multiple sources of law not by choosing between them, but by 'blending' them …"[53] It is an approach similar at the microscopic level to that which the CFR project has sought, over-ambitiously, to achieve at the macrocosmic level of a big-bang.

Evaluation

What can one derive from this history?

First, the time is not yet ripe for wholesale codification. Whatever the Community's powers, the stakeholder process operated as a reality check on the rather romantic notion of a modern jus commune.

Secondly, there is a need for a structured, evolutionary approach. European contract law is a developing phenomenon which is here to stay. It cannot be ignored and, where it exists, it needs attention.

Thirdly, any project like the CFR requires most careful definition, organisation and presentation. The coupling of a useful Commission project with a useful academic project which already had its own direction and momentum has not proved entirely happy. Academic freedom has in some ways proved more a problem than an advantage.

Fourthly, the increase in legislative and judicial activity at the European level in matters of private international law and substantive and procedural civil law call at

[52] *Auto Lease Holland BV v. Bundesamt für Finanzen* Case 185/01; [2003] ECR I-1317 ; *Kuwa\it Petroleum (BG) Ltd. v. Customs and Excise Cmmsnrs.* Case C-48/97; [1999] ECR I-2323; and *Tesco Ltd. v. Customs and Excise Cmmsnrs.* [2003] EWCA Civ. 1367, pars. 114 and 119. A reading of existing directives reveals that they also use terminology, including the concepts of contract and supply, to which it could be necessary to apply an autonomous meaning. However, it is far from clear that there is any urgent imperative to attempt to define in advance and in the abstract what that meaning might be. They also contain definitions, of terms such as "consumer", "supplier" and "producer", and they use words, such as "rescind", in terms which do not always appear consistent or in accord with the general understanding an English lawyer would have. Take for example the right granted as consumer under the Directive on certain aspects of sale of goods to have non-conforming goods "brought into conformity free of charge by repair or replacement" as it rather quaintly put or, if this is not feasible or not done within a reasonable time, to "rescind the contract with regard to those goods". An English lawyer would object that the word "rescind" does not on its face recognise the obvious possibility that the buyer might wish to claim damages for non-performance.

[53] See Alex Mills, *The History of Private International Law* [2006] 55 ICLQ 1, 6.,

least for "reflection" on the desirability of establishing a specialist chamber of the European Court of Justice to cover these areas.

Fifthly, it could be beneficial if in future the Commission asked itself in a more searching fashion some basic questions, before embarking on further private international law harmonisation or so wide-ranging and expensive project as the CFR. Are there really **appreciable** obstacles to cross-border trade, which a new measure would prevent? Could the same objectives be **sufficiently achieved** by the Member States? Or is Community action called for, bearing in mind that it is only justified if **necessary** to achieve the objectives of the Treaty?

It is of course not easy to balance the value of long-established national experience and traditions and the cost of the medium-term disruption that would result from their wholesale abandonment against the advantages for European citizens and others of a new Lex Romana might offer. The existing diversity of European legal systems creates some problems for at least some businesses and individuals seeking to operate or live in Europe. The car manufacturer who sells throughout Europe cannot, for example, offer a single form of common insurance policy, because of the different mandatory regulations governing insurance in different countries. The trader or individual dealing abroad may have to reckon with or take advice about a foreign law. How significant such problems are in the overall scheme is open to real doubt. The authors of the Joint Response of 2001 highlighted difficulties and cost for parties in knowing and courts in applying foreign law[54]. Many of their objections to the present system strike a note of unreality[55], Often, commercial parties engaging in cross-border trade can side-step problems by stipulating for agreed standard conditions and agreeing upon a particular country's legal system and its courts or arbitrators in relation to disputes. Rather than harmonise whole areas of civil law, measures to remove or assimilate mandatory provisions may be just as effective, and much less disruptive and costly [56]. The protection of consumers and small businesses, on which

[54] They cited a survey by Max Rheinstein, according to which, in 40 American cases applying foreign law, it was wrongly applied in 32 of the cases: Materiellen zum auslaendischen und internationalen Privatrecht 10, Die Anwendung auslaendischen Rechts in internationalen Privatrecht, 1968, 187. By the same token, I cannot judge the accuracy of the survey.

[55] See my discussion in *The Future of Private International Law*, Journal of Private International Law, October 2005, p. 185.

[56] A survey sponsored by Clifford Chance in Spring 2005 covered the 175 businesses questioned across 8 European Union countries. Interestingly, although 65% experienced some obstacles to cross-border activity, only 14% considered these large. The survey identified surprisingly high percentages

the CFR will now concentrate through its new focus on the existing *acquis*, is one where consistent terminology and principles could be particularly valuable.

There are also some general benefits which arise from the present diversity. As Advocate General Slynn said, diversity facilitates understanding of the possibilities and the choice of the best solution. But such advantages are perhaps better appreciated by lawyers than users! More importantly, in any serious analysis of problems of cross-border activity and legal certainty, differences in substantive law would come low in the scale. Problems of language and differences in applying the law and - one must add at risk of breaching the European Court's injunction of mutual trust - differences in efficiency are probably far more important.

What is the answer to my title?

In the area of private international law, the Commission is clearly aiming at wide-ranging harmonisation in contract, tort and matrimonial fields. Some issues of power may yet arise. In the field of substantive law, and particularly of harmonised contract law, I doubt whether the Commission has or has had any single clearly defined aim. Siegfried's journey was one of exploration, testing the waters. For the moment the concept of a unified civil law has been returned, like Wagner's ring, to the Rhine. One day, I have little doubt that Europe will achieve some form of restatement of fundamental principles of European contract law, which will be used by the European Court and gain gradual familiarity and acceptance at both European and national levels. I do not think that will herald the end of the common law. Whatever then emerges will be a synthesis, a merging of the different national rivers, not an inundation. Common lawyers have proved as least as good as other European lawyers else in interpreting and applying European principles where they have already developed. We should be ready when the time comes to play our part in formulating such principles, just as I believe that we should try to ensure that whatever emerges

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favouring a harmonised European contract law. But the concept was not explained in the question. Later answers also showed strong support for the ability to choose between contract laws, and for any European contract law to be optional (by either opt-in or opt-out). Even then the preference was to confine any optional instrument to cross-border transactions. The survey questioning appears to have drawn no distinction between mandatory and other rules of law. Further, no attention was, or could be, given to the content of any optional instrument, still less to the teething period and uncertainty, requiring litigation to resolve, which would result before anyone could safely know what any optional instrument really meant.

from the CFR, which seems likely to be modest, is pragmatic and workable. Endless reiteration of hostility to such moves is likely only to be counter-productive.