

Global Jurist Topics

Volume 4, Issue 2

2004

Article 1

Do We Need a European Sales Law?

Viola Heutger*

*University of Utrecht, v.heutger@law.uu.nl

Copyright ©2004 by the authors. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher, bepress, which has been given certain exclusive rights by the author. *Global Jurist Topics* is one of *Global Jurist*, produced by The Berkeley Electronic Press (bepress). <http://www.bepress.com/gj>.

Do We Need a European Sales Law?*

Viola Heutger

Abstract

A few decades ago nobody was discussing a European Sales Law. Nowadays there are already academic working groups coming up with drafts on a future European Sales Law. The academic endeavours can be divided into three channels at this point in time. One concentrates on an already existing codification and aims to create a whole civil code. Another deduces some principles for European use from the already existing *acquis communautaire*. The third group is drafting principles on the basis of national legislation, the *acquis communautaire* and international instruments and will later combine these principles in a Civil Code. The drafted Principles of European Sales Law seek to serve different purposes. On the one hand, they will be an academic answer to the ongoing process relating to the EU-wide harmonization of contract law and will therefore offer their own dogmatic system. On the other hand, they could also be a model law for further comparative and legislative activities within European contract law. The final outcome of this process cannot be predicted, but it can be said that all approaches see the harmonised sales law imbedded within a structure of general rules.

KEYWORDS: Sales Law, Harmonisation, European Civil Code, Restatement, Contract Law

*Viola Heutger, University of Utrecht, Team-Manager of the Utrecht Working Team on Sales Law,
E-Mail: v.heutger@law.uu.nl

Introduction

A few decades ago nobody was discussing a European Sales Law. Nowadays there are already academic working groups coming up with drafts on a future European Sales Law. The discussion on the harmonization of European contract law started some decades ago. An enormous step forward towards the idea of a European Sales Law and Private Law harmonization in general was made in 1980 in the Vienna Sales Convention.¹ More than 60 States are Member to this convention.² But not all EU Member States are party to the convention and neither are all of the acceding countries.³ This fact obliges the harmonization of commercial Sales Law to be still considered on EU level. Furthermore, consumer protection is an important issue on the European agenda. Therefore, consumer as well commercial issues cannot be separated from the discussion. For both of them the internal European market is in need of a more coherent system than that which has been offered so far.

A non-coherent approach so far

The status quo of European Sales Law is a little frustrating. Regional codification is, for the time being, not in line with the policies and decisions provided by the various European directives and, additionally, a provision on sales transactions is quite often not found in a single piece of legislation. In many European countries apart from the civil code even a commercial code and quite often also statutes on consumer protection must be consulted in order to discover the relevant legislation. Many lawyers are aware of this problematic situation and are demanding a complete change and some even request a pan-European approach in order to synchronise the status quo.

Sharing knowledge

Many internationally operating institutions are based in Europe. Uncitral and Unidroit can be referred to here as the best known institutions in the area of contract law. Not only because of these two institutions it is quite common for a European Lawyer to look towards international conventions and international

¹ Also a European initiative commenced its activities: in 1980 Ole Lando founded the Commission on European Contract Law.

² According to the UNILEX Database 62 countries members of the CISG. See www.unilex.info.

³ Most European countries are parties to the convention: Ireland, Portugal and the UK being the exceptions. Three out of the 15 Member States have not ratified the CISG. Out of the 10 candidate countries which are about to join the EU in 2004, all but two, Cyprus and Malta, have ratified the CISG.

practise. From a worldwide perspective, it is fairly inevitable to focus comparative research even on the American efforts in unifying or harmonising law.

Considering the American setting it is obvious that both in Europe and the United States some efforts have been made to standardize regional codification. This desired harmonization is not only for the purpose of encouraging cross-border transactions, doing away with barriers of legal uncertainty and improving the internal market. Harmonising the law also reinforces legislative identity. The United States have a longer tradition in harmonising law than the Europeans have. Therefore, the influence of American concepts cannot be denied in the recent developments within the European Union.

a. On American Restatements and European Principles

The United States of America already started institutionalised legal harmonization at the beginning of the 20th century. Since 1923 the American Law Institute⁴ has chosen the line of Restatements. These Restatements of the Law attempt to present the basic principles of the common law in a systematic fashion. The American Restatements are meant to influence judicial decision-making and are not legislative enactments. The Restatements are not drafted for eternity, after a certain time a revision of the Restatements will inevitably be required. This idea of drafting Restatements also reached Europe. Some decades ago European Lawyers were convinced that some kind of restatement would also make sense for the growing internal market. Independent academic groups were established in order to carry out work which was similar to that of the American Law Institute.

Quite soon, it became obvious that an American kind of restatement did not fit in the European surroundings, because there was no possibility to draft restatements from the given national EU Member States' legislation. Due to the nature of the European independent national States, of which only an economic aspect forms part the European Union, the method of drafting Restatements needed some modifications. Therefore the most recent works by legal scholars are not along the lines of Restatements compelling existing regulations in a systematic fashion, but are in the form of draft Principles based on a so-called best law choice.

⁴ For the history of the institute see www.ali.org/.

A best law choice means that the solution which is the most fitting will be chosen as a provision, irrespective its origin. A national legal solution does not have to be the basis for the choice, nor the internal market *acquis communautaire* or some international conventions. Following this best law approach the first parts of the Principles of European Contract Law were published in the 1990s.⁵ At the beginning there was purely an academic interest in this endeavour. But, some years later, some initial court decisions referring to this voluntary instrument can be found throughout Europe.⁶

b. The American Uniform Commercial Code (UCC) and the notion of a European Civil Code

Nevertheless, not only was the idea of drafting principles of European contract law influenced by American activities, but also the notion of a European Civil Code for cross-border transactions. This idea was inspired by another American attempt. This endeavour to unify American law was the Uniform Commercial Code (UCC), which consists of several black-letter provisions (rules or principles from the Restatements) followed by extensive official comments.⁷ The UCC has served as a model for many thoughts on the future of commercial law. So some scholars even advocate not only a European civil or commercial code, but also a global commercial code.⁸

However, at least within the European Union, the idea of having a European Commercial Code, or a European Civil Code is paramount for many scholars and is vividly discussed at various conferences dedicated to this subject.⁹ The academic world is mainly divided into two groups, one with a great interest in having a European Code, the other being convinced of the idea that each nation

⁵ Lando/Beale, Principles of European Contract Law, Parts I and II, Kluwer International, The Hague, 2000

⁶ See the database www.unilex.info and also www.rechtspraak.nl, e.g. the following case: C99/315HR, Supreme Court of the Netherlands (13.07.2001) with reference to PECL by the Procurator general.

⁷ For the text of the UCC see www.law.cornell.edu/ucc/ucc.table.html.

⁸ See Bonell, Do we need a Global Commercial Code?, in Uniform Law Review, 2000-3, p. 469 ff. and the outcome of a recent discussion on this topic: Heutger, Worldwide Harmonisation of Private Law and Regional Economic Integration –75 Jahre UNIDROIT – Rom 27. – 28. September 2002, in European Review of Private Law 6, 2002, p. 858.

⁹ See Hartkamp, Hesselink, Hondius e.a. (Ed.), Towards a European Civil Code, Kluwer Law International, The Hague e. a., 1998, 2. Edition; Alpa/Buccico, Il Codice Civile Europeo, Giuffrè, Milano 2001

needs its own codification.¹⁰ Among those who believe in national codification, it is regrettable that some wish to condemn those who are working towards European legal harmonization.¹¹

Global or transnational codifications have to battle against some very specific 'diseases'. In Europe people are aware of some of the problems of the UCC. Specific problems inherent in the UCC led to its non-acceptance in other areas. Three core problems can be discerned. First, the text of the Code provides, on the one hand, separate alternatives for enacting legislation while, on the other, it leaves room for lesser variations. Second, not every state has adopted the most recent version of the UCC and, third, there are often non-uniform amendments.

The discussion surrounding a European Civil Code has taken up some of these critical aspects. So, for the time being, there is no official body to take over the compiling and drafting activities. Only a few academic scholars are seriously occupying themselves with drafting a European Model Code. Therefore many scholars have asked for a European Law Institute in order to maintain a high standard for the respective codification and to amend future changes in a uniform fashion.¹² Another European request would be the application of the same version throughout the European Union. In addition, a common last instance court would be required in order to apply the European version of the UCC concept.

The challenge of the American approaches

Both approaches Restatements and UCC, do not tend to be enacted as a governmental legislation in the first instance, but represent a form of systematisation that is only suitable for those fields of law that are governed by judicial precedent. Nevertheless, the American experience suggests a special perspective concerning the European problem of widely diverging legal systems. The main obstacle to European codification may be an overly rigid understanding of what codification requires. But codification must not be an elementary systematisation; it could be the creation of a common vocabulary and a framework for further discussion, which will advance perpetual European dialogue.

¹⁰ Against any European Civil Code are e.g. Legrand and Smits. A reflection on their ideas is presented by Zeno-Zencovich, The „European Civil Code“, *European Legal Traditions and Neo-Positivism*, in: *Il Codice Civile Europeo*, Milano 2001, p. 375 ff.

¹¹ See Lequette, *Quelques remarques à propos du projet de code civil européen de Monsieur von Bar*, *Recueil Dalloz Sirey*, n° 28, 25/07/2002, pp. 2202-2214.

¹² Lando in *Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU*, *EUI Working Papers*, Law No. 99/7, p. 50 and Larouche, *Ius Commune casebooks for the common law of Europe*, in *EUI Working Papers*, Law No. 99/7, p. 120f.

For the time being, there is no European legislator or institution which is enacting or drafting something which is similar to the Restatements or the UCC. But there is a great deal of scholarly interest in this material and therefore many European scholars have started academic endeavours to draft Principles or Civil Codes. The focus of these endeavours is mainly contract law.

The European initiatives

From the official European side, in 2001 the first initiatives were taken to establish a democratic discussion process. There are two communications from the European Commission requesting a future European Contract Law¹³ as well as a more coherent European Contract Law.¹⁴ In both communications sales law is explicitly mentioned as one of the core issues of contract law within the internal market.

So, the focus of the official documents as well as that of the academic drafting groups is directed towards the issue of harmonising sales law and its position in internal market policy.

The European academic approaches towards harmonizing private law

The academic endeavours can be divided into three channels at this point in time. One concentrates on an already existing codification and aims to create a whole civil code. Another deduces some principles for European use from the already existing *acquis communautaire*. The third group is drafting principles on various fields of law on the basis of national legislation, the *acquis communautaire* and international instruments and will later combine these principles in a Civil Code. All three groups consist of international scholars and are all busy drafting principles on European Sales Law, as well as other parts of contract and patrimonial law.

All these academic groups have specific ideas on how their own results will later be used on a European level. The principles seek to serve different purposes. On the one hand, they will be an academic answer to the ongoing process relating to the EU-wide harmonization of contract law and will therefore offer their own dogmatic system. On the other hand, they could also be a model law for further

¹³ http://europa.eu.int/comm/consumers/policy/developments/contract_law/index_en.html

¹⁴ http://europa.eu.int/comm/consumers/policy/developments/contract_law/com_2003_68_en.pdf, see also Viola Heutger, Ein kohärenteres europäisches Vertragsrecht, in Jusletter, 17. Februar 2003, www.jusletter.ch

comparative and legislative activities¹⁵ within European contract law. The principles may offer a solid basis for a common frame of reference as requested in the Commission's Action Plan on a more coherent European Contract Law. The Principles may serve as an optional instrument in cross-border transactions, allowing the parties simply to refer to this instrument as the applicable law. In addition, the principles may provide a solution when it proves impossible to establish the relevant rules of the applicable law. Like the PECL and the UNIDROIT Principles, the principles may be used to interpret or supplement international or European uniform law instruments and customs.

a. Accademia dei Giusprivatisti Europei

The first group is taking an existing civil code as a model, the Italian one, and a draft by the English Law Commission, the so-called McGregor Code, as the common law component. On the basis of these two models a group of scholars is discussing the draft and duly amending it. An Italian professor, Giuseppe Gandolfi, is the head of this group. It was founded in 1992 with its seat in Pavia and in English 'The Academy of European Private Lawyers' it is called.¹⁶ The scholars are from various European countries and many have a Roman law background. Due to their historical orientation they are aware of the fact that when discussing private law on a European level English is not the only important language for this purpose and therefore they carry out their work in various languages and have published their first volume in French. This volume mainly deals with contracts in general.¹⁷

This group is working on a draft Sales Law.¹⁸ For the time being no material has been made public in order to give an indication as to their work already carried out with regard to a European Sales Law.

b. The Acquis Group

A young group is the so-called Acquis Group, founded in 2002. On the basis of the EU *acquis communautaire* this group is developing principles that will complement the approaches of other drafting groups. The group targets a systematic arrangement of existing Community Law which will help to elucidate

¹⁵ See the function mentioned by Schulte Nölke in A Common Frame of Reference – How should it be filled?, ERA-Forum 2/2003, scripta iuris europaei, p. 143.

¹⁶ For a description of their activities and their ideas on how to establish a European Common Frame of Reference, see A Common Frame of Reference – How should it be filled?, ERA-Forum 2/2003, scripta iuris europaei, p. 121-125.

¹⁷ Code européen des contrats / Avant-projet, Livre premier, Milano, Giuffrè, 2001 and a translation in Foundational texts in European Private Law, Giuffrè, 2002.

¹⁸ Additional books on unilateral acts and the problem of tort liability are also foreseen.

the common structures of the emerging Community private law.¹⁹ The group is also taking the Vienna Sales Law into account, but the solutions presented therein do not bind the group, certainly as far as the Vienna Convention is not *acquis communautaire*.

The final results of the research activities of the Acquis Group have not yet been determined. Therefore, for the time being, no answer can be given to the question of whether the formulated principles aim to offer a minimal standardization or present more of a checklist approach. The derived common ‘Principles of the Existing EC Contract Law’ follow the approach of only focusing upon the genuine EC Law instead of comparing different national legal orders.²⁰ How the group deals with the transposition of Directives into national law and their application remains unclear. Most scholars view such transpositions as also being part of the *acquis communautaire*.²¹ Due to the approach taken by the Acquis Group it does not seem to be opportune to take new developments into account before they become any accepted part of the *acquis communautaire*. For the time being no work is being published on the sale of goods or, in particular, on Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Sales Directive). So it cannot be predicted whether this group will only deal with consumer sales or also with commercial sales.

c. The Study Group on a European Civil Code

The Study Group on a European Civil Code is a network of academics from across the EU, conducting comparative law research into private law in the various legal jurisdictions of the Member States. The aim of the SGECC²² is to produce a codified set of Principles of European Patrimonial Law complete with a commentary and comparative annotations.²³

The Principles are so-called ‘black-letter rules’ which form common European Private Law Principles, based on the results of a very detailed analysis of the European *acquis communautaire*, the various European legal systems, academic

¹⁹ So group’s own presentation at an ERA Forum. See A Common Frame of Reference – How should it be filled?, ERA-Forum 2/2003, *scripta iuris europaei*, p. 142.

²⁰ A Common Frame of Reference – How should it be filled?, ERA-Forum 2/2003, *scripta iuris europaei*, p. 145.

²¹ See Remy-Corlay, *The Law of Sales: Acquis and Improved Acquis in European Contract Law*, ERA Forum 2/2003, *scripta iuris europaei*, p. 39. There she quotes the Commission’s Action Plan on a more coherent contract law (p.1): ‘not only the instruments which are part of the Community contract law are to be considered as an *acquis*, but also their implementation and application’.

²² See www.sgecc.net and von Bar, *Die Study Group on a European Civil Code*, in *Festschrift für Dieter Henrich*, 2000, p. 1 ff.

²³ For the time being, the results of the research are presented in English on the website of the Study Group, www.sgecc.net, and will later also be translated into other languages.

and institutionally-drafted Principles like those of the Commission on European Private Law (PECL) and UNIDROIT as well as international instruments like the United Nations Convention on the international sale of goods (CISG).

These black-letter principles are followed by a detailed commentary. This commentary includes the grounds underlying the choice expressed in the principles and describes all the legal aspects of the provision in detail. Furthermore, the commentary provides illustrations to explain the possible scenarios involved in applying the relevant principle.

Comparative notes follow the principle and the commentary. The solution chosen by international and European instruments introduce the comparative notes. The comparative notes show the conformity or non-conformity of the chosen principles with these international and European instruments. Explaining the drafting history and the purpose for which the international or European instrument was drafted justifies the deviations from the chosen principles. The national legal notes follow the international and European instruments. The national notes describe the impact of international and European instruments and their conformity or non-conformity with the drafted common European principle. For the time being, the results of the research are presented in English, and will later also be translated into other languages.

The Study Group on a European Civil Code is split into different working groups.²⁴ Sales Law has been on the agenda of the Study Group from the beginning and therefore the first results of its activities are already available.

The Utrecht working team on Sales Law is one of the various research teams of the Study Group on a European Civil Code and it started conducting comparative research into sales contracts in 1999.²⁵

Towards a European Sales Law

The Utrecht team on Sales Law²⁶ has elaborated its own working methods. In the beginning the members started with a position paper to outline the team's

²⁴ Besides sales law other working teams are currently drafting principles on services, long-term contracts, extra-contractual liability, credit securities, transfer of moveable property and insurance contracts.

²⁵ Recently an overview of the results so far achieved has been published by Heutger, *Konturen des Kaufrechtskonzeptes der Study Group on a European Civil Code – Ein Werkstattbericht*, in *European Review of Private Law*, 2, 2003, p. 155-173 and *Ein Europäisches Kaufrecht*, in *Jusletter*, 10. November 2003, www.weblaw.ch.

²⁶ The group is composed of Ewoud Hondius (team leader), Viola Heutger (team manager), John Dickie (national reporter: English law, until October 2002), Christoph Jeloschek (national

approach. Later on, they elaborated various questionnaires on very detailed problems relating to sales contracts. After analysing the national reports following several questionnaires, the working team presented a position paper on Principles of European Sales Law to the Co-ordinating Committee of the SGECC, composed of about 45 prominent European scholars.

The drafting process does not only focus on the national reports, but even more so on the available international and European instruments like the United Nations Convention on the international sale of goods (CISG) and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Sales Directive). The CISG served as the starting point for the drafting process because of its wide acceptance and its influence on various national sales laws and on the Sales Directive itself. However, deviations from the CISG have been considered necessary insofar as a given rule posed problems in the non-commercial or European context. Besides, the working team has considered the Sales Directive as a minimum standard of consumer protection. In other words, the choices made in the Sales Directive were accepted as compelling for consumer sales law at least.

The mass of information concerning sales law is enormous. In order to deal with the different issues relating to sales contracts, the relevant topics were divided into brief sub-chapters making up the final set of rules. During the first stage, the working team elaborated these sub-chapters, such as general provisions, conformity, remedies, obligations of the buyer and the seller, preservation of the goods, guarantees etc. By the end of 2000, the working team was able to present the first indicative black-letter rules on sales law, which were based both on their comparative research and on the support and expertise provided by their advisors.²⁷ This preparatory initiative has been refined throughout the last few years; as a matter of fact, the core topics characterizing a sales contract are at the

reporter: Austrian law), Hanna Sivesand (national reporter: Swedish law), Aneta Wiewiorowska (national reporter: Polish law), Georgios Arnokouros (national reporter: Greek law, until the end of 2002). The comparative notes have been elaborated with the assistance of members of the Amsterdam and Tilburg Teams covering France (national reporter: Andrea Pinna), Italy (national reporter: Manola Scotton), Germany (national reporter: Viola Heutger and Roland Lohnert, until June 2002), The Netherlands (national reporter: Marco Loos), Portugal (national reporter: Rui Cascao), and Spain (national reporter: Odavia Buenodiaz). The rules have been discussed at the meetings of the whole Dutch team (in addition to the members already mentioned: Maurits Barendrecht, Martijn Hesselink, and Jacobien Rutgers). In particular, the Dutch Team would like to thank Giuseppe Donatiello for his valuable comments and suggestions.

²⁷ Members of the Advisory board are: Johnny Herre, Jerome Huet, Ewan McKendrick and Peter Schlechtriem.

final drafting stage.²⁸ The final result will have to be approved by the so-called Drafting Committee, consisting of about 5 lawyers who are experienced in drafting legislation, which will ensure consistency with other drafts prepared by the SGECC as well as coherence with formal requirements.²⁹

Sources of inspiration

As one can imagine, the drafting process did not only focus on the national reports, but somewhat more on the available international and European instruments like the United Nations Convention on the international sale of goods (CISG)³⁰ and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Sales Directive)³¹. Through the implementation of the Sales Directive in the various European national legislations, the solutions offered by the Sales Directive were emerging under the Directive itself as well as in the national legislative reports.

The Sales Directive itself was already following the solutions provided by the CISG, and therefore one can well imagine the enormous impact which the CISG has had within the whole drafting process of the Principles on European Sales Law. But the CISG was not slavishly followed, because of the fact that the sales chapter is designed to operate within the framework of general contract law as promulgated by the Principles of European Contract Law (hereinafter: 'the PECL'). Thus, certain subjects of general, i.e. non-sales specific interest, such as validity, formation or damages, are regulated in the PECL and will not be repeated in the sales chapter. The PECL also influenced the choice of concepts and of terminology. In cases where two or even more possibilities were foreseen by the different systems the sales team mostly opted for the PECL solution.

Spotlighting the proposal

The drafting activities are at a quite advanced stage. The draft starts with a definition whereby an attempt is made to summarize the essence of a sale: 'the seller undertakes to transfer property and the buyer undertakes to pay the price'.³² Further obligations on the part of the parties are set out in greater detail in separate sections. Rules on barter are to fall under the ambit of this chapter.

²⁸ A preliminary text can be downloaded from the official website: www.sgecc.net.

²⁹ The final text including a commentary and comparative notes will be published during the course of 2005 by Sellier, International Law Publishers, Munich.

³⁰ For the text, cases and literature on this convention see www.unilex.info.

³¹ OJ L 171, 7.7.1999, p. 12.

³² Here the draft deviates completely from its international and European counterparts: neither the CISG nor the Sales Directive offer a definition of a sale.

As mentioned above the sales draft covers all sales transactions, i.e. commercial contracts, consumer contracts, and private contracts (within the meaning of activities of a non-professional seller). Consumer sales are addressed by specific rules, which either deviate from or complement the general rules. One important consequence of the consumer protection regime is that the parties may not derogate from the rules to the detriment of the consumer. In contrast, commercial sales are not regulated as a category in their own right.

Along the lines of both the CISG and the Sales Directive, the sales draft focuses on goods. To some extent, introducing an application with appropriate adaptations also to shares, investment securities and negotiable instruments extends this concept. An application with appropriate adaptations is also provided for money, electricity and other forms of energy, information and data (including software) as well as other rights, with the exception of rights in land.

Conformity of the goods is addressed in a separate section, which, amongst other things, lays down the principle of, and the relevant time for, conformity of the goods. Cases of partial delivery and partial non-conformity are also deemed to be non-conformity. Furthermore, the section on conformity contains a regime which regulates the examination and notification of the lack of conformity for non-consumer sales. The draft also includes an absolute time-limit of two years running from delivery. The remedial regime is linked to the conformity section. As a general principle, specific performance by means of repair or replacement prevails over the other available remedies, i.e. termination of the contract, a price reduction and damages. The section on remedies is followed by rules on guarantees, in the sense of guarantees providing something in addition to the legal rights of a consumer. This section is only applicable to consumer sales and goes a step further than the Sales Directive. A guarantee as defined by the sales draft is a voluntary instrument used by producers and sellers. The draft provides default rules when the guarantor does not specify the content of the product guarantee.

The section on the seller's remedies, following the CISG, provides for a seller's right to make specifications if the buyer has failed to do so. The risk of loss or damage to the assets passes when control over the assets is handed over to the buyer. The section on the passing of the risk provides special rules for the carriage of assets and sales in transit. Finally, the last section deals with the preservation of the goods, which denotes a refined version of the CISG and the approach adopted by the PECL.

The above-mentioned sequence of sections should not be seen as final. Work is still in progress. Representatives from around 18 jurisdictions, which are

members of the Coordinating Committee of the Study Group on a European Civil Code, have agreed on the content of the principles to date. The drafting process that has now commenced will refine the wording, sequence and definition of concepts. Furthermore, the draft will be brought into coherence with other chapters drafted by other working teams of the Study Group on a European Civil Code.

Implications

The sales draft attempts to create a truly uniform sales law, placing the differentiation into different settings, different parties to the contract, and different objects, which are the subject of the sales contract. To that end, a balance is struck between the two poles of the sales spectrum: the commercially-orientated CISG and the consumer-orientated Sales Directive.

Returning to the parties in a sales contract, in any event the parties have, for the time being, a free choice to use the European Principles as a *lex contractus*, which do not supersede national sales laws as such. Later on, the principles may offer a European-wide optional instrument.³³ Another option is more far-reaching in that a EU-wide sales law would govern all sales transactions, domestic and transnational alike. Such a European Sales Law would be a real European codification without any local restriction within the internal market and would therefore replace national legislation on sales law.

By next year (2005) the world as such will have the possibility to criticise the attempts of the Study Group on a European Civil Code and particularly the Utrecht working team on sales law. However, critics have often voiced their concern about the legitimacy of private individuals, and scholars in particular, taking it upon themselves to act as legislators. They demand an internationally acting institution at the very least. The recent developments on the European market have shown that there is also a place for an academic approach.

In February 2003, the Commission launched the so-called 'Action Plan on a more coherent European contract law', which is yet another important step towards the harmonization of European Private Law.³⁴

In fact, the research undertaken by the Working Team on sales law is closely

³³ Such an instrument is now the subject of discussion under the Action plan on a more coherent European contract law. http://europa.eu.int/comm/consumers/policy/developments/contract_law/. See 4.3, 89 s.

³⁴ See Heutger, Ein kohärenteres europäisches Vertragsrecht, in Jusletter, 17. February 2003, www.jusletter.ch.

interconnected with the objectives set out in this Action Plan³⁵. Accordingly, one of the main issues is to improve the quality of the EC *acquis communautaire* in the area of contract law. In doing so, a common frame of reference should help to establish European concepts, principles, definitions and terminology. This compilation, called the common frame of reference in the Commission's terminology, may later even lead to an optional instrument on the European level.

The work elaborated by the SGECC is already such an optional instrument, but at the same time the work undertaken also provides a common frame of reference for European Sales Law, as it provides for references to national legal systems and jurisdictions alongside the actual black-letter rules. Furthermore, the Principles of European Sales Law have defined common concepts and terminology. It is to be hoped that they will meet the expectations of the Commission and can thus contribute to the ongoing process of further developing the *acquis communautaire*. Ideally, such a set of rules should constitute a compromise between the diverging interests of consumers and commercial parties, which could modernize European sales law by bringing it into line with the economic challenges of the 21st century.

Let us see whether the contracting parties will use their free choice to govern their contracts by means of the European Principles.

Conclusions

In 2001 the European Commission started a consultation process with the focus being on contract law. This process is still in its infancy and so far no final results have been published. Therefore, the European internal market is still an interesting marketplace to observe. Commercial practice and dogmatic critics will demonstrate whether the integrated approach of dealing with commercial and consumer sales together will be the future European choice. The approaches of the Gandolfi Group and the Acquis Group are awaited with great interest. Probably only a merger of all three activities will have any effect on the Commission's vision on what a European Sales Law should look like.

In sum it can be said that all drafting groups have a broader approach in mind than only codifying sales law. All approaches see the harmonised sales law imbedded within a structure of general rules. The official documents of the

³⁵ http://europa.eu.int/comm/consumers/policy/developments/contract_law/. This Action Plan was the result of a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at the European level. This initiative dates back to July 2001 when the Commission launched its Communication on European Contract law.

European Commission also focus on a broader approach. Therefore, it can be predicted that something like a European Vienna Sales Convention will not emerge. The new European approach is much broader and does not focusing on commercial sales in isolation.

The final outcome of this process cannot be predicted, but in the far future a European Civil Code is still feasible. Principles of European Sales Law will not stand alone without some additional general rules.