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EU Contract Law:
In Search of a Common Core

JAEM01 Master Thesis

European Business Law
15 higher education credits

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Term: Spring 2021

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Abstract

Contracts in the EU operate in a complex legal environment. Depending on the situation, they are subject to a patchwork of national, European, and international rules. As a result, economic operators exercising the 'four freedoms' find themselves in a great ocean of private international law, containing smaller islands of EU law and national rules.

This paper explores some of the fundamental issues arising from the existing legal structure of the EU contract law *acquis communautaire*. It attempts to determine if the structure supports the internal market objective of establishing a common market without internal frontiers enshrined under Article 3(3) TEU and Article 26 TFEU.

In examining these issues, it discerns that the current framework is inadequate to bridge the eventual normative issues that arise in the long run, as a result of the fragmented nature of European contract law. Therefore, failing to deliver the requisite level of legal certainty for cross-border transactions envisioned for the completion of the internal market project. The paper concludes with observations on structural and formal suggestions on the policy options available for progress towards a more integrated European contract law, in particular, the importance of judicial governance and the added responsibility of the EU legislature in matters of policy impacting contract law.

Table of Abbreviations

B2B	Business-to-business contracts
B2C	Business-to-consumer contracts
CESL	Common European Sales Law
CFR	Common Frame of Reference
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	The European Court of Justice
DCFR	Draft Common Frame of Reference
EC	The European Community
EEA	European Economic Area
EU	The European Union
OECD	The Organisation for Economic Co-operation and Development
PECL	The Principles of European Contract Law
Rome Convention	The Rome Convention on the Law Applicable to Contractual Obligations
SMEs	Small and Medium-sized Enterprises
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
The Commission	The European Commission
UPICC	The UNIDROIT Principles of International Commercial Contracts

1 Introduction

1.1 Background

Article 3(3) TEU enshrines one of the primary objectives of the EU, which states that the "[European] Union shall establish an internal market."[1] The notion of what constitutes the internal market is set out in Article 26 TFEU, which states:

> *"1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market..."*
>
> *"2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured…"*[2]

Article 26 TFEU, therefore, presupposes the task of creating a common economic area with no internal borders in which there is free movement of goods, persons, services, and capital.[3] Contract law, that defines and governs rights and duties of parties to economic transactions, are then, arguably, at the core of this imperative. Yet, different national contract laws govern contracts in the internal market.

In 2001 the Commission expressed its concerns in achieving this objective resulting from the co-existence of divergent national contract laws.[4] Following the publication, contributions from over 180 stakeholders across academic, business, government, consumer, and legal communities were procured.[5] A majority of contributors agreed that further action at the EC-

[1] Consolidated version of the Treaty on European Union 2012/C 326/01, Article 3(3)
[2] Consolidated version of the Treaty on the Functioning of the European Union, 2012/C 326/01, Article 26
[3] Catherine Barnard, The Substantive Law of the EU: The Four Freedoms (6th Edition edn, Oxford University Press 2019) 559
[4] The European Commission, 'Communication From the Commission to the Council and the European Parliament on European Contract Law' [2001] 398 Final (Brussels, 11072001 COM(2001) Official Journal of the European Union
[5] The European Commission, 'Communication From the Commission to the European Parliament and the Council, a More Coherent European Contract Law, an Action Plan' [2003] C 63/1(2003/C 63/01) Official Journal of the European Union, para. 4

level was needed, affirming the current framework is suboptimal and a more rationale and coherent set of laws are needed.[6] Moreover, intuitively, an obvious level of confusion persists. We realise this as soon as we ask common legal questions, such as "Is there a binding agreement under EU law?" or "What are the remedies for non-performance under EU law?" to which the answer is often an invariable counter-question: "Which EU contract law?" Only in rare occasions, where the EU fully occupies the field and where international rules no longer apply, would you be able to furnish a response confidently.[7] But even then, the laws governing the general elements of a contract is subject to national law.

Therefore, a wider interest in clarity presumptively exists. In particular, for small and medium-size enterprises (SMEs) and consumers, where compliance with divergent standards and rules and additional costs may render the potential economic advantages of free movement obsolete. Thus, further clarity may be of relevance for achieving the internal market objective under Article 3(3) TEU and Article 26 TFEU.

1.2 Purpose and Research Question

The purpose of this dissertation is to determine if the existing process of harmonising contract law in the EU supports the internal market objective of establishing a common market. Here, I use the term "existing process of harmonising contract law" to encompass the various legislative approaches adopted by the EU and its Member States in matters of contract law, including how this law is applied. Cumulatively, this constitutes the legal framework of the EU contract law *acquis communautaire*.

Thus, this dissertation seeks to answer the main research question:

> Is the existing process of harmonising contract law in the EU and the existing legal framework of the EU contract law

[6] Ibid. page 1
[7] Stefan Vogenauer and Stephen Weatherill (eds), The Harmonisation of European Contract Law Implications for European Private Laws, Business and Legal Practice (1 edn, Hart Publishing 2006) 1

acquis communautaire which results from it, capable of sufficiently eliminating barriers to the internal market so as to enable it to achieve its internal market objective as stated under Article 3(3) TEU and Article 26 TFEU?

For the purpose of arriving at an answer to this question, the following sub-questions will also be explored:

- What are the issues arising from the co-existence of divergent national contract laws in the EU?
- Is the current methodology and structure capable of sufficiently eliminating barriers to the internal market in the long run?
- Are there measures that can be taken at the EU-level to converge EU contract law under the existing process of harmonisation?

1.3 Methodology and Material

An honest examination of EU contract law, which is adopted across 27 Member States, each with its own legal tradition, would inevitably require looking beyond black letter law. Therefore, this dissertation does not have the luxury to be intellectually rigid or inflexible, as many interdisciplinarians perceive doctrinalists to be.[8] However, it will also not establish any claims to socio-legal research. Rather, its purpose is to identify some of the existing gaps in the legal framework of EU contract law to determine if it supports the establishment of a common market. This is why a hybrid legal research methodology encompassing qualitative research of a doctrinal (dogmatic) and comparative nature is adopted. Qualitative research is defined as, "the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made."[9]

[8] Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 JL & Soc 163, 164

[9] Ian Parker, 'Qualitative Research' in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), Qualitative Methods in Psychology: A Research Guide (OU 1994) 2

The doctrinal research methodology is adopted to examine legal rules in the field of EU contract law to provide a systematic exposition to clarify *de lege lata.*[10] This allows for a detailed analysis of the wording of legal rules found at the national, EU, and international levels as well as the rationale of its case decisions. However, it is important to note that normative elements are ubiquitous in legal interpretation and therefore undermine objectivity to some degree, and while based on logical conclusions; these conclusions themselves are not exact science.[11] Despite this, their results should be possible to recreate.[12]

This dissertation also adopts a comparative research methodology. This allows for a critical analysis of different bodies of law, to show how the outcome of a common legal issue could result in different outcomes under different sets of rules. This allows for a determination of whether the divergences under the existing process of harmonising contract law begs change.

Further, it must also be said that an empirical research method is used. This allows for the use of data to support the hypothesis. Here, I must distinguish between "methodology" and "method". With methodology being defined as "the research strategy as a whole", [13] and "method referring to the range of techniques that are available to us to collect evidence about the social world."[14] The empirical research in this paper will be of the latter kind.

1.4 Delimitations

Firstly, this dissertation focuses on the framework of the EU contract law *acquis communautaire* in general, without any distinction between

[10] Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007) 49
[11] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10:8 Harv L Rev 457, 465–6
[12] See Nils Jansen, 'Making Doctrine for European Law' in Rob van Gestel, Hans-W Micklitz, and Edward L. Rubin, Rethinking Legal Scholarship A Transatlantic Dialogue (Cambridge University Press 2017), 234
[13] Matt Henn, Mark Weinstein and Nick Foard, 'A Critical Introduction to Social Research' (2nd edn, Sage 2006) 10
[14] Ibid.

particular contracts, such as B2B or B2C contracts, or contracts in a particular area, such as the digital market or distance selling. The approach is chosen to address the main research question explicitly, which focuses on the structural problems with the framework of EU contract law as a whole.

Secondly, no contract lawyer would argue that there is one contract law. We have different laws governing different types of contracts, be it consumer contracts, financial contracts, real estate contracts, and so on. However, all contracts remain subject to the general law of contracts (to the extent that they are not superseded by other rules). Thus, the term "general contract law" in this paper refers to the basic standard elements of a contract, that are generally known, free from doubt or dispute, and applicable to most contracts, such as formation, validity, breach, among others.[15]

Thirdly, since each Member State has its own general contract law, a number of differences between each exist. Any attempt to select those differences on the basis of their importance or provide a comparative analysis between each legal system, is far beyond the scope of this thesis. Instead, this dissertation will review key elements of general rules of contract law to display their varied application in the internal market. So that they may serve as illustrations of the diversity of legal doctrines characterising the internal market and its legal evolution.

Fourthly, for reasons of time and space, only a selected typology of structural, economic, and legal barriers of the EU contract law *acquis communautaire* will be discussed. It does not raise all the issues in this area nor can it be presumed to give a complete picture of all the problems that exist. Instead, this brief recital strives to produce sufficient information on the normative foundation of European contract law, to provide at least a limited response to the main research question.

Fifthly, a familiar distinction between domestic and cross-border contracts is made, with this dissertation addressing the latter. There are two main reasons for this: (i) A cross-border element is necessary to trigger the application of EU law;[16] (ii) Domestic contracts are almost exclusively dictated by the domestic law of that national legal system; whereas parties to cross-border contracts have to determine the applicable law of the contract subject to limitations on the free choice of law and exceptions to overriding rules,[17] raising a number of pre-contractual issues relevant to us.

Sixthly, the question of whether the EU has the constitutional foundation for more far-reaching European action in the area of contract law will be avoided, as this will require examining the feasibility of the approximation of laws, which in turn requires an in-depth inquiry into the principle of subsidiarity and proportionality and the appropriate legal basis.[18] Such an analysis is simply beyond the scope of this dissertation. Nonetheless, it is important to bear in mind that Article 114 TFEU, relating to the proper functioning of the internal market, often serves as the appropriate legal basis for harmonising contract law in the EU.[19] According to the interpretation of the CJEU, the "objective of this provision is the improvement of conditions for the establishment and functioning of the internal market."[20] Therefore, most matters of EU contract law are justified almost exclusively in market terms. Thus, coinciding with the main research question.

Seventhly, despite European contract law being a political process,[21] questions of political philosophy are avoided. This paper will not discuss market reductionism, private law essentialism, nationalism, normative

[16] Paul Craig and Gráinne de Burca, EU law: Text, Cases and Materials (7th edn, Oxford University Press 2020), Chapter 8
[17] Regulation (EC) No 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome 1) (2008) OJ L 177, Article 9
[18] See Paul Craig and Gráinne de Burca, Chapter 3
[19] Article 14 TFEU
[20] Case C-376/98, Federal Republic of Germany v. European Parliament and Council of the European Union ('Tobacco Advertising') (EU:C:2000:544), at para. 84
[21] See in general: Martijn W Hesselink, Justifying Contract in Europe: Political Philosophies of European Contract Law (Oxford University Press 2021

institutionalism, or any other political philosophical doctrine, even though they may render a better understanding of the present state of European contract law. It is simply beyond the scope of this paper to explore these topics in any meaningful way.

1.5 Outline

The starting point in section 2 is, somewhat unsurprisingly, the status quo. This section sets out the concept of EU contract law in its general context, and it is in this context that the fundamental research question will be raised. It situates the normative discussion and sets the scene by introducing the milestones in the process of Europeanisation of contract law— after all, to know the future we must know the past. It covers the core characteristics of the current framework and the various pluralities that are part of its reality (section 2.1). In addition to this, a brief synopsis of the current state of EU contract law will also be provided for further context (section 2.2).

Subsequently, in section 3, the structural barriers inherent in the existing framework of EU contract law are examined. This will include an exploration of the legal evolution and the implicit dimensions of contracts in the EU (section 3.1). Thereafter, the economic barriers as a result of the existing framework will be discussed (section 3.2). After all, the EU is an economic union and therefore we must have compelling economic reasons if we are to abandon the current state of affairs. Finally, the legal barriers in the area of general contract law will be considered, because the general law of contracts that relates to making and enforcing agreements apply to all areas of contract law, and therefore can be considered to be a foundational element of the framework of EU contract law. Here, the paper investigates two fundamental areas of general contract law— the notion of a contract and the breach of contract (section 3.3). Emphasis will be given to the foundational elements in each of these areas in order to determine if there are compelling reasons to improve the existing infrastructure.

In section 4, the paper will conclude with observations on structural and formal suggestions on the policy options available for progress towards a more integrated European contract law. This section will explore the plurality of options available for improving the current legislative mandate of EU contract law, particularly the importance of judicial governance and the added responsibility of the EU legislature in matters of policy impacting contract law.

2 The Status Quo

2.1 The Europeanisation of Contract Law

There exists a long road towards a greater degree of harmonisation of EU contract law and its exact starting point, in many ways, is quite difficult to identify. One can go back to the medieval *lex mercatoria*,[22] but the link between the *lex mercatoria* and the research question is at best tenuous. For our purposes, a more realistic starting point would be the three seminal European Parliament resolutions on the approximation of European private law[23] and the Principles of European Contract Law (PECL).[24]

The European Parliament resolutions of 1989, 1999, and 2001 requesting a start to be made on work towards approximating private law of the Member States, brings to the fore the importance of unified law for the development of the internal market. It prompts discussion on unification of private law among the Member States, the development of a common European Code of Private Law, and the desirability for a European Civil Code.[25] Simultaneously, the PECL, drafted by the Commission on European Contract Law (commonly associated with the name of Professor Ole Lando), which started its work around the same time (1982),[26] also greatly advances this debate. The PECL drafted and published in three phases between 1995 and 2002 aims to elucidate general rules of contract law for the European Community.[27] The Principles contain model rules addressing, inter alia, formation, validity, interpretation, contents and effects, performance, non-performance, and remedies, among other general

[22] The historical Lex Mercatoria is the Law Merchant of the Middle Ages. An anonymous author first inscribed it in the late thirteenth century as part of Colford's Collection ("Incipit Lex Mercatoria, que, quando, ubi, inter quos et de quibus sit")
[23] European Parliament resolution of 26 May 1989, OJ 1989 C 158, p 400; European Parliament resolution of 25 July 1999, OJ 1999 C 205, p 518; European Parliament resolution of 13 September 2001, OJ 2001 C 255, p 1
[24] The commission on European Contract Law, Principles of European Contract Law (The European Commission 1995-2002)
[25] See e.g. A. S. Hartkamp et al. (eds), Towards a European Civil Code (1994)
[26] See PECL Parts I and II, xi-xii
[27] Ibid. Table of Content

principles of contract law.[28] However, they are non-binding in nature and are subject to mandatory national laws.[29] Namely, the parties cannot incorporate the Principles into their contracts as the applicable law and replace the governing law provisions of their contracts. Consequently, contracts made pursuant to the Principles, are made subject to mandatory national laws, and as a result, mandatory national laws take priority over any conflicting rules. In defence of the PECL, they were neither drafted as, nor intended to be, a legally binding set of rules.[30] Its primary objective was to establish a foundation for judicial and legislative developments in the area of European contract law and serve as a possible first step towards a future European Code of Contracts.[31]

The next major development in the European contract law debate is arguably the 2001 Communication from the Commission to the Council and the European Parliament on European Contract Law.[32] The Communication, which consulted over 180 stakeholders, from private, public, government, consumer, and academic sectors, identified potential obstacles to cross-border trade resulting from divergent national contract regimes. It did this by putting forward a non-exhaustive list of four possibilities to stimulate debate, which were: (i) taking no action at all— leaving stakeholders to solve problems under the current framework and observing its natural evolution; (ii) promoting the development of non-binding common contract law principles; (iii) improving the quality of legislation in place to produce a more rational and coherent set of laws; and (iv) adopting a new instrument at the EC level (e.g. in the form of an optional instrument).[33] Its findings were reported by the Commission in 2003, by further Communication in the form of an "Action Plan".[34] Of the four options, taking no action at all (Option I) was the least favoured. Acknowledging that the existing

[28] Ibid. Table of Content
[29] Ibid. Article 1:103
[30] O Lando and H Beale (eds), Principles of European Contract Law, Parts I and II (The Hague, Kuwer, 200), Editorial Introduction
[31] Fryderyk Zoll and Reiner Schulze, European Contract Law (2nd edn, Nomos 2018) 22
[32] The Commission's Communication 2001
[33] Ibid. Executive Summary, page 2
[34] The Commission's Communication 2003

framework of EU contract law is, for all intents and purposes, unsatisfactory. In fact, the four consumer associations, primarily dealing with B2C contracts, patently declared the unsatisfactory nature of the current framework on the same grounds discussed in this paper— that it substantially deters consumers from cross-border transactions.[35] And while some respondents saw the benefits of having a new instrument— a potential European civil code (Option IV)— improving the quality of legislation already in place (Option III) was the overwhelming favourite.[36] With this in mind, the Action Plan suggested a mix of regulatory and non-regulatory measures to improve the quality of the Community *acquis*. At its core was the development of a "Common Frame of Reference (CFR)".[37] The CFR contained three primary objectives: (I) to serve as a guide for reviewing the existing *acquis* and the transposition of any new measures; (II) to serve as a tool for a higher degree of convergence between the Member States and possibly third countries; (III) to serve as a foundation to reflect on non-sector-specific measures, in particular, an optional instrument of European contract law that would operate in parallel to national contract law regimes.[38] In a follow-up Communication in 2004, entitled "The Way Forward",[39] the Commission confirmed it would "pursue the elaboration of the CFR", listing eight existing directives for specific attention and providing a possible structure for the CFR[40] (which bears a remarkable resemblance to the structure of the PECL).

These developments paved the way for the Draft Common Frame of Reference (DCFR) in 2009,[41] which serves as a draft for the CFR, among other important purposes.[42] The DCFR goes far beyond general contract law

[35] Ibid. 68, above n 15, annex, paragraphs 3.1.2, 3.2.2, 4.1.2, 4.2.2, 4.3.2, 4.4.2
[36] Ibid. Summary, p 1
[37] Ibid. Para. 59
[38] Ibid. Para. 62(a)
[39] The European Commission Communication, 'European Contract Law and the Revision of the Acquis: The Way Forward' (COM(2004) 651
[40] Ibid. Annex I
[41] Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group), Principles, definitions and model rules of European private law: Draft common frame of reference (DCFR) (2009)
[42] Ibid, p 3

to include, inter alia, principles, definitions, model rules plus a commentary covering most subjects of patrimonial law, tort law, property law, and the law of trusts.[43] In many ways the DCFR is an academic treatise. However, with respect to general contract law, the DCFR incorporates the PECL in a revised form.[44] In addition to dealing with specific forms of contracts, such as sale of goods, services, commercial agency, franchise and distribution, loan contracts, personal securities, and donations, among others.[45]

In 2010, the Commission set up an expert group to revise the academic DCFR into a draft Commission proposal for an instrument on European contract law.[46] In the following year, the Expert Group's work was presented in the form of a feasibility study.[47] The Study covered general rules on formation of contracts and rules on sales contracts and related services, prompting the Commission's proposal for a Common European Sales Law (CESL).[48] The CESL sought to introduce a self-standing set of contract rules that would govern all cross-border sales and related services. It was meant to operate as a second national regime, which traders could opt for, instead of national contract law.[49] Despite the strong rationale for a common sale of goods law, the Member States met the proposal with strong opposition. A number of national parliaments accused the proposal of competence creep,[50] while the European Consumer Organisation rejected the proposal on the grounds that it violated consumer protection rights under

[43] Ibid. Introduction, p 1
[44] Ibid. p 30-33
[45] Ibid. p 23
[46] See Commission Decision 2010/233/EU of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, OJ 2010 L 105/109
[47] The European Commission Expert Group on European Contract Law, Feasibility Study for a Future Instrument in European Contract Law (2011)
[48] The European Commission, Common European Sales Law: the Commission's Proposal For a Regulation (CESL) COM (2011) 635 final
[49] Ibid.
[50] The reasoned opinions came from the British House of Commons, the Belgian Senate, the Austrian Parliament, and the German Bundestag and Bundesrat. For details, see http://www.ipex.eu/IPEXL-WEB/dossier/document/SEC20111165.do#dossier-COD20110284 (last visited 15 June 2020)

existing national laws warranted by Article 6 Rome I.[51] Following the pushback, the proposal was ultimately withdrawn in 2014.

The failure of the CESL was accompanied a year later by two watered-down proposals for directives[52] for harmonising EU rules for e-commerce in the digital market[53]— a hard blow for EU contract law enthusiasts— marking an end of the spirited three-decade trend of the Europeanisation of contract law. Thence, the debate of establishing an overarching framework for EU contract law had momentarily come to a haul, with the pursuit for a future optimal instrument of European Contract Law hanging in the balance.[54]

2.2 The Current State of Affairs

Today, EU contract law seems to consist of a combination of national rules, EU legislative measures, international conventions, and soft law proposals found not only at the national level, but also at European and international levels, and in some cases at the further sub-national level.[55] This is contingent on whether aspects of substantive law, choice of law, or dispute resolution are at issue. National law for the most part governs the general law of contacts. However, in view of a number of issues, EU law, international conventions, and soft law instruments come into the picture.

[51]BEUC and Ecommerce Europe joint call to reject CESL', joint letter sent to all Members of the European Parliament on 20 February 2014. Eidenmüllerl., 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European European Contract Law', 16 Edinburgh Law Review (2012) 301

[52] Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content (2015) 634; Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods Brussels 2015 which was amended in 2017 to include offline sale of goods: Amended Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods, 31 October 2017, 637

[53] The European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2015, A New Start' 2014, 910, Annex 2, at 12, proposal no. 60: 'Modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market'

[54] See Martijn Hesselink, p. 1

[55] See Martijn Hesselink, p. 144

The EU takes a piecemeal approach to adopt specific measures for specific issues in relation to matters of contract law.[56] The EU legislator has adopted this selective approach of harmonising contract law since the early 1980s.[57] And the growth in global trade, e-commerce, and privatisation of previously state owned sectors has exacerbated this trend.[58] As a result, many areas of contract law, from consumer law to various areas of the digital market are now subjects of determined efforts at harmonisation. Case decisions have also played a prominent role in this endeavour.[59]

The landscape is, however, slightly different when we turn to international law. Here, a large number of conventions deal with commercial matters, and therefore subsequently matters of contract law. The CISG, which governs cross-border contracts for the sale of goods, is probably the most notable.[60] The CISG applies automatically where both parties to the contract have their places of business in different contracting states (given the *lex fori* is the law of a contracting state and the parties have not expressly excluded its application); or provided that the rules of private international law lead to

[56] The explanation for this lies in the limited competence of the EC legislator: any act of EU legislation requires a specific legal basis justifying the particular measure; See Paul Craig and Gráinne de Burca, Chapter 3

[57]See Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372; Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382; Directive 2008/48/EC on credit agreements for consumers, OJ 2008 L 133; Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993 L 95; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171; Directive 2000/35/EC on combating late payment in commercial transactions, OJ 2000 L 200

[58] See reasons given in Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC; Also see H-W. Micklitz, Y. Svetiev, and G. Comparato (eds) European Regulatory Private Law—The Paradigms Tested, EUI Working Papers, LAW 2014/04 69, at 78

[59] See Case C-26/91 Jakob Handte & Co. GmbH (1992) I-03967 that approached freedom of contract; Case C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände (Quelle) (2008) I-02685 that considered the supremacy of EU law over national law; Cases C-585/08 and 144 /09 Joined cases Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller respectively (Pammer) (2010) I-12527 dealt with jurisdiction; Case C-137/08 VB Penzugyi Lizing ZRT v Ferenc Schneider (2010) ECR I-10847 that stated Article 267 TFEU must be interpreted to mean that the CJEU can interpret the concept of unfair terms used under the Directive 93/13/ECC of 5 April 1993 on unfair terms in consumer contracts

[60] It has a considerable amount of case law and academic literature; and is ratified by all Member States

the application of the law of a contracting state.[61] However, the extent to which the CISG has been successful in harmonising sales law is a matter of debate. There is strong evidence to suggest that adjudicators remain prone to interpreting the broad provisions of the Convention through the lens of domestic law, and thereby debilitating its universality.[62] In addition to the CISG, a number of conventions put forward by different organisations govern contractual issues in various fields, such as international sales,[63] international financial leasing,[64] carriage of goods by road,[65] air,[66] sea,[67] and inland water ways,[68] among others. However, they do not amount to a comprehensive legal framework in any commendable capacity.[69] Therefore, similar to EU law, international law too takes a piecemeal approach of adopting specific measures to specific issues. Not to mention, the fact that contracting states vary from convention to convention exacerbates this further.[70]

In addition to this, both the EU and other non-state actors have enacted soft law instruments with different aspirations.[71] They range from striving to codify trade usages and commercial customs[72] to providing model

[61] See CISG Article 1(1) (a) & (b)
[62] See Harry Flechtner, "The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1999) 17 Journal of Law and Commerce 187
[63] Convention of 1 July 1964 relating to a Uniform Law for the International Sale of Goods; Convention of 1 July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.
[64] UNIDROIT Convention of 28 May 1988 on International Factoring
[65] UNIDROIT Convention of 19 March 1956 on the Contract for the International Carriage of Goods by Road.
[66] Montreal Convention of 28 May 1999 for the Unification of Certain Rules relating to International Carriage by Air
[67] United Nations Convention of 31 March 1978 on the Carriage of Goods by Sea; Athens Convention of 1 November 2002 relating to the Carriage of Passengers and their Luggage by Sea; United Nations Convention of 11 December 2008 on Contracts for the International Carriage of Goods wholly or partly by Sea
[68] Convention of of 22 June 2001 on the Contract of Carriage of Goods by Inland Waterway
[69] Directorate General For Internal Policies of the Union of the European Parliament, Building Competence in Commercial Law in the Member States PE 604.980 2018, p 17
[70] Poland and Ireland have not adopted the CISG
[71] See Jürgen Basedow, The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Law Making, Am. J. Comp. L. 56 (2008) 703
[72] See ICC Incoterms, ICC Publication No 720E (2011) and ICC Uniform Customs and Practice for Documentary Credits – UCP 600, ICC Publication No 600E, 2006

contracts.[73] However, in the field of general contract law (pertinent to us), the PECL and the UNIDROIT Principles loom large. They contain model rules addressing issues of general contract law, such as formation, validity, interpretation, contents and effects, performance, non-performance, and remedies.[74] Under the PECL, parties can incorporate its rules into their contract should they wish their contract to be governed by those laws.[75] However, parties are unable to incorporate the Principles into their contracts as the applicable law and replace the governing law provisions of their contracts.[76] In this respect, the Rome Convention applies. While parties may choose the law applicable to the contract in whole or in part, and change the applicable law by mutual agreement at any time,[77] they do not have the freedom to avoid choosing a national jurisdiction as the applicable law.[78] Therefore, contracts made pursuant to the Principles, are ultimately made subject to mandatory national law, and thus, mandatory national laws take priority over any conflicting rules.

Therefore, while these instruments may provide parties to cross-border transactions with useful guidance and offer uniform rules for international transactions. It goes without saying that they do not amount to a comprehensive framework for general contract law in the EU, which still remains strongly national. Conversely, parties subject to national law may simultaneously be subject to EU law where it approximates the field and potential international rules that may have not been excluded. As a result, cross-border agreements in the EU will not be interpreted or enforced as anticipated, even if the parties have agreed upon a domestic choice of law clause, since they may be subject to both EU and International rules. This is

[73] See the ICC Model Commercial Agency Contract, the ICC Model International Sale Contract, and the ICC Model Distributorship Contract
[74] The PECL Table of Content
[75] The PECL Chapter 1: General Provisions 2 Section 1- Scope of the Principles 3 Article 1:101 (ex art. 1.101) - Application of the Principles 4 (2)
[76] Article 1:103(2) PECL states that "*Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract*."
[77] See Rome Convention Article 3
[78] See Adrian Briggs, The Conflict of Laws (Oxford University Press, 2002) 159

not all; directives, which often govern the field of EU contract law, by default, contribute to further fragmentation at the national levels (discussed in section 3.1.2.). This means, when a dispute arises under a contract with a foreign party, whether it is for the purchase or sale of goods or for the carriage of goods, a party may be surprised to learn that their contract may not be interpreted or enforced as anticipated. In other words, *"as soon as users leave these safe harbours* [(national law)] *they risk running around on shallows consisting of either unresolved conflicts of individual private law regulations or the absence of coordination between European law and international private law. In some places there is risk of the ocean drying up altogether, because the law of EU directives which is purely geared to individual conflict situations is in the long term upsetting the inner equilibrium of the national civil codes."*[79]

[79] In 2001 European Parliament Resolution, n 63, recital. The accompanying Report: 2001 Report, n 66, 11; carries the quote from the reporter for the European Parliament

3 Legal Diversity and the Internal Market

3.1 Structural Barriers

3.1.1 Legal Evolution and the Implicit Dimensions of a Contract

Contracts strive to reduce the complexity of human relationships by confining their expectations and obligations on pain of state sanctions. Thus, each legal system must labour methods to interpret these expectations and obligations. Few legal contractual doctrines can be interpreted without reference to the implicit dimensions of a contract; in fact, most jurisdictions require contracts to be interpreted as a whole. Namely, taking into account all surrounding circumstances of the contract.[80] The implicit dimensions of a contract are, in part, derived from the social and cultural norms and conventions of the applicable jurisdiction.[81] For example, to ascertain the existence and meaning of a contract, the intention of the parties is of central importance.[82] Here, the courts infer whether the parties intended to create legal relations and whether they intended their representations to be promissory in nature. Thus, most courts often perform an objective test to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be*".[83] In the process of ascertaining this, the courts will look to both the language and the commercial context of the contract. Both vary in light of social and cultural preconditions.[84] To uncover these latent intentions, courts must engage in an elaborate process of examining the circumstances, conditions, and environs

[80] Catherine Valcke, Contractual Interpretation at Common and Civil Law; An Exercise in Comparative Legal Rhetoric (Hart Publishing 2009) 77-144
[81] Micheal Sandel, 'The Procedural Republic and the Unencumbered Self', 12 Political Theory (1984) 81,p 86–87
[82] Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38
[83] Ibid., para 14
[84] See D. Campbell, H. Collins, and J. Wightman, Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts (2003)

of the contract, in order to discover a complete picture of the parties' intentions. This is not all, once a contract is found to exist; it is also construed by reference to the parties' intention within that social fabric.[85] This is true for establishing the most basic notions of a contract, such as an offer, acceptance, consideration, breach, damage, or even more specific terms such as, fraudulent use, durable medium or equitable remuneration.[86]

Further, general principles of contract law, which are broad and open in nature, give judges the possibility to resolve matters that are not explicitly provided under the contract. But to do so, they often look to the evolution of underlying values and norms of the applicable principles, which continue to adapt through social evolution. Namely, on how interactions between individuals within that particular context arise, change, and are maintained.[87] Take for example, the German Constitutional Court's (the *Bundesverfassungsgericht)* interpretation of fundamental rights in matters of private law. Here, the *Bundesverfassungsgericht*, establishes that rules of private law are to be interpreted in light of the order of constitutionally protected values.[88] This spirit of interpreting fundamental rights establishes the general clauses of the German Constitution as inroads for interpreting fundamental rights in matters of private law. On the other hand, when legal disputes concerning matters of private law dealing with social rights are brought before the Italian Constitutional Court, the application of the principle of solidarity and equality in combination with similar rules of private law, such as good faith and fair dealing, apply.[89] Further, the German Constitutional Court explicitly recognises the freedom of contract, whereas the Italian Constitutional Court does not (theoretically

[85] Ibid.
[86] See Martijn Hesselink, p. 144
[87] Even though civil courts do not have precedents in the same way that common law courts do, uniformity requires courts not to deviate too far from the established norms in general contract clauses; Martijn Hasselink, p. 400-401. This also then leaves us with the question of what constitutes "too far".
[88] Chantal Mak, Fundamental Rights in European Contract Law (1 edn, Academisch Proefschrift 2007) 23
[89] Ibid.; also See Equality pursuant to Article 3 of the Constitution (Ref. Decisions No.188/2015 and No.10/2016); Solidarity, pursuant to Article 2 of the Constitution (Ref. Decision No.264/2012)

giving it less credence). This further stands in direct contrast to most common law jurisdictions. These jurisdictions do not apply the doctrine of good faith in interpreting contractual dealings at all; instead they apply specific rules for unethical contracts. [90] The Scandinavian courts also differ in some respects. Scandinavian courts would sometimes look to the facts, as opposed to the law, to lead its evaluation. The court after examining the facts, may decide that the breach of contract law was so reckless as to render a party's ability to invoke the exemption clause of the contract void.[91] Therefore, parties are unable to determine whether the courts are relying on a general rule of contract law to determine the liability for reckless breach or whether it applies to some special circumstances of the case. Ultimately, expressed or implied, judges must take into account the surrounding circumstances— the social context of the applicable jurisdiction— to interpret these principles.[92]

Therefore, contracts are to a large extent, social artifacts. Courts interpret contracts through the empirical study of the real-world problems they seek to solve and the context in which those problems take place. In other words, they are interpreted by how they are governed "in-action" and where this action takes place is inseparable from this process. Thus, each legal system operating in its own microcosm will interpret the micro-dynamics of why and how parties to a transaction draft certain contracts, and why and how specific commercial norms within that jurisdiction exist. This is not to say that different jurisdictions do not share common technical properties, but instead, to say that those properties are also subject to the social micro-dynamics of the particular context;[93] and therefore, take into account symbolic theories and traditions within that context. Similarly, legal

[90] E. McKendrick, Contract Law. Text, Cases and Materials, (Oxford University Press 2003) 533

[91] Art. 3(3) TEU read in conjunction with Protocol 27 on the internal market and competition, states that the EU is to establish an internal market with a system where competition is not distorted. Additionally, Art. 19(1) TFEU promotes Member States' activities to be conducted with the principle of open market economics with free competition; also see Kåre Lilleholt, 'Application of General Principles in Private Law in the Nordic Countries' [2013] (20) Juridica International 12-19.

[92] See Martijn W Hesselink, page 35

[93] The varied transposition of EU Directives serves as a good example of this fragmentation

doctrines interpreted through a European lens would bear a uniquely European spirit. Take the EU courts for example; here, the court embodies a European identity (as opposed to a national one).[94] Thus, the courts' implicit dimensions would drive from the values and goals of the EU, such as building an economic area with no internal borders in which there is free movement of goods, persons, services, and capital[95]— markedly different to the values and goals of any Member State. Then, the dynamic nature of the EU and its legal rules that play a role in bringing about the change they regard as progress— an ever-closer Union— would naturally permeate the interpretation of these general principles. From this perspective, further Europeanisation is most welcome, and more importantly, comes first. Contracts would be interpreted in light of that commercial context created by European social norms and thus evolve accordingly.[96]

In addition to this, from a purely administrative and practical perspective, laws in each jurisdiction through their unique legal evolution congregate in different places.[97] Even if contract rules carry the same substance in two different Member States, their threshold for qualification or simply it's place within the national legislative system may be different. Due to each jurisdiction's unique legal evolution, the same laws can quite well be found in vastly different places in their *acquis*.[98] Thus, for foreign SMEs and consumers (that often do not have in-house lawyers or access to large law firms), it is not that the law is different but that it may not even be detectable. For example, the substantially equivalent limitations to freedom to contract are to be found in some jurisdictions under rules on formation of contracts, and in other jurisdictions under rules on the content of a contract

[94] See e.g. S. Zweig, Die Welt von Gestern: Erinnerungen eines Europäers ([first published 1942] 2017), at 463, one of the heroes of Europeanism wrote at a particularly dramatic moment: 'Europa, unsere Heimat, für die wir gelebt'
[95] See Catherine Barnard, p 559
[96] See Guy Verhofstadt, The United States of Europe; Manifesto for a New Europe (2006); Sofia Declaration of The Spinelli Group and the Union of European Federalists (Sofia, 22 February 2018); see Bartl, 'From Europe-As-Project to a Real Political Community', Social Europe, 24 April 2019
[97] Matthias Strome, 'Freedom of Contract: Mandatory and Non-Mandatory Rules in european Contract LAw' [2006] 9 (XI/2006) Juridica International 35
[98] Ibid.

or validly.[99] We run into the same issues with general contract norms. As one can imagine, the vaguer the norms (and general contract norms are vague) the larger the number of interpretations. Take for example the significant differences in the development of inadmissible terms in contracts between Member States. In some Member States such as Germany and the Nordic countries, courts exert strict control over the fairness of contractual terms (even in B2B contracts),[100] while others provide for a limited control by way of interpretation or only allow specific contract clauses to be struck down in commercial contracts.[101] Another prime example is the transposition of 1999 EC Sales Directive[102] by France and Germany. Here, Germany, chose to integrate consumer law into the existing Civil Code— bringing EU contract law into the Civil Code;[103] while France stayed with the model of splitting contract law into a Code civil and a Code de la consummation— creating two different models as to why parties in contractual relationships should be protected.[104] Ultimately, making it difficult for parties to find out why and when they would be protected against unfair contract terms in both jurisdictions.[105]

Despite their differences, some argue, that their outcomes are similar.[106] After all, general contract clauses in many jurisdictions provide their judges with the legal basis to apply certain fundamental norms, even when they are not expressly acknowledged. But even if the outcomes are in fact similar in nature, it does not cure the intransparency caused by different rules in different Member States, which qualify differently and are found in different places, to ultimately bring the level of requisite legal certainty to establish a common market for all participants.

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[99] Ibid.
[100] The Commission's Communication 2003, p 8
[101] Ibid.
[102] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
[103] Stefan Grundmann and Marie-Sophie Schäfer, 'The French and German Reforms of Contract Law' [2017] 0025(2017; 13(4)) European Review of Contract Law 459-490
[104] Ibid.
[105] Ibid.
[106] Stefan Vogenauer and Stephen Weatherill (eds), p 245–248

3.1.2 Varied Application of EU Law

Directives primarily regulate the field of EU contract law.[107] Under Article 288 TFEU, a directive "shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the national authorities the choice of form and methods."[108] Therefore, unlike regulations, which are "binding in [their] entirety and therefore directly applicable in all Member States" upon their entry into force,[109] directives need to be transposed. Each Member State is then left to decide the measures it would implement to achieve the outcome set out in the directive. Thus, implementation of directives is rarely uniform in every Member State.[110] Issues of minimum harmonisation further complicate this. I.e. directives allow Member States to have higher levels of protection than those provided by the directive itself. While beneficial for some areas it often fails to achieve the uniformity of solutions for similar situations that the internal market strives to achieve in regard to cross-border trade. The early consumer directives in the field of distance selling, namely, doorstep selling[111], timeshare[112], distance selling,[113] and distance selling of financial services,[114] are prime examples. Here, the right of withdrawal; that is, the "cooling off" period in which the consumer could withdraw from the contract without incurring any penalties, varied under each directive. In addition to this, the Distance Selling Directive provided a "minimum

[107] Schulze; Zoll, European Contract Law (n27), pg. 12-15; also see for example: Doorstep Selling (1985), Consumer Agents (1986), Consumer Credit (1987), Travel Package (1990), Unfair Terms (1993), Time Share (1994), Distance Selling (1997), Late Payments (2000).
[108] See Article 288 TFEU
[109] Ibid.
[110] See Paul Craig and Gráinne de Búrca, p 201
[111] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31).
[112] Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).
[113] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
[114] Directive 2002/65/EC of 23 September 2002 on distance marketing of consumer financial services, (OJ L 271, 9.10.2002, p. 16)

clause" that allowed consumers a period of at least seven working days to withdraw from a contract.[115] This led to numerous inconsistencies with the "cooling off" period varying under each directive and therefore applying differently in different situations, and the 'minimum clause' leading to different levels of consumer protection in different jurisdictions. With some Member States providing up to twice the withdrawal period available in other Member States.[116] Consequently, consumers were not sure if the same level of protection in their home country applied when they shopped in another Member State. Simultaneously, businesses were not sure if the same level of compliance in their home country would suffice when they marketed and sold their products and services in other Member States.[117] This created categorical inconsistencies, with similar situations having the potential of being treated vastly differently without any meaningful justification.

Further, regulations have both vertical and horizontal direct effect.[118] I.e. they are capable of being relied upon by individuals before their national courts against both State entities (vertical direct effect) and private parties (horizontal direct effect), granted they are sufficiently clear, precise, and relevant.[119] The position of directives is markedly different. Under EU law, directives generally have only a vertical direct effect.[120] Therefore, private parties, with a few exceptions,[121] may only use direct effect vertically, against the state or an emanation thereof.[122] This precludes individual parties from enforcing measures in the directive against other individual entities. Here, parties may only rely on national implementing measures.

[115] Council Directive 85/577/EEC, Article 6
[116] The Commission's Communication 2003, paragraph 16
[117] Under Council Directive 85/577/EEC certain amount of mandatory information is to be provided to the consumer
[118] See Paul Craig and Gráinne de Búrca, Chapter 7
[119] Case C 403-98 Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna [2001] ECR I-103, in which the provisions of a regulation were not sufficiently precise and therefore could not be directly relied upon.
[120] Case 41?74 Van Duyn v Home Office [1974] ECR 1337
[121] Case C-144/04 Mangold v Rüdiger Helm [2005] ECR I-9981: The CJEU held national courts must set aside national law that conflicts with the principles enshrined under the directive where the time limit had not expired
[122] Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723

Another concern involves the interpretation of directives. If a term is interpreted in light of the specific directive, and the directive itself applies differently in different Member States, then such an interpretation can lead to further fragmentation. For example, in the case of *Simone Leitner*[123] the CJEU interpreted the term "damage" in the Package Travel Directive only in light of that one particular directive.[124] This then requires each Member State to amend their existing set of implementing measures and definitions, in order to implement the specific meaning of this abstract term in the light of the relevant directive applied differently in their own jurisdictions.

Additionally, further fragmentations persist due to the high level of discretion given by directives to national legislatures. In many cases terms in directives are defined too broadly or not defined at all.[125] This grants broad discretion to national legislatures and courts to define them. While it is true that the national implementation laws would still have to conform to the directive's overarching objective, their application can be markedly different. While these characteristics may allow directives to serve as a vehicle between the EU and its Member States on controversial matters, by providing discretionary legislative options to the state as a compromise, they may not meet the requisite level of legal certainty and uniformity in matters of general contract law required for international trade. Therefore, the only apparent way to obtain absolute legal certainty is to take local legal advice, which is often an expensive and inconvenient solution for consumers and SMEs.[126] Thus, confidence in contracts as a tool for economic co-ordination between Member States is greatly diminished, since no one can be certain where they stand in each jurisdiction.

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[123] Case C-168/00 Simone Leitner v TUI Deutschland, [2002] ECR I- 2631

[124] See Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29), where the term 'damage' is defined.

[125] This was also highlighted as a significant problem by the final report of the High-Level Consultative Group ('Mandelkern Group', set up by the ministers responsible for the civil service in November 2000 report submitted on 13th November 2001) on Better Regulation 70

[126] The Commission's 2003 Communication, Section 3.2

3.2 Economic Barriers

An empirical study conducted by the Tinbergen Institute in Amsterdam, found that similar legal systems might be capable of bringing between 50 to 80 per cent more cross-border trade within the OECD.[127] Another study, conducted by the Center for Economic Policy Research, showed that legal similarities could increase trade among OECD countries by up to 65 per cent.[128] The European institutions' regular public opinion survey, the Eurobarometer, confirms this. Several of its surveys show that European consumers are substantially hesitant to purchase goods and services from sellers in other Member States due to legal uncertainties.[129] The directive for digital contracts refers to this issue, stating that consumers avoid purchasing goods from websites in other countries for lack of legal certainty and recourse to remedies.[130] Studies show only around 30 per cent of consumers consider themselves well-protected in issues culminating with sellers in different Member States.[131] In fact, the proposal for the directive for digital content states that at least 70 million consumers have experienced one or more problems with just four popular types of digital content (music, anti-virus, games, and cloud storage), and further, only an appalling 10% of consumers experiencing cross-border problems received adequate remedies,[132] this includes inadequate access to courts.[133] According to the same proposal this has resulted in an estimated financial and non-financial detriment of 9 to 11 billion Euros for consumers. This explains why the Commission's proposal points out that 42% of retailers selling offline and

[127] F den Butter and R Mosch, Trade, Trust, and Transaction Costs (2009) Tinbergen Institute Working Paper No 2003-082/3.
[128] A Turriniand and T Van Ypersele, Legal Costs as Barriers to Trade (2006) Center for Economic Policy Research Discussion Paper Series Paper No 575.
[129] WHJ Hubbard, 'Another Look at the Eurobarometer Surveys' (2013) Common Market Law Review 187
[130] See proposal for new digital contract rules on the European Commission's website: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en
[131] S Macaulay, 'Non-contractual Relations in Business: a Preliminary Study' (1963) 28; H Beale and T Dogdale 'Contracts betweenBusinessmen' (1975) 2 British Journal of Law & Society 45, for Engliand
[132] Proposal for new digital contract rules on the European Commission's website
[133] Standard Eurobarometer 57.2, reported in 'Public Opinion in Europe: Views on Business-to-Consumer Cross Border Trade' (2002) 3, 20, 39-40

46% of retailers selling online consider the cost of compliance with different consumer protection and contract law rules as significant barriers to cross-border sales.[134] It is said "*two thirds of companies face costly obstacles to trading with others in a different jurisdiction. A major reason for this is the existence of different legal systems… [and] as to the way ahead, a surprising 83% of businesses view the concept of a harmonized contract law favorably."*[135]

It's true that we cannot delineate the exact cost of divergent national contract laws in relation to the economic ramifications suffered as a result of the multi-faceted EU legal system as a whole. However, intuitively, given the elemental role that contracts play in economic transactions and the debilitating effects of legal uncertainty they seek to alleviate, it seems reasonable to presume that their divergences would contribute to creating an unreasonable level of legal uncertainty for cross-border trade, particularly for consumers and SMEs.

3.2.1 Barriers to Trade

While the freedom to choose the applicable law and the competent forum provide some legal certainty and enjoy near universal recognition,[136] it is not always commercially realistic or desirable. For instance, consider the unequal bargaining power that is ubiquitous in economic transactions; where one party to a bargain, has more and better alternatives than the other. The dominant party would impose the applicable law and other limiting contractual provisions on the smaller, less dominant party. Even where parties agree on the applicable law and the competent forum amicably, the mandatory rules of the law that has not been chosen as applicable,

[134] Ibid.
[135] Stefan Vogenauer and Stephen Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law— an Empirical Contribution on the Debate found in Stefan Vogenauer and Stephen Weatherill (eds), 136-37
[136] See for an overview of the freedom to choose the competent forum Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968, OJ EC 1972, L 299/32, consolidated version OJ EC 1998, C 27/1; Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, OJ EC 1980, L 266/1, consolidated version OJ EC 1998, C 27/34

nevertheless apply.[137] Therefore, less dominant parties may reasonably decide that the effort of negotiating and the corresponding legal costs for seeking advice on foreign law, and all other potential costs, such as the authentication of documents, translations, on-going legal advice, and the potential out-of-state litigation costs are simply not worth the economic benefits.[138] This is especially true for SMEs and consumers, which have limited access to legal services and other human capital that large organisations routinely enjoy. As a result, consumers and SMEs in foreign markets suffer clear competitive disadvantages, which also has serious anti-competitive ramifications for the internal market and the economic constitution of the European Community.[139]

3.2.2 EU Law Unsuitable for International Trade

Every legal system interprets its laws and determines its legal norms in light of its own legal context (as discussed in length in section 3.1.1.). They do little harm within that context, because parties operating within it can be presumed to know or have the possibility of finding out the law relatively easily, in comparison to their foreign counterparts. This does not hold water at the international level. Take the old Scandinavian Sale of Goods Act for example. Here, the Act requires buyers that invoke the 'late delivery on goods' clause to give immediate notice,[140] while most other jurisdictions require notice to be given within a reasonable period of time.[141] This has had the effect of taking foreign traders unfamiliar with Scandinavian law by surprise. A more common example is the common law concept of "time is of the essence". This phrase in a contract means that performance by one party at or within the specified period in the contract is necessary to enable

[137] See Matthias Strome, pg 35
[138] The Commission's 2003 Communication, p. 7-10
[139] Julio Baquero cruz, Between Competition and Free Movement The Economic Constitutional Law of the European Community (Hart Publishing 2002) 85-104
[140] O Lando, "the Lex Mercatoria in International Commercial Arbitration" (1985) 34 ICQLQ 753.
[141] See CISG Article 45(2)

that party to require performance by the other party;[142] something that lawyers outside the common law jurisdictions are unfamiliar with. It must also be noted that boilerplate clauses and contracts that play a large role in business transactions are also dampened under the current framework. Ready-made contracts (which are created to facilitate trade) would now have to be different for different Member States, since it's impossible to use the same business terms across the EU. The point is, every legal system has rules of this nature, and their divergent legal evolution only exacerbates these legal fissures over time, making varied national contract law unsuitable for cross-border transactions within the internal market.

3.3 Legal Barriers

3.3.1 Notion of a Contract

The notion of what constitutes a binding agreement is the starting point for all considerations. Each court considers a number of elements to determine whether parties have made an enforceable contract. This could include, inter alia, ensuring parties of full capacity made the contract; with the intention of creating legal relations; satisfying all requirements of form.[143] The assessment of whether parties have engaged in a process of offer and acceptance is recognised universally.[144] While both concepts are present in many jurisdictions, they apply differently. Take French law for instance, where consent and the theory of autonomy take precedence.[145] This requires the parties to have a meeting of the minds, at least in principle, for a valid offer and acceptance to take place. On the other hand, most common law jurisdictions apply an objective test to determine if parties have made an offer and gone on to accept it. This means, if party A reasonably believes that party B made him or her an offer, and party A accepted that offer, a

[142] See the Law Reform Commission Report on Land Law: Service of Completion Notice, 1991
[143] Reiner Schulze and Hryderyk Zoll, P 39-104
[144] See the recently revised French Code civil, Article 1113 to 1122; Ewan McKendrick, Contract Law, 11th edition (Palgrave, 2015) Chapter 3
[145] Ibid.

binding agreement is made under common law, even if party B subjectively did not intend to create legal relations, and thus there was no meeting of the minds.[146] Further, most common law jurisdictions require an element of consideration to be present for a binding agreement to exist,[147] i.e., some form of exchange or inducement capable of rendering the promise enforceable. On the other hand, French law and most civil law jurisdictions dictate that a contract cannot exist without a lawful cause (*causa*).[148] Cause is the reason why a party enters a contract and undertakes to perform contractual obligations. This is different from consideration, which requires something of value to be exchanged between the parties.[149]

Similar fundamental problems persist where a unilateral mistake is found upon the completion of a contract. The doctrine of mistake within the notion of what constitutes a contract is important in order to provide relief or for rectifying any misunderstandings between the parties. For example, French law holds that an *"error is a cause of nullity of an agreement … when it goes to the very substance of the object of the agreement".*[150] Similarly, German law enables lawful cancellation of a contract where an *"error as to* [the] *qualities… of the thing which are regarded as essential"* to the contract emanates.[151] Then, in order to cancel a contract, the courts look to whether the mistake goes to the substantial qualities of the object of the agreement. If this is so, avoidance is valid.[152] By contrast, the EU soft law instruments take a slightly nuanced approach. Article 4:103 (1) (b) of the PECL outlines that for the avoidance of a contract due to a mistake, the situation must be that "*the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract*

[146] Uniform rules for European contract law, page 12
[147] Ewan McKendrick, Contract Law, 11th edition (Palgrave, 2015)
[148] For example, Artilce 1131 of the French Civil Code provides that 'an agreement without cause or one based on false or an illicit cause cannot have any effect"
[149] Christian Larroumet, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law"(1986) 60 Tul L Rev 1209.
[150] Du Code Civil Article 1110.
[151] German Civil Code S199 (2) BGB
[152] Hein Kötz, European Contract Law Vol. 1: Formation, Validity, and Content of Contracts; Contract and Third Parties (Clarendon Press, 1997) p 173

or would have done so only on fundamentally different terms."[153] Similarly, Article 7:201(1)(a) of the DCFR states "*a party, but for the mistake, would not have concluded or would only have done so on fundamentally different terms"*.[154] Here, the non-mistaken party must reasonably discern that the other party was entering the contract on mistaken terms. The knowledge of a fundamental mistake alone is insufficient. While the doctrines of mistake under common law jurisdictions underpin the objective concept of misrepresentation, there is no equitable jurisdiction for having knowledge of a fundamental mistake as to the state of affairs governing a contract.[155] Instead, the mistake must be regarding a specific term of the contract. The contract is to be assessed objectively to determine if any mistakes persist, and what the reasonable expectations of the parties were, based on the written word of the contract.[156]

These differences lead to radical differences in outcome. Say, a party to a contract in France makes a mistake as to the nature of what is bought or sold, or its usage,[157] French law will give relief on the basis that the buyer or seller's consent was not adequately informed. Under common law, the mistake is immaterial, unless the buyer or seller's consent was induced by a misrepresentation (an incorrect statement, which may or may not be made in good faith) objectively decided on the language of the contract.[158] This means that there is no notion of fraud by silence or a duty to disclose a mistake to the other party. Namely, then, under common law there are no remedies even where one party knowingly refrains from pointing out a mistake of fact— diametrically opposite to French and German law.[159] Therefore, some legal evolutionary processes simply require parties to have less regard to certain matters while giving more regard to others. In this

[153] PCEL Article 4:103 (1) (b)
[154] DCFR Book II, Art 7:201(1)(a)
[155] Catherine MacMillan, Mistakes in Contract Law (Edition 1, Hart Publishing 2012), Introduction
[156] Ibid.
[157] Barry Nicholas, French Law of Contract, 2nd edition (Oxford University Oress, 1992), 103
[158] For misrepsentation see Chitty on Contracts (n 10) Vol 1 Ch 7; Mc Kendrick (n 8) Ch 13
[159] H Beale, Mistake and Non-disclosure of Facts: Models for English Contract Law (Oxford University Press, 2012)

case, French and German contract law requires reasonable regard to be had for the other party's interests. To give a simple example, take the case of *Interfoto Pictures Liberty*,[160] where the Privy Council allowed a seller of land to terminate the contract, on the grounds that the buyer was 10 minutes late to pay for the land. A decision a continental court would be very reluctant to reach. The theory of preconditions (Förutsättningsläran) often applied by Swedish lawyers to interpret contracts, is yet another varied approach for establishing what constitutes the terms of a contract. This principle is based on how the contract would have been written if at the time of the contract one had known of subsequent events, thereby putting prodigious emphasis on the exact time at which the contract was concluded to determine what constitutes the terms of a contract.[161]

This is not all; most jurisdictions have their own requirements of form in order to find a valid contract. Some jurisdictions require certain contracts to be concluded before a notary or have special authentication of documents.[162] Other jurisdictions require certain contracts to be in writing or have certain language.[163] For example, under Article 1341 of the Italian *Codice Civile*, certain clauses must be individually initialled to be legally valid.[164] Such rules apply independently of the choice of law made by the contracting parties. Furthermore, the area of implied contracts varies in each jurisdiction as well. Thence, at first it may appear that there are some apparent differences that do not make much practical difference, since they rely on similar models and principles, such as the offer-acceptance model. But as we can see major differences do persist in practice and those differences are

[160] Bingham LJ in Interfoto Picture Liberty Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, 439; "In many civil law systems, and perhaps in most legal systems outdie the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith… English law has, characteristically, committed itself to no such overriding principle"
[161] Christina Ramberg, The Hidden Secrets of Scandinavian Contract Law. in Peter Wahlgren (ed), What is Scandinavian law? (Stockholm Institute for Scandinavian Law 2007) 251-252
[162] Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433
[163] The European Communication's 2003 Communication, para. 35
[164] Italian Codice Civile Article 1341

only amplified through their varied evolution (as discussed in length in section 3.1.1.).

3.3.2 Breach of Contract

The doctrine of breach of contract is broadly divided between 'non-performance/breach' and 'fundamental non-performance/breach' across almost all jurisdictions.[165] This paper will focus on the latter using two approaches. First, it will provide an overview of typical processes that courts undertake in finding a fundamental breach. This is done to elaborate, somewhat intuitively, that such a process is inevitably bound to have divergences where it is not unified. Second, it will provide a comparative analysis in relation to one of the most important aspects of breach— termination— to highlight these divergences.

3.3.2.1 Application of Fundamental Breach

Many international, European, and national instruments use a "foreseeability test" using the reasonable person criteria to determine if a fundamental breach has occurred.[166] Article 25 of the CISG encapsulates this. It states: "*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*"[167]
Therefore, for a breach to be fundamental in nature, it must result in substantial detriment and for the non-performing party to not foresee a reasonable person of the same kind in the same situation to foresee such a result.

This requires the national court to first assess "substantial detriment". Under CISG case law this requires an assessment of the gravity of the seller's

[165] See PECL and DCFR
[166] The PECL and the UPICC also confirms this approach
[167] CISG Article 25

breach and the corresponding economic loss.[168] Next, it requires assessing the "expectations" of the aggrieved party, since the detriment necessitates ascertaining what the party was entitled to expect under the contract. Thus, the courts must also labour methods to carry out a test to ascertain the expectations under the contract in order for non-performance to be regarded as fundamental. The definition also requires assessing "foreseeability", which has several elements. An objective element; where the courts must decide what "a reasonable person in the same trade" constitutes.[169] A procedural element; asking if that reasonable person operating within that particular social context could not have foreseen the result.[170] In addition, it also has a further knowledge element; to determine "whether the promisor foresaw the circumstances which made the obligation in question important".[171] An assessment of time of foreseeability is also required here. For instance, do the courts determine foreseeability at the time the contract is made or is it based on knowledge gained after entering into the contract? The CISG is not clear on this. However, under the DCFR, a party is liable for loss actually foreseen at the time the contract was made.[172] Finally, ascertaining what constitutes "a reasonable person" is also required under the above definition. Here, CISG case law resorts to the criteria under the PECL, which requires reasonableness to be judged by a party acting *in good faith,* in the same situation, as he or she would consider as being reasonable. This assessment requires several elements to be taken into account, including but not limited to, the "*nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions."*[173] These questions, however, beg further clarity in the courts. For example, how will the courts determine if the reasonable man standard

[168] See 'The UNIDROIT Principles and CISG
[169] Schlechtrien 'Commentary on the UN Cinvention on International Sale of Goods (CISG)', 1998, Munich, 289
[170] Robert Koch 'The Concept of Fundamental Breach of Contract under United Nations Convention on Contracts for the Internatioal Sale of Goods (CISG), Pace ed., Review if the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International
[171] Stefab Vogenauer, Jan Kleinheusterkamp 'Commentary on the UNIDROIT principles of international commercial contracts (PICC), p 826
[172] DCFR Article 3:703
[173] PECL Article 1:302

is used for different markets or sectors? What if standards for trade differ vastly between the *lexi fori* and the parties' place of business?

This requires, fundamental breach to be defined on a case-by-case basis through analysing the prerequisites of what constitutes a fundamental breach. As we can see this includes analysing broad terms such as foreseeability, substantial detriment, reasonable man criterion, intention or recklessness, strict compliance, the essence of the contract, loss of reliance, and disproportionate loss, among others. As one can imagine, majority of these broad terms are based and defined by judges on the parties' own understanding, influenced by social and economical factors within the social fabric of each jurisdiction. Ultimately, there seems to be a delicate balancing of interests that is required, with many matters of judicial discretion contingent on the commercial context of the jurisdiction. Therefore, it is difficult, if not impossible, to find common definitions for these rules in different Member States. Thus, eventual fragmentation seems inevitable without any overarching unification.

3.3.2.2 Termination for Fundamental Breach

According to the PECL, CISG, UPICC, and most common law jurisdictions, mere notice (without prior warning) is sufficient for unilaterally terminating a contract for a fundamental breach.[174] With a few rare exceptions,[175] this is contrary to the French courts, which require the terminating party to take legal action and have the court determine whether non-performance by the other party is sufficient to justify termination.[176] For instance, under French law, a business would have to wait for the court decision in order to enter a new contract for the provision of the same services procured by the old contract. Whereas, under the PECL, CISG, or UPICC, the same party would

[174] PECL 9:303, CISG 49, 64, PICC 7.3.2
[175] Clauses allowing automatic termination (clauses rėsolutoire de plein droit) are permitted; case law has recognized that in certain cases unilateral rėsolution as valid; see M. Will, in Bianca-Bonell, 'Commentary on the International Sale Law', Giuffre; Milan, 1987. P 411
[176] M. Will, in Bianca-Bonell, 'Commentary on the International Sale Law', Giuffre; Milan, 1987. P 411

be able to terminate the contract with mere notice, and enter a new contract with another party immediately. German law differs further, in Germany there is a general requirement for the aggrieved party to first allow the non-conforming party a reasonable period of time to perform his or her contractual obligations.[177] This is only necessary under common law and the PECL, CISG, or UPICC where there is uncertainty as to whether the breach is fundamental.[178] Therefore, non-conforming parties under German law will receive a grace period followed by an opportunity to make right, during which the aggrieved party's remedies are suspended. This can also be possible under French law, although through a judicial pronouncement.[179] Applications in other Member States also differ. Take Lithuania for example, which models both the French and the PECL systems, where a party may terminate a contract unilaterally through consensus or judicial pronouncement.[180]

[177] Ibid.162; Article 314(1) BGB allows termination without a grace period to be possible only for 'compelling reasons'— a higher threshold than fundamental breach.
[178] PECL (9:301), CISG (45(3)), 65(3)) and PICC 7.3.1. does not provide the party with the additional period of time when non-performance is fundmanetal
[179] Hugh Beale, Benedicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon, Stefan Vogenauer 'Cases, Materials and Text on Contract Law', Hart Publishing, Oxfprd and Portland, Oregon, 2010, p. 917
[180] Civil Code of the Republic of Lithuania Article 6.217 (1)(4)(5)

4 Analysis and Conclusion

4.1 Analysis

Once it is established whether good reasons exist, as a general matter, for striving towards a uniform set of rules for matters of general contract law,[181] the next question is how we might organise the existing diversity to achieve this. Here, we have two main courses of action that are not necessarily mutually exclusive. The first, enacting a uniform set of rules for general contract law (should this be back of the EU agenda[182]); and the second, taking steps to improve the existing process of adjudicating and enforcing contracts.

In discussing a uniform set of rules for general contract law, I will avoid the question of form. That is, whether it should constitute is a single set of rules or different sets of rules. In its most radical sense, it would mean a single set of binding laws replacing all national contract law rules and transferring the competence in the field to the EU. In another sense, it could mean, the reformation of private international law, such as the Rome Convention, to have soft law instruments apply as the applicable law of contracts. The point is, whatever form it takes, it should seek to alleviate the difficulty and opacity discussed in this paper. And here, we don't have to start from scratch. The use of the PECL and other soft law instruments, such as the DCFR and the UNIDROIT Principles have long been used to modernise contract law in different Member States. Spanish contract law and the German law of obligations are prime examples.[183] The Spanish case law

[181] The questions that concerns us in Section 3

[182] Given the political climate following the 2005 French and Dutch "no" referendums on the Treaty establishing a Constitution for Europe; the fate of CESL proposal; and the limited scope of the online sales proposal and the digital content proposal; the idea of a trans-European general contract law, seems remote at the present time. Although, with the withdraw of the United Kingdom from the EU and the Commission's White Paper on the Future of Europe, the dialogue seems to be shifting towards how the EU should look in 2025. This has the potential of breathing new life to this debate

[183] See de Elizalde page 122-123 for a full list of Spanish case decisions that has used the articles of the PECL to update its contract law in various areas; See p 129-131 for the reception of uniform contract law in the German Law of Obligations brought about via the PECL and other soft law instruments

shows that the Principles have had a unifying effect on various areas of contract law, including breach of contract, remedies for breach, liability of breach, frustration, and the like.[184] Similarly, the complete reformation of the German law of obligations can also be attributed in large part to the PECL and the other soft law instruments.[185] The extensive national case law in these areas serve as ardent reminders that a potential way forward awaits.

We must acknowledge that when a legal concept is transplanted into a different legal system, the transplant grows differently, despite similar overarching concepts.[186] So, where legislative measures and policies are drafted with the aim of unifying existing rules, both legislators and the courts have a responsibility. They must carefully think about how these measures fit into the broader legislative framework, in this case the EU, and if they are likely to develop in the same direction over time (in this case, a single market comprising 27 Member States of the EU as well as — with certain exceptions — Iceland, Liechtenstein, and Norway through the Agreement on the EEA,[187] and Switzerland through bilateral treaties[188]). Thus, we need legislators to explain how they envisage the measures put forward to be applied, and for judges in various jurisdictions to interpret those measures in light of shared priorities. For this purpose, rules of contract law alone are not enough. The fact is, uniform law has legislative appeal as a systematic approach, but without adequate, detailed descriptions of their application within the judicial process, they lack the ability to truly

[184] Ibid; These developments have been observed in ruling interpreting Article 1124 of the Spanish Civil Code (remedies of breach)
[185]Ibid: p 128; and since particular provisions modernizing contract law in Germany were introduced through various parliamentary act, such provisions for protection of weaker parties
[186] See eg. G Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences (1998) 61 Modern Law Review 11
[187] Council of the European Communities, and Commission of the European Communities. 1992. Agreement on the European Economic Area. Luxembourg: Office for Official Publications of the European Communities
[188] More than 100 bilateral agreements currently exist between the EU and Switzerland (known as Bilaterals I and II), which cover, inter alia, Switzerland's participation in Schengen, the free movement of persons, technical trade barriers, and public procurement

drive a unifying agenda. One solution would be for legislators to elaborate on the intended form and function of the legislative measures it puts forward. In order to reduce the risk of divergent interpretations, drafters can take a more proactive approach to capture the overarching context and *modus operandi* to be applied by the courts. Article 2:102 PECL is a good example of this. The Article provides that "*the intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other*."[189] Here, the Article expressly propounds a qualified objective approach to be applied by the adjudicator to find a legally binding contract. In fact, for our purposes, the drafter may even go a step further to explicitly spell out the technique to be applied by the courts in detail, with further guidance on such techniques provided by way of informal guides and best practices.

Another approach would be to have comments accompanying the main articles. These comments should carry the methodology for interpretation and where possible give examples of their application in-action. Conversely, drafters may even consider explicitly mentioning areas and methods, which should not be applied. In fact, Professor Hugh Beale, who was part of the Expert Group that drafted the CESL,[190] alludes to the fact that one of the reasons for the failure of the CESL proposal was that members of the Commission's working group found it hard to understand what provisions were supposed to mean without an accompanying commentary. He goes on to mention that the results would have been far more favourable had a commentary explaining the intended form and function were incorporated into the explanatory memorandum.[191]

Furthermore, the efforts to improve coordination of the general principles of contract law among the Member States proposed above, requires proper adjudication of the law itself; after all, judges are responsible for applying

[189] PECL Article 2: 102
[190] Commission Decision (2010/233/EU) of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010) OJ L105/109
[191] Uniform rules for contract law, p 49

the written word. Thus, adequate judicial governance becomes a precondition. Even if a single legislative framework were to harmonise general principles of contract law in the EU, we would still need national judges to interpret that framework. Albeit, here, national courts can resort to the preliminary reference procedure to access the CJEU and clarify matters.[192] As a matter of practicality not all matters can or should be escalated through the procedure.[193] Not to mention, it's an ill-advised, arduous, ineffective solution for low-value, smaller, one-off transactions typically undertaken by SMEs and consumers.[194] Here, the PECL serves as a good starting point. In fact, the Principles were drafted with this purpose in mind, as it states in the introduction:

> *"The Principles are thus available for the assistance of European courts and legislatures concerned to ensure the fruitful development of contract law on a Union-wide basis. Even beyond the borders of the European Union, the Principles may serve as an inspiration for the Central and Eastern European legislators who are in the course of reforming their laws of contract to meet the needs of a market economy."*[195]

4.2 Conclusion

It was never the premise of this paper to say, normatively speaking, that achieving the single market project is largely within the realm of general principles of contract law and alleviating its nuances. It does not claim that

[192] The preliminary reference procedure, enshrined under Article 267 TFEU, provides national courts access to the EU courts for assistance on questions regarding the interpretation of EU law. The preliminary reference procedure strives to contribute to a uniform application of EU law across the Union

[193] The EU courts do not adjudicate hypothetical cases; questions which are raised that are not relevant to the resolution of the dispute at hand; questions which are not articulated sufficiently by the national courts; among others: See the Courts application of the Foglia Principle established in Case 244/80 Pasquale Foglia v Mariella Novello (No. 2)

[194] Lord Denning in HP Bulmer Ltd v J Bollinger SA [1974] 2 WLR 202 emphasizes that the national courts should consider, inter alia, time to get rulings *("months and months"*); expenses; and the importance, prior to using the discretion to refer matters to the CJEU

[195] PECL (full text published in 2000) p xxii

the resulting picture presents nearly all there is to be considered in that endeavour. Instead, the question posed in this paper revolves around what we might call "high-level" aims of the EU to strengthen the internal market to facilitate cross-border trade. Therefore, it was the explicit ambition of this paper to open up the debate on whether to fulfil this aim; a more coherent legal infrastructure in the form of unifying general contract law rules would be beneficial. And the answer is in the affirmative.

It is difficult to argue that general principles of contract law are so culturally specific that national legal systems are incapable of having uniform rules in the area. Every legal system is capable of revising old laws and regulations and incorporating new ones, let alone those from a familiar legal order (the EU). This also holds true for businesses and consumers who are continuously adapting their behaviour to conform to new laws and regulations. Besides, given the nature of transactions and transactional law today, the benefits of structural homogeneity of the general rules of contract law which increases the certainty of parties' legal positions and the intelligibility of their acts, far outweighs arguments for national sovereignty. Not to mention, the removal of obstacles to free movement is synonymous with competition and its corresponding economic advantages. The creation of the Euro, the establishment of public procurement regimes, and the emphasis on the "Digital Single Market Strategy" all contribute to greater competition, which is contingent on the participation of all stakeholders.[196]

Nonetheless, in a field such as this, careful choice of terminology is crucial (as discussed in section 3.3) and their evolution paramount (as discussed in section 3.1.1). Words in one jurisdiction (e.g., good faith) may appear to be synonymous with similar words in other jurisdictions (e.g., 'bonne foi'), but their underlying application and evolution can differ radically.[197] This is

[196] David Bailey and Richard Whish, Competition Law (2018 edn, Oxford University Press 2002) 01-20; Also see the CJEU's judgement in Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) which reaffirms the importance of the single market imperative and its economic benefits

[197] Stefan Vogenauer and Stephen Weatherill (eds), 249

why the CJEU insists that terms used by the EU legislator are to remain "autonomous concepts" that have their own meaning in EU law despite other meanings they may acquire in other jurisdictions.[198] Ultimately, all legal systems evolve. Here, the Union can evolve through the natural evolutionary process (the piecemeal approach); adapting as and when change is required (often late, varied, and inefficient); or it can evolve to meet the day's economic realities and in search of a common core.

[198] See Paul Craig and Gráinne de Búrca, Chapter 13

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