EU Contract Law: In Search of a Common Core

JAEM01 Master Thesis
European Business Law
15 higher education credits

Supervisor: Niklas Selberg

Term: Autumn 2021
# Contents

## Table of Contents

EU Contract Law: ....................................................................................................................... 1
In Search of a Common Core ........................................................................................................ 1

1 Introduction ............................................................................................................................. 3

2 The Status Quo ....................................................................................................................... 11
   2.1 The Europeanisation of Contract Law .............................................................................. 11
   2.2 The State We Are In ........................................................................................................ 15

3 Legal Diversity and the Internal Market ............................................................................ 20
   3.1 Structural Barriers .......................................................................................................... 20
      3.1.1 Legal Evolution and the Implicit Dimensions of a Contract ........................................ 20
      3.1.2 Varied Application of EU Law .................................................................................. 25
   3.2 Economic Barriers .......................................................................................................... 28
      3.2.1 Barriers to Trade .......................................................................................................... 29
      3.2.2 EU Law Unsuitable for International Trade ................................................................. 30
   3.3 Legal Barriers .................................................................................................................. 31
      3.3.1 Notion of a Contract ................................................................................................... 31
      3.3.2 Breach of Contract ..................................................................................................... 34

4 Analysis and Conclusion ........................................................................................................ 39
   4.1 Introduction ...................................................................................................................... 39
      4.1.1 A Uniform Set of Rules ............................................................................................... 39
      4.1.2 Improving the Existing Process ................................................................................ 40
   4.2 Conclusion ....................................................................................................................... 42

5 Bibliography ............................................................................................................................ 44
   5.1 EU Legislation and Official Documents ......................................................................... 44
      5.1.1 Primary Legislation .................................................................................................... 44
      5.1.2 Regulations ................................................................................................................ 44
      5.1.3 Directives .................................................................................................................... 44
      5.1.4 Quasi-Legislative Instruments .................................................................................... 46
      5.1.5 Communications ........................................................................................................ 46
      5.1.6 Parliament Resolutions .............................................................................................. 47
      5.1.7 Other Documents ....................................................................................................... 47
   5.2 International Instruments .................................................................................................. 48
   5.3 Books ................................................................................................................................ 48
   5.4 Academic Articles ............................................................................................................ 49
   5.5 Case Decisions .................................................................................................................. 49
Summary

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 thesis 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, this thesis 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 contract law in the EU. Therefore, it fails to deliver the requisite level of legal certainty for cross-border transactions envisioned for the completion of the internal market project. The thesis 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.
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>B2B</td>
<td>Business-to-business contracts</td>
</tr>
<tr>
<td>B2C</td>
<td>Business-to-consumer contracts</td>
</tr>
<tr>
<td>CESL</td>
<td>Common European Sales Law</td>
</tr>
<tr>
<td>CFR</td>
<td>Common Frame of Reference</td>
</tr>
<tr>
<td>CJEU</td>
<td>The European Court of Justice</td>
</tr>
<tr>
<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
</tr>
<tr>
<td>EC</td>
<td>The European Community</td>
</tr>
<tr>
<td>EU</td>
<td>The European Union</td>
</tr>
<tr>
<td>OCED</td>
<td>The Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>PECL</td>
<td>The Principles of European Contract Law</td>
</tr>
<tr>
<td>Rome Convention</td>
<td>The Rome Convention on the Law Applicable to Contractual Obligations</td>
</tr>
<tr>
<td>SMEs</td>
<td>Small and Medium-sized Enterprises</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>the Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>The Commission</td>
<td>The European Commission</td>
</tr>
<tr>
<td>UPICC</td>
<td>The UNIDROIT Principles of International Commercial Contracts</td>
</tr>
</tbody>
</table>
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.” 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...”

This 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. 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. Following the publication, contributions from about 180 stakeholders across academic, business, government, consumer, and legal communities, were procured. 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
level was needed, affirming the current framework is suboptimal and a more rationale and coherent set of laws was needed. 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. But even here, the laws governing the general elements of a contract are 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 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:

---

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
Is the existing process of harmonising contract law in the EU and the existing legal framework of the EU contract law *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?
- What measures can be taken at the EU-level to converge EU contract law under the existing process of harmonising contract law?

### 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. 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’.  

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.\textsuperscript{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.\textsuperscript{11} Despite this, their results should be possible to recreate.\textsuperscript{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’, \textsuperscript{13} and ‘method referring to the range of

\textsuperscript{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
\textsuperscript{10} Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007) 49
\textsuperscript{11} Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10:8 Harv L Rev 457, 465–6
techniques that are available to us to collect evidence about the social world." 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 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.

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*

---

14 Ibid.
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 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 this thesis.

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 of the contract law in the EU is justified almost exclusively in market terms. Thus, coinciding with the main research question.

¹⁶ Paul Craig and Gráinne de Burca, EU law: Text, Cases and Materials (7th edn, Oxford University Press 2020), Chapter 8
¹⁸ See Paul Craig and Gráinne de Burca, Chapter 3
¹⁹ Article 14 TFEU
Seventhly, despite European contract law being a political process, questions of political philosophy are avoided. This paper will not discuss market reductionism, private law essentialism, nationalism, normative 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, I will explore the structural barriers inherent in the existing framework of EU contract law. This will include an exploration of the legal evolution and the implicit dimensions of contracts in the EU (section 3.1). Thereafter, I will explore the economic barriers as a result of the existing framework (section 3.2). After all, the EU is an economic union and therefore we must have compelling economic reasons to abandon the current state of affairs. Finally, I will consider legal barriers in the area of general contract law. I do so 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 framework of

---

EU contract law. Here, I will confine myself to two fundamental areas of general contract law— notion of a contract and 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 thesis 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. 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 and the Principles of European Contract Law (PECL).

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.

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), also 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. The Principles contain model rules addressing, inter alia, formation, validity, interpretation, contents and effects, performance, non-

---

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”).
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
performance, and remedies, among other general principles of contract.\textsuperscript{28} However, the Principles are non-binding in nature and are subject to mandatory national laws.\textsuperscript{29} Namely, the parties cannot incorporate the Principles into their contracts as the applicable law and thereby replace the governing law provisions of their contracts. Therefore, contracts made pursuant to the Principles, are made subject to mandatory national law, and thus, 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.\textsuperscript{30} One of its primary objectives was to establish a foundation for judicial and legislative developments and serve as a possible first step towards a future European Code of Contracts.\textsuperscript{31}

The next major stage in the development of the European contract law debate is the 2001 Communication from the Commission to the Council and the European Parliament on European Contract Law.\textsuperscript{32} The Communication consulted over 180 stakeholders, from private, public, government, consumer, and academic sectors, to identify potential obstacles to cross-border trade resulting from divergent national contract regimes. The Communication put forward a non-exhaustive list of four possibilities to stimulate debate: (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 EC level (e.g. in the form of an optional instrument).\textsuperscript{33} The Commission, by further Communication in 2003, reported its findings in the form of an Action Plan.\textsuperscript{34} Of the four options, taking no action at all (Option I) was not an option for most contributors. Acknowledging that the

\textsuperscript{28} Ibid., Table of Content
\textsuperscript{29} Ibid., Article 1:103
\textsuperscript{30} O Lando and H Beale (eds), Principles of European Contract Law, Parts I and II (The Hague, Kuwer, 200), Editorial Introduction
\textsuperscript{31} Fryderyk Zoll and Reiner Schulze, European Contract Law (2nd edn, Nomos 2018) 22
\textsuperscript{32} The Commission’s Communication 2001
\textsuperscript{33} Ibid., Executive Summary, page 2
\textsuperscript{34} The Commission’s Communication 2003
existing framework of EU contract law is, for all intents and purposes, unsatisfactory. And while some respondents saw the benefits of having an new instrument altogether—a potential European civil code (Option IV)—improving the quality of legislation already in place (Option III) was the overwhelming favourite.\textsuperscript{35} In fact, the four consumer associations, primarily dealing with B2C contracts, patently declared the unsatisfactory nature of the current framework on the basis that it substantially deterred consumers from cross-border transactions.\textsuperscript{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).”\textsuperscript{37} The CFR has 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, which would operate in parallel to national contract law regimes.\textsuperscript{38} In a follow-up Communication in 2004, entitled The Way Forward,\textsuperscript{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’\textsuperscript{40} (which bears a remarkable resemblance to the structure of the PECL).

This paves the way for the 2009 Draft Common Frame of Reference (DCFR),\textsuperscript{41} which serves as a draft for the CFR, among several other important purposes.\textsuperscript{42} The DCFR goes far beyond general contract law to

\textsuperscript{35} Ibid., Summary, p 1
\textsuperscript{36} 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
\textsuperscript{37} Ibid., Para. 59
\textsuperscript{38} Ibid., Para. 62(a)
\textsuperscript{40}Ibid. Annex I.
\textsuperscript{42} Ibid, p 3
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.\textsuperscript{43} In many ways the DCFR is an academic treatise. However, in respect of general contract law, the DCFR incorporates the PECL in a revised form.\textsuperscript{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.\textsuperscript{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.\textsuperscript{46} In the following year, the Expert Group’s work was presented in the form of a ‘feasibility study’.\textsuperscript{47} The Study covered general rules on formation of contracts and rules on sales contracts and related services. This prompted the Commission’s proposal for a Common European Sales Law (CESL).\textsuperscript{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.\textsuperscript{49} Despite the strong rationale for a common sale of goods law, the Member States met the proposal with strong resistance. A number of national Parliaments accused the proposal of competence creep,\textsuperscript{50} while the European Consumer Organisation rejected the proposal on the grounds that it violated consumer

\textsuperscript{43} Ibid. Introduction, p 1
\textsuperscript{44} Ibid, p 30-33
\textsuperscript{45} Ibid, p 23
\textsuperscript{47} The European Commission Expert Group on European Contract Law, Feasibility Study for a Future Instrument in European Contract Law (2011)
\textsuperscript{48} The European Commission, Common European Sales Law: the Commission’s Proposal For a Regulation (CESL) COM (2011) 635 final
\textsuperscript{49} Ibid.
\textsuperscript{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).
protection rights under existing national laws warranted by Article 6 Rome I. Following the pushback, the proposal was withdrawn in 2014.

The failure of the CESL seemed to have interrupted the enthusiastic three-decade trend on the Europeisation of contract law, and the pursuit of a future optimal instrument of European Contract Law. The failure was accompanied a year later by two watered-down proposals for directives to try to harmonise EU rules for e-commerce in the digital market. This was a hard blow for EU contract law enthusiasts, and the debate of establishing an overarching framework for EU contract law had momentarily come to a haul.

2.2 The State We Are In

Today 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. 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.

52 See Martijn Hesselink, p 1
53 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
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. The EU legislator has resorted to this selective approach of harmonising contract law since the early 1980s. Growth in global trade, e-commerce, and privatisation of previously state owned sectors has only exsiccated this trend. As a result, many areas of contract law, from sale of goods online and consumer law to areas of the digital market are now subjects of determined efforts at harmonisation. Case decisions have also played a prominent part in this endeavour.

The landscape is 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 of sale of goods, is probably the most notable. 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);

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.
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 Penzügyi 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.
or provided that the rules of private international law lead to the application of the law of a contracting state.\textsuperscript{61} However, the extent to which CISG has been successful in harmonising sales law is a matter of debate. There is evidence to suggest that adjudicators remain prone to interpreting the Convention through the lens of domestic law.\textsuperscript{62} Additionally, a number of conventions put forward by different organisations govern contractual issues in various fields, such as international sales,\textsuperscript{63} international financial leasing,\textsuperscript{64} carriage of goods by road,\textsuperscript{65} air,\textsuperscript{66} sea,\textsuperscript{67} and inland waterways,\textsuperscript{68} among others. Nonetheless, they do not amount to a comprehensive legal framework in any commendable capacity.\textsuperscript{69} Therefore, similar to EU law, international law also takes a piecemeal approach of adopting specific measures for specific issues. This is further exacerbated because contracting states vary from convention to convention.\textsuperscript{70}

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

\textsuperscript{61} See CISG Article 1(1) (a) & (b)
\textsuperscript{64} UNIDROIT Convention of 28 May 1988 on International Factoring
\textsuperscript{65} UNIDROIT Convention of 19 March 1956 on the Contract for the International Carriage of Goods by Road.
\textsuperscript{66} Montreal Convention of 28 May 1999 for the Unification of Certain Rules relating to International Carriage by Air.
\textsuperscript{68} Convention of 22 June 2001 on the Contract of Carriage of Goods by Inland Waterway.
\textsuperscript{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
\textsuperscript{70} Poland and Ireland have not adopted the CISG
\textsuperscript{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. However, in the field of general contract law pertinent here, 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. Under the PECL, parties can incorporate its rules into their contract should they wish their contract to be governed by those laws. However, parties are unable to incorporate the Principles into their contracts as the applicable law and replace the governing law provisions of their contracts. 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, they do not have the liberty of not choosing a national jurisdiction as the applicable law. 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 they 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.

Thus, parties applying to national law may simultaneously be subject EU law where it approximates the field and potential international rules which 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 not all; directives, which often

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
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. Consequently, “as soon as users leave these safe harbours [(national law)] they risk running aground 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.”

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 the 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. The implicit dimensions of a contract are, in part, derived from the social and cultural norms and conventions of the applicable jurisdiction. For example, to ascertain the existence and meaning of a contract, the intention of the parties is of central importance. Here, the courts infer whether parties intend to create legal relations and whether they intend 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”. 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. Thus, to uncover these latent intentions, courts must engage in an elaborate process

---

80 Catherine Valcke, Contractual Interpretation at Common and Civil Law; An Exercise in Comparative Legal Rhetoric (Hart Publishing 2009) 77-144
82 Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38
83 Ibid., para 14
of examining the circumstances, conditions, and environs 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 party’s intention within that social fabric.\(^\text{85}\) 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.\(^\text{86}\)

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 applicable principles, which continue to adapt through social evolution. Namely, on how interactions between individuals within that particular context arise, change, and are maintained.\(^\text{87}\) 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.\(^\text{88}\) 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.\(^\text{89}\)

Further, the German Constitutional Court explicitly recognises the freedom

\(^{85}\) 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)
of contract, whereas the Italian Constitutional Court does not (theoretically 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. 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, then decides that the breach of contract law was so reckless as to render the parties ability to invoke the exemption clause of the contract void. Therefore, parties are unable to determine whether the courts are relying on a general rule to determine the liability for reckless breach or whether it applies to some special circumstances of the case. Despite their differences, one may argue, that their outcomes are similar. Ultimately, however, expressed or implied, judges must take into account the surrounding circumstances—the social context of the contract—to interpret these general principles.

Therefore, contracts are to a large extent, social artifacts. They are interpreted by courts 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 in 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, it says that those properties are also subject to the social micro-dynamics of the particular context; 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 See Martijn W Hesselink, page 35
92 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). 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—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 their interpretation of these 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.

In addition to this, from a purely administrative and practical perspective, laws in each jurisdiction through their unique legal evolution congregate in different places. Even if contract rules carry the same substance in two different Member States, their threshold for qualification or simply its 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. Thus, for foreign SMEs and consumers, it is not that the law is different but that it may not even be recognisable. For example, the substantially equivalent limitations to freedom to contract are to be found in some jurisdictions in the rules on formation of contracts, and in others 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.
98 Ibid.
or validly.\textsuperscript{99} We run into the same issues with general contract norms. As one can imagine, the vaguer norms are—and general contract norms are vague—the larger the number of interpretations it has within each system. 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),\textsuperscript{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.\textsuperscript{101} Another prime example is the transposition of 1999 EC Sales Directive\textsuperscript{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;\textsuperscript{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.\textsuperscript{104} This will affect parties seeking to find out why and when they would be protected against ‘unfair’ contract terms in both jurisdictions.\textsuperscript{105}

Despite their differences, some argue, that their outcomes are similar.\textsuperscript{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, I do not believe it cures the intransparencies caused by rules in different Member States qualifying differently and found in different places under different titles evolving according to different theories, to bring the level of requisite legal certainty for the common market.

\textsuperscript{99} Ibid
\textsuperscript{100} The Commission’s Communication 2003, p 8
\textsuperscript{101} Ibid.
\textsuperscript{104} Ibid
\textsuperscript{105} Ibid
\textsuperscript{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. 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’. Therefore, unlike regulations, which are ‘binding in [their] entirety and therefore directly applicable in all Member States’ upon their entry into force, 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. Issues of minimum harmonisation further complicate this, i.e. they allow Member States to have higher levels of protection than those provided for by the directive. 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, timeshare, distance selling, and distance selling of financial services, 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 clause’ that allowed

108 See Article 288 TFEU
109 Ibid
110 See Paul Craig and Gráinne de Búrca, p 201
consumers a period of at least seven working days to withdraw from the contract.\(^\text{115}\) This led to numerous inconsistencies with the “cooling off” period varying under each directive and therefore being different in different situations, and the ‘minimum clause’ leading to different levels of consumer protection in different jurisdictions, with some providing up to twice the period of other Member States.\(^\text{116}\) 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 applied when they marketed and sold their products and services in other Member States.\(^\text{117}\) This creates categorical inconsistencies, where similar situations have the potential of being treated differently without any meaningful justification.

Further, regulations have both vertical and horizontal direct effect.\(^\text{118}\) 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.\(^\text{119}\) The position of directives is markedly different. Under EU law, directives generally have only a vertical direct effect.\(^\text{120}\) Therefore, private parties, with a few exceptions,\(^\text{121}\) may only use direct effect vertically, against the state or an emanation thereof.\(^\text{122}\) This precludes individual parties from enforcing measures in the directive against other individual entities. Here, they may only rely on national implementing measures.

\(^{116}\) 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 41774 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. Here, 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* the CJEU interpreted the term ‘damage’ in the Package Travel Directive only in light of that one particular directive. 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. 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 SMEs and consumers. Thus, confidence in contracts as a tool for economic coordination between Member States is greatly diminished, since no one can be certain where they stand in each jurisdiction.

---

123 Case C-168/00 Simone Leitner v TUI Deutschland, [2002] ECR I- 2631
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 OCED. Another study, conducted by the Center for Economic Policy Research, showed that legal similarities could increase trade among OCED countries by up to 65 per cent. The European institutions commission 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. 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. Studies show only around 30 per cent of consumers consider themselves well-protected in issues culminating with sellers in different Member States. 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, this includes inadequate access to courts. According to the same proposal this has resulted in an estimated financial and non-financial detriment of 9 to 11 billion Euros for consumers alone. This explains why the Commission’s proposal points out that 42% of retailers selling offline and 46% of retailers

132 Proposal for new digital contract rules on the European Commission’s website
selling online consider the costs of compliance with different consumer protection and contract law rules as significant barriers to cross-border sales. In fact, further reports corroborate this. 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.”

It’s true that we cannot delineate the precise cost of divergent national contract laws in relation to the economic ramifications suffered by the multi-faceted EU legal system as a whole. Intuitively, however, given the 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 lead to some reasonable level of legal uncertainty.

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, it is not always commercially realistic or desirable. For instance, consider unequal bargaining power 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.
nevertheless apply. Therefore, less dominant parties might reasonably decide that the negotiation effort and the 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 gains. Even if these barriers are as much psychological as they are real. 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, SMEs and consumers in foreign markets suffer a clear competitive disadvantage, which has serious anti-competitive ramifications for the internal market.

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 (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 however, 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, while notice is required to be given within a ‘reasonable’ amount of time in most other jurisdictions. This has the potential 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 that party to require performance by the other

137 See Matthias Strome, pg 35
138 The Commission’s 2003 Communication, p. 7-10
140 O Lando, “the Lex Mercatoria in International Commercial Arbitration” (1985) 34 ICQLQ 753.
141 See CISG Article 45 (2) o
party; something lawyers outside the common law jurisdictions would be 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 in different Member States, since it’s not possible 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 this legal fissure over time, making varied national contract law unsuitable for international transactions conducted by SMEs and consumers 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.\(^ {143}\) However, 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


\(^{143}\) 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 had no meeting of the
minds. Further, most common-law jurisdictions require an element of
consideration to be present for a binding agreement to exist, 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). 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.

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 law 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.”

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. 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. 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

---

146 Uniform rules for European contract law, page 12
147 Ewan McKendrick, Contract Law, 11th edition (Palgrave, 2015)
148 For example, Article 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
contract or would have done so only on fundamentally different terms”\(^\text{153}\)

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”.\(^\text{154}\) 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 knowledge of a fundamental mistake as to the state affairs governing a contract.\(^\text{155}\) 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.\(^\text{156}\)

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 about its use.\(^\text{157}\) 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 language of the contract.\(^\text{158}\) This means that there is no notion of fraud by silence or a duty to disclose a mistake to the other party. Namely, then, there are no remedies even where one party knowingly refrains from pointing out a mistake of fact under common law.\(^\text{159}\) This is diametrically opposite to French and German law. Therefore, some legal evolutionary processes simply require parties to have less regard

\(^{153}\) PCEL Article 4:103 (1) (b).
\(^{154}\) DCFR Book II, Art 7:201(1)(a).
\(^{156}\) Ibid.
\(^{158}\) For misrepresentation 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)
to certain matters and more regard to others, in this case, French and German contract law requiring reasonable regard to be had for the other party’s interests. To give a simple example, take the case of *Interfoto Pictures Liberty*, here 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 reluctant to reach.

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. Other jurisdictions require certain contracts to be in writing or have certain language. For example, under Article 1341 of the Italian *Codice Civile*, certain clauses must be individually initialled to be legally valid. 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. Therefore, at first it may appear that there are some apparent differences that do not make much practical difference, since they rely on similar principles; but major differences do persist in practice.

### 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. For reasons of time and space I will focus on the latter using two approaches. First, I will provide an overview of typical processes that courts must undertake in finding a fundamental breach. My

---

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 outside 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 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

162 The European Communication’s 2003 Communication, para. 35

163 Italian *Codice Civile* Article 1341

164 See PECL and DCFR
intention here is to showcase the extensive judicial analysis the courts labour in defining the concept of 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, I will provide a comparative analysis in relation to one of the most important aspects of breach—termination.

**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.\(^{165}\) 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.”\(^{166}\) 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 breach and the corresponding economic loss.\(^{167}\) Next, it requires assessing the “expectations” of the aggrieved party, since the detriment necessitates ascertaining what he or she 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; here the courts must

---

\(^{165}\) The PECL and the UPICC also confirm this approach

\(^{166}\) CESL Article 25

\(^{167}\) See ‘The UNIDROIT Principles and CISG
decide what ‘a reasonable person in the same trade’ constitutes.\textsuperscript{168} It has a procedural element, namely, asking if that reasonable person within that social context could not have foreseen the result.\textsuperscript{169} And it also has a further knowledge element to determine ‘whether the promisor foresaw the circumstances which made the obligation in question important’.\textsuperscript{170} An assessment of time of foreseeability is also required here. For instance, do the courts determine foreseeability when 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 “when the contract was made.”\textsuperscript{171} 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 \textit{in good faith}, in the same situation, as he or she would consider to be reasonable. This assessment requires several elements to be taken into account, including but not limited to, the \textit{nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions}.\textsuperscript{172} These questions, however, beg further clarity in the courts. For example, how will the courts determine if the reasonable man standard is used for different markets or sectors? What if standards for trade differ vastly between the \textit{lex fori} and the party’s 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,

\textsuperscript{168} Schlechtrien ‘Commentary on the UN Convention on International Sale of Goods (CISG)’, 1998, Munich, 289
\textsuperscript{170} Stefab Vogenauer, Jan Kleinheusterkamp ‘Commentary on the UNIDROIT principles of international commercial contracts (PICC), p 826
\textsuperscript{171} DCFR Article 3:703
\textsuperscript{172} PECL Article 1:302
and disproportionate loss, among others. As one can imagine, majority of these broad terms are based and defined by judges on a party’s 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 and many matters of judicial discretion contingent to 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 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.\(^\text{173}\) With a few rare exceptions,\(^\text{174}\) 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.\(^\text{175}\) 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. Whereas, under the PECL, CISG, or UPICC, the same party would 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.\(^\text{176}\)

---

\(^{173}\) PECL 9:303, CISG 49, 64, PICC 7.3.2

\(^{174}\) Clauses allowing automatic termination (clauses résolutoire de plein droit) are permitted; case law has recognized that in certain cases unilateral résolution as valid; see M. Will, in Bianca-Bonell, ‘Commentary on the International Sale Law’, Giuffre; Milan, 1987. P 411


\(^{176}\) 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.
This is only necessary under common law and the PECL, CISG, or UPICC where there is uncertainty as to whether the breach is fundamental.\textsuperscript{177} 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.\textsuperscript{178} 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.\textsuperscript{179}

\textsuperscript{177} 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 fundamental.
\textsuperscript{179} Civil Code of the Republic of Lithuania Article 6.217 (1)(4)(5)
4 Analysis and Conclusion

4.1 Introduction

In my opinion, the subject of EU contract law must focus on two issues. The first refers to the benefits of striving towards a uniform set of rules for matters of general contract law in hopes of improving the current legal infrastructure (should this be back of the EU agenda\textsuperscript{180}). The second refers to how we might organise the existing diversity so as to increase legal certainty and ensure a more uniform evolution of contact law in the EU.

4.1.1 A Uniform Set of Rules

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 and transferring the competence in this 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 major intransparencies discussed in this paper.

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 been long used to modernise contract law in different Member States. Spanish contract law and the German law of obligations are prime

\textsuperscript{180} 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.
examples. The Spanish case law shows that the Principles have had a unifying effect on various area of contract law, including breach of contract, remedies for breach, liability of breach, frustration, and the like. The complete reformation of the German law of obligations can too be attributed in large part to the PECL and the other soft law instruments. The extensive national case law in these areas serves as an ardent reminder that a potential way forward awaits.

4.1.2 Improving the Existing Process

When a legal concept is transplanted into a different legal system the transplant grows differently, despite similar overarching concepts. 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 in to 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 across 27 Member States). 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.

4.1.2.1 Intended Form and Function

Rules of contract law alone are not enough. The fact is, uniform law has legislative appeal as a systematic approach, but without adequate detailed descriptiveness of their application in the judicial process, they lack the

---

181 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.
182 Ibid; These developments have been observed in ruling interpreting Article 1124 of the Spanish Civil Code (remedies of breach)
183 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.
ability to truly 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 should 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.” Here, the Article expressly propounds a ‘qualified objective approach’ to be applied by the adjudicator to find a legally binding contract. In fact, in my opinion, 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 an informal guide.

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 its 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, alludes 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.

4.1.2.2 Judicial Governance

---

185 PECL Article 2: 102
187 Uniform rules for contract law, p 49
The efforts to improve coordination of the general principles of contract law among the Member States proposed above, requires proper adjudication of the law; after all, judges are responsible for applying 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 judges to interpret that framework. Although, here, the national courts may resort to the existing preliminary reference procedure to clarify matters. 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.”

4.2 Conclusion

The question posed in this thesis, revolves around what we might call “high-level” aims of the EU to strengthen the internal market to facilitate cross-border trade. The thesis examines, whether to fulfil this aim, a more coherent legal infrastructure in the form of unifying general contract law rules, would be beneficial. My answer is in the affirmative.

---

188 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.

189 PECL (full text published in 2000) p xxii
I do not believe 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 (EU) legal order. This also holds true for businesses and consumers who are also used to adapting their behaviour to conform to new laws and regulations. In my opinion, given the nature of transactions and transactional law today, the benefits of structural homogeneity of the general rules of contract law to bring further legal certainty, far outweighs arguments for national sovereignty. 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 language (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 may differ radically.190 This is 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.191

Ultimately, however, all legal systems evolve. Here, the Union can develop through the natural evolutionary process; adapting as and when change are required (often too late); or it can develop in search of a common core to lead the matters in the day’s political, economic, and social realities.

190 Stefan Vogenauer and Stephen Weatherill (eds), 249
191 See Paul Craig and Gráinne de Búrca, Chapter 13
5 Bibliography

5.1 EU Legislation and Official Documents

5.1.1 Primary Legislation


5.1.2 Regulations


5.1.3 Directives

Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372;


Directive 2000/35/EC on combating late payment in commercial transactions, OJ 2000 L 200


5.1.4 Quasi-Legislative Instruments


5.1.5 Communications


Commission´ Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses (Communication) COM (2010) 0348 final

Commission´ Communication to the Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions. Upgrading the Single Market: more opportunities for people and business

Commission Communication to the European Council for completing the internal market: white paper from the commission to the European council (Communication) COM (1985) 310

5.1.6 Parliament Resolutions


5.1.7 Other Documents


The European Commission, Proposal for a Regulation on a Common European Sales Law (2011)


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

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

5.2 International Instruments


Unidroit Principles of International commercial Contracts (2016)

5.3 Books


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)


Reiner Schulze and Hryderyk Zoll, European Contract Law (Hart Publishing 2018)

Chantal Mak, Fundamental Rights in European Contract Law (1 edn, Academisch Proefschrift 2007)


5.4 Academic Articles


5.5 Case Decisions


Case C-26/91 Jakob Handte & Co. GmbH (1992)

Case C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände (Quelle) (2008) I-02685 ;

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

Case C-137/08 VB Penzugyi Lizing ZRT v Ferenc Schneider (2010) ECR I-10847

Case C 403-98 Azienda Agricola Monte Arcosu v Regione Autonoma della Sardegna [2001] ECR I-103

Case C-278/02 Herbert Handlbauer GmbH [2004] ECR I-6171, [24]-[35

Case 41774 Van Duyn v Home Office [1974] ECR 1337

Case C-144/04 Mangold v Rüdiger Helm [2005] ECR I-9981

Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) [1986] ECR 723
Case C-168/00 Simone Leitner v TUI Deutschland, [2002] ECR I- 2631