
The Main Directives of the Process of Unification Commercial Contracts Law in Europe – The Path for Serbian National Private Law Legislation

Tamara Milenkovic-Kerkovic¹

Abstract:

International character of economic relations is in discrepancy with the limitation of their national legislation. During the whole last century and especially since World War II enormous grow of international trade created inevitable need for attempts of harmonization and even unification of commercial contract law. The unknown law of the different countries and contradictions and discrepancies among the legal families of common and civil law were the big risk which increased enormously transactional costs of the business arrangements in the trade between nations, especially in the trade among European countries. Existed varieties of contract law in European countries become a special type of non-tariff barrier which opposed to the free flow of goods, services, persons and capital and at the end decreased wealth. Legal scholars, practitioners and lawyers in Europe realized the need for harmonizing contract law in a way to create and adopt uniform rules for commercial activities, in one word to Europeanize the law of commercial contracts and create uniform legal environments. The problem of appropriate method of the unification divides many academics between idea of codification method in the way of legislation or by so called "creeping" method which uses common customs and practices in order to create unified system of generally accepted principles of commercial contracts law (lex mercatoria). In spite the first stages of unification was realized by way of directives, such as the law of consumer contracts, later on creation of the body of European competition law, emanation of the idea of Europeanized contract law took another direction emanating itself through the legal instrument of the so called "soft law" such as Principles of European Contract Law (PECL) created by the Commission of European Contract Law (so called Lando Commission). The Lando Principles which in their 17 Chapters content the common core of the all national legal systems of European countries are nowadays regarded as the nucleus of a European Civil Code. In Serbian attempts to join the EU it is the process of Europeanizing its commercial contract law which creating a challenge which obstacles should be overcome thankfully to the healthy roots of Serbian Law of Obligations-de lege lata which is the best part of Serbian positive private law founded on European legal tradition.

Key words: Principles of Contract Law, lex mercatoria, unification of contract law, Europeanization, PECL,

JEL Classification: K12

¹ Associate Professor, Faculty of Economics University of Nis, Serbia, e-mail salamanca@eunet.rs, Ekonomski fakultet u Nisu, Trg Kralja Aleksandra Ujedinitelja 17, 18000, Nis

1. Introduction

Contemporary business conditions are characterized by more and more distinct connection of various markets which function is creating the global market. This is caused by the growing intense of the international trade i.e. by the clearly expressed trends of denationalization and “Europeanization” of trade which is an important factor for the common welfare. At the same time contract law plays an important factor in the organization and in the process of saving and decreasing the transactions costs of the trade operations.

Existing varieties of contract law in European countries and gross differences among legal systems of civil law and common law especially in the sphere of private law become a special type of trade limit which opposed to the free flow of goods, services, persons and capital and at the end decreased wealth. In order for the global and common market to be created, it is necessary to secure legal instruments that will be unified in the highest degree. It is also important to mention that term Europe denotes those countries which are or will become members of European Union and the term Europeanize relates to the processes of unification or harmonization of European contract law. This is crucially important not only for EU member’s contract law to be unified than process of Europeanization of contract law creates and challenge for future EU members. However, this is difficult to achieve because of the fact that the existing variety of laws prevents the mobility of the European market not only because it is difficult to understand foreign laws but also because they differ considerably.

When doing business in some other European country, a business person will typically experience the same frustration that Voltaire went through when he traveled to France. As he puts it, the laws have changed every time he changed his horses.

Businessman doing abroad is conscious of the fact that some of his contracts with foreign partners will be governed by foreign law. The unknown law of foreign country is one of his risks. This risk make him to be unsecure on the foreign market because lack of knowledge of foreign law solutions create high grade of legal insecurity and unpredictability which may keep foreign business away from foreign markets in Europe.

Differences of law create restrictions to trade so it is the aim of the Union to abolish those restrictions which many times may be regarded as a non-tariff barrier to trade.

An idea developed about the creation of the uniform law that will defeat the greatest enemy of international business transactions – national borders. The

adoption of uniform regulations that are applied to the contracts concluded in different legal, economic and social systems removes the hindrances to running international business transactions, which contributes to the development of the international transfer and the creation of the overall legal security. The unification of the contract law has, therefore, become a constant aspiration of business people, national legislators and legal doctrine. This specifically refers to the contract law that is naturally close to the market relations and, thus, the changes in economic structure first reflect in this area. As it is emphasized in the legal theory of the European private law, the process of internationalization and globalization has reached the area of the contract law even before the process of the “Europeanization” of the private law, that is contract law, has commenced within the framework of the European Union, and then it only accelerated.

2. What Are The Obstacles Of Europeanization In The Contract Law?

The process of the unification of contract law in Europe is lasting for last few decades and there have been significant results in the sphere of consumer protection regulation which by way of directives prevent the enterprises to impose unfair terms upon the consumers as well as by establishing the unfair competition law which goal is to prevent restrictive trade practices.

The most important unification has been achieved in the sphere of the law of consumer contracts which numerous directives promulgates the minimum of protection on the national level in broad sphere of unfair contractual terms in numerous consumer transactions when they buy goods and services. That unification of EEC and later the Union covers different areas such as doorstep sales, distance selling, consumer credits, e-commerce, unfair contract terms, commercial guarantees, services of general economic interests such as telecommunications, electricity and natural gas, consumer contracts in tourism and other agreements where specific protection of consumer as contracting party is predicted.²

On the other side in the process of Europeanization the Union has established the law which prevents abusive and restrictive trade practices, such as unfair competition law, Antitrust and Unfair Competition law were passed under the belief that the economy functions best when competitors have limits for permitted

² See Directive 98/6/EEC on Doorstep Selling; Directive 97/7/EC on Distance Selling; Directive 2000/31/EC on E-Commerce; Directive 93/13/EEZ on Unfair Contract Terms; Directive 99/44/EC on Sale of Consumer Goods and Associated Guarantees; Directive 2002/22/EC on Universal Service (Telecommunication); Directive 2003/54/EC on Electricity; Directive 2003/55/EC on Natural Gas; Directive 90/314/EEC on Package Travel; Directive 2008/122/ EC on Timesharing; Directive 2008/48/EC on Credit Agreements for Consumers; Directive 2002/65/EC on Distance Marketing of Financial Services.

activities. Activities governed by the law of competition include monopoly, pricing limitations, predatory practices, merger control, advertising etc. In the sphere of contract law the rules of law of competition provide restriction of the parties' contractual freedom such as mandatory rules contented in Directive on the Self-employed Agent which protect the agent in his relationship with the principal.³

In spite the process of Europeanization in the sphere of consumer protection and competition law has made a big level of uniformity in the national regulations, beside those areas there is no European general law of contract which could be overwhelming and universal for all commercial activities.

One of the great obstacles of the Europeanization in the field of the law of contract is the existence of the two "legal families" in Europe, the civil law of the Continent and the common law of the British Isles. The civil law as the private law of countries from the Continent is based on the Roman law established about 2000 years ago but the level of uniformity in spite of national differences derived from the period which started from the 19th century and prolonged to the first half of 20th century which was the period of national codification (Code de Civil, Code de Commerce in France, BGB and HGB in Germany, Law of Obligation in Suisse, ect.). The private law in the countries of civil law is mainly to be found in the Civil Codes, or in the statutes, developed and supplemented with the law courts and with the legal opinions of the law professors. On the other side of the La Manche English law is being developed by the law of precedents and the active role of courts where during many centuries Parliament did not legislate in the area of contract relationships. Even today when there are numerous statutes on the field of the law of contracts and torts those law stays and judge made- law.

Besides differences which derive from the methods used in the legal systems of civil law and common law, there are also numbers of lawyers which opposed to the idea of uniform contract law and refuse the Europeanization of contract law with various argumentations. Some of that argumentation is based on the opinion that law is part of national cultural heritage and because of that fact it should stay in contemporary phase of national law. Also there are many lawyers who oppose to a new contract law in Europe because they will lose all existed knowledge and practice which is based on national differences of contract law and have to learn new Europeanize contract law.

There are discrepancies also in the answering of the question of used method of Europeanization of the law of contract. Number of academics and practitioners are proponents of codification or legislation method and other part of academics and business community are supporters of so called "creeping" method of establishing and unifying common customs and practices which are in the form of *lex mercatoria* are common core of contract rules.⁴ On the other side several legal

³ Directive 86/653/EEC on the Self-employed Agent.

⁴ See Berger, Klaus Peter , *The Creeping Codification of the Lex Mercatoria*, The Hague, 1998, pp. 278.

writers argued that unification of law should be left to a free movement of legal rules and in this way a competition would be created in which the best rules will survive. Those rules will be chosen by contracting parties in order to regulate in most effective way their interests. Opponents of the process of Europeanization of the contract law argue that in the USA each state has their own company and contract law and the entrepreneurs are free to choose to establish a company in the preferred state. The most beneficial state (such as for example Delaware, which is state with lowest standard) will automatically attract investors.

In spite those opinions the positive European experience with the unification of consumer protection law and the law of competition were prevails, and invisible hand of Europeanization has prolonged with its activities. Unification of contract law in spite difficulties facilitates operating in all Member States of the European Union and decreases the risks of an unknown legal system in the situation when other party doesn't perform its contractual obligation.

3. The Unification Of The European Contract Law And The Creation Of The European Contract Law Principle

It was some of the limitations and the obstacles which opposes to the idea of unification of contract law in Europe. One of the early initiatives that have been trying to find adequate answers to the complex issues of the unification of the private law within the framework of the European Union is the creation of the *Principles of European Contract Law – PECL* by the *Commission of European Contract Law (CECL)*.⁵

In 1976, in the academic circles, a Danish professor of the Civil and Commercial law Ole Lando presented the idea of the creation of the draft of the future European unified Commercial Code i.e. suggested first the creation of the Principles of the European Contract Law. The project received informal support of the Commission of the European Economic Community of that time and in 1980, the Commission for the European Contract Law was created, often called by its founder and chairman “Lando Commission”.

Lando Commission commenced its work in 1982. The members of the CECL were the representatives of the academic community, that is eminent professors of civil law, and some of them were at the same time practicing lawyers. The members of the CECL came from all the countries- members of the European Union. The members of the Commission have not been representatives of the specific political or governmental interests. This structure of the Commission was decided upon in order for each national legal system to have its own

⁵ See, Lando, O. Principles of European Contract Law in the Third Millenium, *Transnational Law in Commercial Legal Practice*/Center for Transnational Law(ed.) Muenster:Quadis Publ., 1999, pp164.

“representative” i.e. expert who will contribute to the functioning of CECL by his knowledge of their own national law. In the process of creating the principles, the Lando Commission started from the assumption that different regulations of the Contract law existing in the national legal systems do not favor the requirements of the common European market.

Despite the relatively high level of the economic and socio-political integration achieved within the EU, the member countries in the area of the Civil Law belong to at least two families, to the Civil Law tradition and to the Common Law tradition. There are considerable differences between these two traditions in the area of the Contract law. In order to overcome those differences in 1989, the European Parliament first proposed the adoption of a European Civil Code.⁶ The European Commission responded to the Parliament’s call in a Commission document, COM (2001) 398, 2001 O.J. (C255) (Sept. 9, 2001).⁷ Annex I of this document summarizes the *acquis communautaire* that deals with private law, in particular, the law of contract. Annex II summarizes relevant international treaties dealing with substantive contract law issues. Annex III analyzes the structure of the then existing EU directives on contract law and relevant international treaties.

The main goal of the Principles is to be a first draft for the European Civil Code which is the *de lege ferenda* legal instrument which will content Europeanized rules for the law of obligation in Europe. At the same time the Principles which are formulated as the *black-letter rules* serve as the main legal source of the so called “*the general principles of law*”, “*the transnational commercial law*” or the *lex mercatoria*⁸ which could be applied among contractual

⁶ 1989 O.J. (C 158); 1994 O.J. (C 205); 2000 O.J. (C 377).

⁷ Documents published in the Official Journal of the European Union (or O.J.) after January 1, 1998,

⁸ The *lex mercatoria* is the concept of transnational commercial law which is reinvented at the end of 60s by the legal authors such as Schmitthoff, Goldštajn, Kahn, Goldman which denotes corpus of autonomously created rules, customs and practices applied by international community of traders and salesman. Those rules were heredity from the medieval law of merchant which was universal, global and transnational. In the late 1950s and early 1960s, the notion of transnational commercial law was reinvented by the French professor Berthold Goldman. In an article in 1956 dealing with the nationality of the Suez Canal Company professor Goldman has marked the beginning of the process of recreation of the new autonomous *lex mercatoria*. In Goldman's view, this company was not of Egyptian, English, French or mixed nationality even though it could be considered as a juridical person of private law. Due to its particular capital structure, its organization and its activities, he regarded this company as '*une société internationale*'. The status of the Suez Canal Company, both in terms of its legal source and its legal nature, was in his view 'essentially international' and it was of a private law nature but of a transnational character. In article published by Schmitthoff's London Colloquia in 1964 Goldman pointed : “*The lex mercatoria fits well into the domain of the law, both in terms of substance and in terms of form. It remains to be seen whether the interests, which it seeks to satisfy, are sufficiently balanced to guarantee*

partners or by arbitrators as the main legal source in drafting, formatting and performing of commercial contracts as well as in the processes of solving disputes arising from the commercial contracts. Together with other main sources of the law of the autonomous contracts of the new *lex mercatoria* such as UNIDROIT Principles of International Commercial Contracts (1994, rev.2004) and CENTRAL List of Principles, Rules and Standards of the *Lex Mercatoria*, developed by the Center for Transnational Law from Muenster University, Germany, the Principles of European Contract Law establish on a comparative basis the main principles which best regard to the prevailing economic and social conditions in Europe.⁹

The Principles of the European Contract Law don't have legal legitimacy of a legal document. It is an academic achievement of an informal and completely independent group of eminent experts and practitioners for contract's law and thus at the same time for the International Private Law. Each of the distilled Principle is followed by Comment and Notion in order to be adapted in the each legal system's environment, and especially to be in convergence with other commonly accepted legal instrument such as UN Convention on Contracts for the International Sale of Goods of 1980 (CISG-Vienna Sales Convention). The articles of the Principles are supplied with the comments which explain the technique of the article which is the method similar with US Restatements. Each comment contents illustration which is the short case which shows practical application of the rule in practice. The interesting part of the Principles reflects its sources also deriving from the specific legal systems and shows the state of the laws in EU Member States.

4. The Structure Of The Principles Of The Principles Of European Contract Law- Influence On Serbian Civil Code *De Lege Ferenda*

The Commission of European Contract Law so called Lando's Commission have been published the final version of the Principles in 2003 and by this document has finished its work . The final text of the Principles embraces 17 Chapters which text is easily to understood by practicing lawyers and business people. The rules are drafted as general principles which are to be applied not exclusively to international contracts such as the intention of other document embodied in UNIDROIT Principles prepared by prof. M.J.Bonnell. The structure of the PECL is created in

the legitimacy of its rules. But that is, as Kipling would say, another story". See, Milenkovic Kerkovic, T. Origin, developments and the main features of the new lex mercatoria, Facta Universitates, Vol.1, No5, Nis, ,1997, pp. .87-91.

⁹ The PECL could be compared with other specific source of law which was published in its second edition in 1981 in the USA in the form of American Restatement of the Law of Contract. This legal source expresses the state the common law of contracts of the U.S. The creators of this legal document uses specific legal method comparable with talmudisitic approach of Mishna and Gemara creates and destilaze the rules which has been illustrated and supported with the ilustration explanated by specific case.

order to fall off the whole life of contract from its creation, draft and formation to its conclusion, formation, performance, contents, interpretation, validity, non-performance, assignments and termination. The Chapter are formatted as follows:

- **1: GENERAL PROVISIONS;**
- **2 : FORMATION;**
- **3: AUTHORITY OF AGENTS;**
- **4: VALIDITY;**
- **5: INTERPRETATION;**
- **6 : CONTENTS AND EFFECTS;**
- **7 : PERFORMANCE;**
- **8: NON-PERFORMANCE AND REMEDIES IN GENERAL;**
- **9: PARTICULAR REMEDIES FOR NON-PERFORMANCE;**
- **10: PLURALITY OF PARTIES;**
- **11. ASSIGNMENT OF CLAIMS;**
- **12: SUBSTITUTION OF NEW DEBTOR.TRANSFER OF CONTRACT;**
- **13. SET-OFF;**
- **14: PRESCRIPTION ;**
- **15: ILLEGALITY;**
- **16: CONDITIONS;**
- **17: CAPITALISATION OF INTEREST.**

The method which is adopted in PECL is comparable with the American Restatement of the Law of Contract¹⁰ and it is a “soft law” legal instrument which is possible to be used by a European Court of Justice in deciding issues of contract law. Beside, Principles of European Contract Law should be used by EU legislator in drafting *de lege ferenda* directives and regulations in the sphere of the law of contract. The most important role of the Principle is to serve as the basis for future legislative work as a first step to the drafting European Civil Code as the most important legal monument of the processes of the Europeanization of contract law.

¹⁰ Basedow Juergen, Codification of Private Law in the European Union:the Making of a Hybrid, 9 Eur.Rev.Priv.L. pp. 35-37 (2001)

As the legal source of the new *lex mercatoria* Principles of European Contract Law, finally issued in 2003 should be of significant interest to the countries which will be part of the EU in the next future such as Balkan countries, represented with Serbia. In those countries Principles could serve as legislative support. This fact become a more apparent nowadays processes and tendency of legislation of Serbian Civil Code through the Work of the especially Government mandated Commission of experts created in 2006.¹¹

In drafting part dedicated to the General Notions of the law of obligations legislator were obviously inspired by the solutions given in the Principles especially in the parts which refers to the notion of obligations, general provisions referred to the freedom of contract principle, good faith and fair dealing principles, binding character of contract (*pacta sunt servanda*), *neminem laedere* principle, formation of contracts and authority of and agent, offer and acceptance of the offer, interpretation, *rebus sic stantibus* and *culpa in contrahendo* legal principles as well as in other provisions which regulate whole life cycle of the contract. Serbian Civil Code draft was also inspired by the Principles of European Contract Law in the attempt of regulation of the new autonomous commercial contracts such as franchising, factoring, forfeiting and leasing which instruments are drafted in manner of the new *lex mercatoria* legislative approach.

5. Conclusion

In the third millennium process of Europeanization of contract law has reached a new dimension and start to be the significant feature of the legislative processes at various level. The influence of those movements was significant together on national and common level. Europeanization and globalization of contract law has a significant influence in overcoming legal uncertainty and barriers in free movement of values. Differences in legal systems which obviously increase the costs of international trade should be restrained by uniform solutions which will be accepted in national legislations. Legal rules and basic principles of contract law play an extremely important role not only in economic flows but they are crucial in establishing European cultural identity as well as share of similar cultural, moral, religious, moral and legal values. Despite the numerous obstacles the process of drafting European Civil Code represents law in action nowadays.

¹¹ See, Government of Republic of Serbia, Decision on creation Commission for drafted Civil Code, Službeni glasnik RS, br. 55/05 i 71/05

Referencies:

1. Basedow Juergen, Codification of Private Law in the European Union:the Making of a Hybrid, 9 Eur.Rev.Priv.Law, 2001.
2. Berger Klaus Peter , *The Creeping Codification of the Lex Mercatoria*, The Hague, 1998.
3. Draetta Ugo, Lake Ralph, Nanda Ved, *Breach and Adapoation of International Contracts, An Introduction to a Lwx Mercatoria*, Butterworth Legal Publishers, USA, 1992.
4. Lando Ole, Principles of European Contract Law in the Third Millenium, *Transnational Law in Commercial Legal Practice*/Center for Transnational Law(ed.) Muenster:Quadis Publ., 1999.
5. Milenkovic-Kerkovic Tamara, *Origin, developments and the main features of the new lex mercatoria*, Facta Universitates, Vol.1,No5,Nis, ,1997.