



WORKING PAPERS

LAW 2015/35

Department of Law

European Regulatory Private Law Project (ERC-ERPL)

European Research Council (ERC) Grant

The internal vs. the external dimension of European private law – a conceptual design and a research agenda

Hans-W. Micklitz



European Research Council
Established by the European Commission

European University Institute
Department of Law

“European Regulatory Private Law” Project

European Research Council (ERC) Grant

**THE INTERNAL VS. THE EXTERNAL DIMENSION OF EUROPEAN
PRIVATE LAW – A CONCEPTUAL DESIGN AND A RESEARCH
AGENDA**

Hans-W. Micklitz

EUI Working Paper **LAW** 2015/35
ERC-ERPL Project



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© 2015 Hans-W. Micklitz

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

This paper will be published in Marise Cremona/H.-W. Micklitz (eds.), the External Dimension of European Private Law, Oxford University Press forthcoming

The research leading to these results has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722].



Author's contact details

Hans-W. Micklitz

Professor of Economic Law
European University Institute
Florence, Italy

e-mail: Hans.Micklitz@eui.eu

Abstract

Research on the external dimension of European Private Law is still in its infancy. However it is possible to group the debate around four major observations which seem to hold the external European private law together and which indicate a move: (1) (from) legal rules and (to) legal practice; (2) (from) formal law making and (to) European governance; (3) (from) substantive law and (to) procedural law; (4) (from) private law and (to) trade law. It will have to be shown that the 'from... to' by and large corresponds to the distinction between traditional private law and regulatory private law. The paper is meant to set out a research design rather than coming up with proposals for solution.

Keywords

European private law, traditional private law, regulatory private law, internal dimension, external dimension

Table of Contents

CLARIFICATIONS 1

 Traditional and regulatory private law 1

 The internal and the external dimension 3

FOUR OBSERVATIONS ON THE EXTERNAL EUROPEAN PRIVATE LAW 5

 Legal rules vs. legal practice 6

 Experimentalist governance vs. formal regulation 9

 Substance vs. procedure 13

 Private law vs. trade law..... 16

Clarifications

The concept of the external dimension of European private law is built on a number of premises: the need to distinguish between ‘traditional’ and ‘regulatory’ private law; the need to draw a line between national and European private law; and, last but not least, the need to keep the internal dimension of EU private law distinct from its external dimension. This should be clarified.

Traditional and regulatory private law

During the last years I have put much effort in analysing and explaining the rise of European *regulatory* private law.¹ This does not have to be repeated here. In essence, the point is that European private law is neither built on the premise of freedom of contract, on private autonomy, on *autonomie de la volonté*, nor on tort, on *unerlaubte Handlung* (wrongful acts) or *responsabilité d’autrui*.² It is argued that freedom of contract and maybe even tort is built into the Economic Constitution of Europe and be found in the case law of the CJEU on the four market freedoms.³ However, this is a highly contested claim, as there is no agreement about the foundations and the outlook of the European Economic Constitution, or about its content.⁴ The adoption of the Charter of Fundamental Rights has partly remedied this uncertainty in that the Charter explicitly recognizes economic liberties. At the very least, since 2000 freedom of contract enjoys constitutional status at the EU level through Article 16.

What is missing at the EU level, is, in continental language, a European civil code or, in common law language, a European law on contract and tort. Pushed into action by the European Parliament, the European Commission launched a communication on European contract law in 2001,⁵ which was meant to initiate a political debate about the need and feasibility of a European civil code. The European Commission requested the Study Group and the Acquis Group to elaborate a ‘Common Frame of Reference’.⁶ The model presented in 2008/2009, the so-called Academic Draft Common Frame of Reference, very much looks like a fully-fledged European civil code. In 2011 Commissioner Reding launched a political debate through the publication of a draft proposal on a ‘Common

¹ Micklitz, ‘The Visible Hand of European Private Law’, 28 *Yearbook of European Law* (2009) 3-60; in Italian in: G. Alpa and R. Mazzei (eds), *Seminari del Consiglio Nazionale Forense: Collana ‘Studi storici e giuridici’* (2010), at 125-192; in Finnish: *Lakimies* (2010) 330-356; in Japanese: 12 *Hokkaido Journal of New Global Law and Policy* (2011); and in French: ‘La main visible du droit privé réglementaire Européen’, 28 *Revue Internationale de Droit Economique* (2014) 5-57.

² Much could be said and quoted on the origins of the different language, see my modest account: ‘On the Intellectual History of Freedom of Contract and Regulation’, to be published in 33 *Penn State International Law Review* (2015) = EUI Working Paper LAW 2015/09.

³ This is particularly true for the representatives of the ordo-liberal school, a German based undertaking to lay down the structure for a market economy after the Second World War; Gerber, ‘Constitutionalizing the Economy: German Neoliberalism, Competition Law and the “New” Europe’, 42 *American Journal of Comparative Law* (1994) 25. After the establishment of the European Economic Community, the second generation of ordo-liberals transferred the concept from the German context to the European Union; Mestmäcker, ‘Auf dem Wege zu einer Ordnungspolitik für Europa’, in E.-J. Mestmäcker, H. Möller and H. P. Schwartz (eds), *Eine Ordnungspolitik für Europa – Festschrift für Hans v.d. Groeben* (1987), at 9.

⁴ M. Maduro, *We the Court – The European Court of Justice and the European Economic Constitution* (1998); review by Reich, ‘Europe’s Economic Constitution or: A New Look at Keck’, 19 *Oxford Journal of Legal Studies* (1999) 337; K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe* (2010).

⁵ COM (2001) 398 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0398&from=EN> (last accessed 5 June 2015).

⁶ Research Group on the Existing EU Private Law (Acquis Group), *Principles of the Existing EU Contract Law (Acquis Principles): Contract I* (2007); Ch. v. Bar *et al.* (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline Edition, 2009).

European Sales Law'.⁷ In November 2014 the newly appointed European Commission officially withdrew the proposal. For the time being the ambitious project of creating an equivalent to the grand codifications in continental Europe and the common law on contract and tort at the EU level seems 'dead'.⁸

Therefore, trans-border conflicts within the EU have to be solved through private international law means – a field of law which is designed to solve conflicts between different national private legal orders in the tradition of Fritz Carl von Savigny.⁹ Here, Europeanisation has been successfully achieved: through the Brussel Convention and the Rome Convention, both adopted in 1980, 25 years later transformed into the Brussels Regulations I and II *bis* on jurisdiction in private, commercial and family law and through the two Rome Regulations on contract (Rome I) and tort (Rome II). It is no longer national law that defines its applicability – it is now European law. The EU managed to harmonize national private international law and replace it (more or less fully) by European private international law. The CJEU has jurisdiction to shape an autonomous body of European private international law.

Regulatory private law is different. Roughly speaking, we may distinguish between two waves of regulatory private law. The first goes hand in hand with the rise of the 'social', which started in the late 19th century and had its peak with the social welfare state of the Second World War.¹⁰ Social regulation in private law is meant to restrict freedom of contract, private autonomy and *autonomie de la volonté* to the benefit of workers in employment contracts, to the benefit of tenants in tenancy contracts and last but not least to the benefit of consumers in contracts with their suppliers. The second wave of regulation is linked to the liberalization and privatization of public services in the last three decades of the 20th century. This process started in the US in telecommunication and postal services and then reached energy and transport. It has not yet come to a halt as health care and education – traditionally fields of public services – are coming under ever greater pressure.¹¹ The second wave of regulation enlarged the space for freedom of contract and at the same time set boundaries to it.¹²

Both waves of regulation are much older than the European Union. However, gradually but steadily the EU has first taken over social private regulation and later the liberalization and privatization of former public services – not to forget financial services. The decline of the welfare state model in the Member States and the transfer of regulatory competences to the EU are parallel developments. The shift from the national to the European level had its down sides. The 'social' was weakened. Matters of social justice via regulation have been substituted through a new model of European justice, called access justice.¹³ With the support and backing of the Member States the EU became by far the most important regulator within the original domain of the 'social' and within regulated markets.

⁷ COM (2011) 635 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

⁸ In the Communication (2015) 192 final 6.5.2015, the Commission announces under 2.1. a proposal for a regulation on internet sales.

⁹ Muir Watt, 'Integration and Diversity: The Conflict of Laws as a Regulatory Tool', in F. Cafaggi (ed.), *The Institutional Framework of European Private Law* (2006), at 191.

¹⁰ Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006).

¹¹ M. Cremona (ed.), *Market Integration and Public Services in the European Union* (2011).

¹² N. Reich, *General Principles of EU Civil Law* (2013); Comparato and Micklitz, 'Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU', in U. Bernitz, X. Groussot and F. Schulyok (eds), *General Principles of EU Law and European Private Law* (2013), at 121.

¹³ Micklitz, 'Social Justice and Access Justice in Private Law', in H.-W. Micklitz (ed.), *The Many Faces of Social Justice in Private Law* (2011), at 3 = EUI Working Paper LAW 2011/2.

In these two domains the visible hand of European private law has become ever more obvious. Since the seventies the EU has got involved in the domain of labour and employment, later in the 1980s even more successfully in the field of consumer law. The EU is not only regulating the new markets of telecom, postal services, energy, transport and, more and more, financial services, but it is also indirectly and directly interfering with private law relations that govern the different sector – between business and business, between business and customers, but not between customers/consumers. The domain of services covers 70% of the gross income of the EU.¹⁴ In this new emerging field, the EU succeeded in framing and shaping private law relations.

The rise of regulatory private law at the EU level is amazing and deserves a short though necessarily incomplete explanation. What matters in our context are two phenomena: the rules on services contracts, enshrined into continental codifications which only provide rudimentary rules. They are based on the distinction between *obligation de moyen* and *obligation de résultat*, dating back to the French Code Civil from 1804. The manufacturer of a ‘work’ is liable for the result and is only paid for the result. This might have worked in the pre-industrial age, when handcraft held the manufacturing of products for the daily use in its hands. The opposite type is the supplier of a work who is paid for the time he spends. The prototype has become the worker in Fordism. Today, we may observe a trend where the *obligation de résultat* is more and more replaced by an *obligation de moyen*. There was a conceptual gap resulting from the rise of the service society,¹⁵ which was gradually filled through regulatory private law, with the European Commission in the driver’s seat. None of the EU Member States has undertaken serious efforts to reform the law on contract for services and to investigate the feasibility of a coherent and systematic body of rules that embodies the new domain of liberalized public services or more precisely of regulated markets.¹⁶ The Study and the Acquis Group could have opted for the elaboration of service contracts, but the attempts remained half-hearted, mainly because key economic domains were excluded from the scope of the analysis.¹⁷ The most important type of contracts, service contracts outside the traditional domains already known for the last 200 years, escaped the political and academic attention of politicians and scholars in Europe. This, however, forms the core of European regulatory private law.

The internal and the external dimension

At first hand glance the distinction is easy and self-explaining. The internal dimension refers to the scope of EU law, which is restricted to the number of Member States which have joined the EU. In that sense, the inner dimension has much in common with the ‘territory’ of the EU. Just like nation states, the EU defines the reach of its law through its ‘territory’. The external dimension is, then, outward-looking – the attempt to analyse and define the reach, impact and effect of European private law outside the territory of the EU.

As the title indicates this book is meant to explore the new and uncharted territory of the European private law outside the EU borders. There is a need to analyse and understand the inward-looking character of European private law. However, the two areas, European private international law and European regulatory private law follow different patterns.

Traditional law. Private international law is international in the sense that all national legal systems are treated alike. The ideology and the theory behind private international law is that no country –

¹⁴ Services contributed 73.5 % of the EU-28’s total gross value added in 2013: Eurostat, Data from May 2014, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP.

¹⁵ R. Rosecrance, *The Rise of the Trading State, Commerce and Conquest in the Modern Welt* (1986).

¹⁶ See for a doctrinal account which does not go into the different areas of regulated markets: R. Zimmermann (ed.), *Service Contracts* (2010).

¹⁷ Such as financial services, telecommunication and energy; Study Group on a European Civil Code (ed.), *Service Contracts* (2007).

more adequately, no nation state – should draw a distinction between categories of countries. The rules which design the reach of the jurisdiction and the applicable law should be the same, whether in a rich or a poor country, a developed or less developed country, a democracy or an authoritarian regime. The perfect world would be one where all national private international law rules follow the same pattern. This is what stands behind the ‘Hague Academy’ and what shapes its mandate.¹⁸ Europeanizing private international law rules necessarily entails difficult distinctions between the inside and the outside. One possible solution to remain within the ideology of the ‘international’ in private international law would be to adopt a European private international law which is universally applicable. This would imply that the same rules apply to trans-border conflicts between Member States and trans-border conflicts between Member States and non-Member States.

There are, however, two challenges to overcome. The first is whether and to what extent the EU body of private international law regulations follows this path – systematically and coherently. Each and every exemption or reservation questions the universality of the approach and paves the way for ranking and classifying the legal orders of non-EU countries. Seen through the glasses of the EU, one might start the external dimension with the candidate countries who applied to the EU and who are tied to the EU via a whole set of bilateral contracts which are intended to prepare them for full membership. Then there are countries belonging to the European Economic Area, still closely connected to the EU via joint administrative authorities and a mirror image of the CJEU – the EFTA Court. This is not the place to provide for a full picture. What matters is that the broader one draws the circle, the weaker the influence of the EU law might be. This corresponds, however, with a growing sentiment of alienation. One might assume that these reservations would re-appear in the judicial practice of national and European courts.¹⁹ The second difficulty is less an obstacle than a consequence. Private international law rules are claimed to be ‘neutral’ as they do not contain or promote a value judgment on the differences between legal orders. However, there are well-known contradictions.²⁰ All courts around the world tend to extend their jurisdiction beyond national territories – in terms of competences for the courts and in terms of the applicable law. In theory, the decision on jurisdiction and the decision on the applicable law are distinct. However, in practice they are more often than not closely interlinked. Once the court has established jurisdiction, the applicable law might very well be the national law.

In confirming European jurisdiction and the applicability of (harmonized) EU law, the EU courts and the Member State courts ‘impose’ on non-EU countries European procedural and substantive legal standards. It suffices to recall the dense body of mandatory rules within secondary EU law, in insurance law, in employment law and consumer law. The consequence – perhaps not the intention – of any affirmative decision on European jurisdiction and on the applicability of (harmonized) EU law in trans-European litigation is quite far-reaching. The laws and regulations of the non-EU Member States are implicitly or explicitly measured against ‘European legal standards’. It remains to be analysed what the impact of the external dimension of Europeanized private international law rules looks like – whether there are ideological ruptures and, even more importantly, whether it is possible to identify common patterns in the different degrees of alienation.

Regulatory private law. The external dimension of European regulatory private law is even more opaque. It is necessary to go through all the bits and pieces of European social regulation and European rules on regulated markets in order to find out whether and to what extent the respective European directives and European regulations contain provisions on the external dimension at all and, if this is the case, what they look like. The field of law with the best available knowledge so far is

¹⁸ It suffices to consult the different series of publications, available at <https://www.hagueacademy.nl/publications/>.

¹⁹ Some of the research on Europeanisation might be relevant but it is mainly directed at candidate states. This book does not focus on neighbouring/candidate states, except perhaps A. Marhold and, to some extent, J. Stuyck and M. Djurovic. It is helpful to distinguish these cases from the ‘purer’ international legal regimes.

²⁰ See S. Francq on the two difficulties.

consumer contract law.²¹ The different consumer law directives contain rules on the external reach of mandatory standards. The Rome I Regulation has streamlined the different wordings and laid down common standards for consumer contract law.²²

The picture is much less clear with regard to employment contracts, insurance contracts, financial services, company law and rules on regulated markets, telecommunication, postal services, energy, and transport. If there is research, it focuses on the internal dimension of the respective field of law. The external dimension of the different fields is analysed through the lenses of the Europeanized private international law rules – the Brussels and the Rome Regulations. Such an approach is self-explaining with regard to insurance and employment contracts that are explicitly regulated in the Brussels and Rome Regulation. When it comes to services in regulated markets, a full analysis would have to include explicit and implicit references in the regulations and directives on regulated markets. The mental barrier for such an exercise might be the deeply ingrained distinction between private law – the Brussels and Rome Regulations – and public law – the EU rules on regulated markets. The result is that most of the analysis undertaken so far falls short from the proclaimed holistic approach.

Similar to the Academic Draft Common Frame of References and Political project on a Common European Sales Law, scholarly research is focused on horizontal perspectives: on the scope and reach of Brussels I and II *bis*, on Rome I, and Rome II. It does not look into the messy field of European regulatory private law that provides for rules on the external dimension of private law. The different contributions in this book shed light on financial services, on company law, on pharmaceutical law and energy law. However, it would go far beyond the purpose of the book to provide for a full analysis of the external reach of all the different fields and to compare them with the Brussels and Rome regulations in order to identify gaps and contradictions.

Four observations on the external European private law

Research is still in its infancy. That is why it seems premature to formulate over-ambitious objectives. In taking into account the different contributions in the book it is possible to group the debate around four major observations which seem to hold the external European private law together and which indicate a move: (1) (from) legal rules and (to) legal practice; (2) (from) formal law making and (to) European governance; (3) (from) substantive law and (to) procedural law; (4) (from) private law and (to) trade law. It will have to be shown that the ‘from... to’ by and large corresponds to the distinction between traditional private law and regulatory private law.

The four observations are united by a common characteristic: the tensions and contradictions between the antipodes, which hold them together. That is why it seems more appropriate not to combine the antipodes via a simple ‘and’ but via a ‘versus’. Of course, these observations are tentative and meant to trigger a debate rather than to provide answers. Observations are based on practice, on impressions and assumptions. One possibility would be to reject the observations as ill-founded and to return to a clear distinction between private law and public law, delegating the recent development in regulated markets to public law. Similar considerations have long been voiced by those who regard ‘mandatory’ rules as regulation, to be kept separate from ‘contract’.²³ However, only by testing the observations and assumptions it will be possible to push the debate further and beyond the boundaries of a traditional understanding of private law, which has found its own comfort zone. Each of the four

²¹ This is due to the fact that the Rome Convention from 1980 had to be transposed into national law. There are numerous contributions in books and commentaries (in the German tradition) on what is called today the Brussels Regulation as well as the Rome I and Rome II Regulations.

²² Reich in H.-W. Micklitz *et al.*, *Understanding European Consumer Law* (2nd edn, 2014).

²³ For a theoretical discussion of the distinction between contract and regulation, see Brownsword, ‘Contract, Consent, and Civil Society: Private Governance and Public Imposition’, in P. Odell and C. Willett (eds), *Civil Society* (2008), at 5. For a different voice: H. Collins, *Regulating Contracts* (1999).

observations start with a set of guiding hypotheses which condense the implicit preconceptions, though based on ongoing research on regulatory private law for a couple of decades now.

Legal rules vs. legal practice

First, in external European private law we have too many rules and not enough law. Secondly, where there is law, we have no or limited practice. Thirdly, where we have legal practice, it is about procedure not about substance. Fourthly, where we have extensive practice, we do not have enough law. Again, the distinction and differences between traditional private law and regulatory private law might help to understand what is meant by these claims.

Traditional private law rules are very well developed. The two Brussels Regulations on jurisdiction and enforcement as well as the two Rome Regulations on the applicable law of contract and tort form an impressive body of highly sophisticated legal rules. There is legal scholarship analysing and commenting on the Regulations in great detail. However, there is an obvious contradiction. The two Brussels Regulations, in particular Regulation 44/2001, ‘recasted’ (this is the official language) through Regulation 2015/2012, are of high practical relevance. Since the adoption of the Brussels Convention in 1980, an endless flow of references has been reaching the Court in Luxemburg and has led to a dense set of rules, in particular on consumer law, on the concept of the consumer and the concept of the contract, both highly influential in that the CJEU does not draw a distinction between the Brussels regulation and the different consumer contract law directives.²⁴

This finding stands in stark contrast to the still rather limited practical importance of the two Rome Regulations.²⁵ One might argue that its predecessor, the Rome Convention, did not grant the CJEU jurisdiction and that the Rome Regulations gained importance once the Member States were ready to accept the interpretative authority of the CJEU. However, with the exception of family law, private international law rules in the field of contract and tort have always played a rather limited role.

There are many open questions. Most of them are related to empirics. To what extent do the references that reach the CJEU have an external dimension? And if they do, is the CJEU using the same methodology, the same arguments, the same mode of interpretation as in internal EU cases? To my knowledge no systematic and comprehensive analysis of the case-law of the CJEU has been undertaken to shed light on possible differences between the internal and the external.²⁶ The

²⁴ The CJEU is not drawing a distinction in the notion of the consumer under the Brussels Regulation/Convention, which provides for a fully harmonized set of rules on jurisdiction and the consumer contract law directives, which are mostly laying down minimum standards in a rather narrow context. On the trend towards a genuine and autonomous concept of contract, see Micklitz, ‘Der Vertragsbegriff in den Übereinkommen von Brüssel und Rom’, in R. Schulze, H. Schulte-Nölke and L. Bernardeau (eds), *Europäisches Vertragsrecht im Gemeinschaftsrecht* (2002), at 39.

²⁵ All in all, 20 cases so far and not all yet decided. 6 cases under the Rome Convention: Case C-305/13, *Haeger & Schmidt*, judgment of 23 October 2014, not yet published; Case C-184/12, *Unamar*, judgment of 17 October 2013, not yet published; Case C-64/12, *Schlecker*, judgment of 12 September 2013, not yet published; Case C-384/10, *Voogsgeerd*, [2011] ECR I-13275; Case C-29/10, *Koelzsch*, [2011] ECR I-1595; and Case C-133/08, *Intercontainer*, [2009] ECR I-9687. 6 cases under the Rome I Regulation: Case C-483/14, *KA Finanz AG*, not yet decided; Case C-557/13, *Lutz*, judgment of 16 April 2015, not yet published; Case C-396/13, *Sähköalojen*, judgment 12 February 2015, not yet published; Case C-508/12, *Vaepenik*, judgment of 5 December 2013, not yet published; Case C-190/11, *Mühlleitner*, judgment of 6 September 2012, not yet published; Case C-585/08, *Pammer*, [2010] ECR I-12527. 8 cases under the Rome II Regulation: Case C-240/11, *Prüller*, not yet decided; C-475/14, *AAS Gjensidige Baltic*, not yet decided; Case C-359/14, *ERGO Insurance*, not yet decided; Case C-350/14, *Florin Lazar*, not yet decided; Case C-45/13, *Kainz*, judgment of 16 January 2014, not yet published; Case Case C-22/12, *Haasová*, judgment of 24 October 2013, not yet published; Case Case C-412/10, *Deo Antoine*, [2011] ECR I-11603; Case C-173/11, *Fotball Dataco*, judgment of 18 October 2012, not yet published.

²⁶ I would like to thank Angela Ward, Référendaire at the Court of Justice for the European Union, for this inspiring information.

spectacular cases decided by the CJEU with a strong external dimension, such as *Ingmar*²⁷ on the external reach of mandatory rules in the Directive 86/653/EEC on commercial agents or *West Tankers*,²⁸ *TNT*,²⁹ and *Gazprom*³⁰ are well-known. But what kind of arguments can be drawn from the few cases that have received public attention?

There is more. What are the reasons for the differences between the role and importance of the Brussels and the Rome Regulations? An obvious explanation would be that businesses, in particular big businesses, prefer arbitration to litigation in (European) courts. If they opt for a particular court, they choose New York, London or Switzerland as the place of jurisdiction.³¹ Businesses do not engage in a sophisticated distinction between the internal and the external dimension of EU law. It simply does not matter whether two companies located in the EU or two companies, one located in the EU, the other outside the EU, are litigating. The result is the same. Businesses will opt for arbitration. These findings do not apply to consumer law. The rise of online sales has considerably increased the number of cross-border transactions in the EU and outside the EU. In theory, the carefully designed set of EU private international law rules should and could apply. They aim at protecting the consumer, granting him the right to litigate at his domicile (in the EU) and to rely on his (Europeanized) national consumer protection laws.³² In reality, there is little litigation before courts, independent from the internal or the external dimension. Consumers shy away from going to court. Litigation is too costly and private international law rules are too complicated. The EU is promoting out-of-court settlement for trans-border conflicts *within* the EU. The design of the ODR Regulation and the ADR Directive is not laid out to integrate trans-EU consumer litigation. It is simply too much dominated by the European Commission, which will run the ODR platform.³³ The complex EU model leaves room for access to court as a means of last resort. From a transnational perspective, the EU platform will have to compete with business models for conflict resolution, such as eBay or Alibaba in China.³⁴ The UNCITRAL initiative, which promotes a rather simple arbitration model for low cost consumer conflicts, seems to be quite promising.³⁵

But if this is correct, why has the Brussels Convention and later the Brussels Regulation gained such importance? Provided it is reasonable to assume that big businesses do not go to court, then SMEs should be identified as possible litigants. Again, we lack facts and knowledge about what has happened before the CJEU between 1980 and 2015. All we know is that there are quite a number of consumer law cases which have been decided on the lieu of jurisdiction. Many of the references are related to dubious marketing practices where SMEs are playing around with jurisdiction in business transactions near to the borders between two EU countries in order to escape the tighter grip of

²⁷ Case C-381/98, *Ingmar*, [2000] ECR I-9305.

²⁸ Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, [2009] ECR I-663.

²⁹ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*, [2010] ECR I-4107, with opinion by AG Kokott.

³⁰ Case C-536/13, *Gazprom' OAO Lietuvos Respublika*, judgment of 13 May 2015, not yet published, which could be read so as to limit both *West Tankers* and *TNT*.

³¹ S. Vogenauer and S. Weatherill (eds), *Harmonisation of European Contract Law* (2006); G.-P. Calliess, 'Der Richter im Zivilprozess – Sind ZPO und GVG noch zeitgemäß', *Gutachten A zum 70. Deutschen Juristentag* (2014).

³² Admittedly, this is a rather crude version of an extremely complex set of rules. On top of this, there is much pressure from business to cut down the privileges.

³³ For a more comprehensive discussion see: Eidenmüller and Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe', 29 *Ohio State Journal on Dispute Resolution* (2014) 261; Rühl, 'Die Richtlinie über alternative Streitbeilegung: Handlungsperspektiven und Handlungsoptionen', 127 *Zeitschrift für Zivilprozess* (2014) 61; Caponi, 'Just Settlement of Just About Settlement? Mediated Agreements: A Comparative Overview of the Basics', 79 *Rebels Zeitschrift für Ausländisches und Internationales Privatrecht* (2015) 117.

³⁴ See R. Metz *et al.* (eds), *E-Commerce in China and Germany – A Sino-German Comparative Analysis* (2012), with many facts on how the e-commerce and the conflict resolution is organized.

³⁵ Information available at http://www.uncitral.org/uncitral/publications/online_resources_ODR.html.

national consumer protection legislation at the place where the consumer is domiciled or even to render enforcement through courts more difficult for consumers.³⁶

Regulatory private law outside the reach and scope of the four regulations is again different. There is no coherence and there is no recognizable system. The law is erratic, piecemeal, opaque and incomplete. At least this is the dominant (continental) view in legal scholarship, which proclaims private law to be coherent and consistent, transparent and systematic. The EU rules on regulated markets might serve as a blueprint.³⁷ They do not focus on private law, more particularly on contracts for services. They regulate the legal environment in which the contract is embedded. Characteristic for regulated markets is the variety of rule makers – the European Union, the Member States implementing the rules, the sector-related agencies which are adopting rules and recommendations, the variety of rules, European, national, binding, non-binding, soft and hard, which surround the contract for services. This is only the law-making side. On the enforcement side, the EU rules on regulated markets provide for out-of-court settlement procedures to be applied between businesses and between businesses and consumers. They involve the regulatory agencies in surveying and monitoring contractual practice, thereby blurring the line between law-making and law enforcement. Litigation before courts, national and European courts is the exception to the rule.

This is only the internal dimension and it is already complex enough – in particular, if one assumes that each regulated market and each domain of regulatory private law is following its own rationality.³⁸ Whilst it seems possible and manageable to pierce the veil of ignorance in the internal market, the degree of complexity still increases considerably when it comes to the external dimension of European regulatory private law. At first glance, European regulations and directives adopted under the procedural (democratic) requirements set out in the EU Treaty suggest that the rules originate in Europe. This means that the European Commission, the European Parliament and the Council are those who stand behind the substance laid down in secondary Union law. This, however, is only half the truth. The relevant EU rules on regulated markets are not free-standing, they are connected and affected by international rules of supranational and international bodies as well as national rules from outside the EU, in particular the United States. The interaction between the EU and the rest of the world in the standard-setting may take various forms, which will be discussed later on.

At the level of enforcement beyond the EU, we have to distinguish between the enforcement of private law rules via regulatory agencies across the EU borders, the enforcement of private law rules via out-of-court mechanisms, and, last but not least, litigation before courts. There are questions about questions. The regulatory agencies and the networks in which they are embedded are designed for the internal market, for the inner world of the EU. The same is true with regard to the ADR bodies, which are established within the relevant sectors, highly promoted by the EU. The status of non-EU regulatory agencies is not subject to systematic analysis. There are strong differences between the

³⁶ The various judgments on sweep stake (sales promotion strategies where the consumers are approached by sending him or her a letter that he or she has won a price); for a discussion see H.-W. Micklitz, J. Stuyck and E. Terryn (eds), *Cases, Materials and Text on Consumer Law* (2010), at 546.

³⁷ Here I rely on extensive empirical research within the ERC project on European regulatory private law; see H.-W. Micklitz and Y. Svetiev, 'A Self-Sufficient European Private Law – A Viable Concept?', EUI Working Paper LAW 2012/31 (ERC-ERPL 01/2012); H.-W. Micklitz, Y. Svetiev and G. Comparato (eds), 'European Regulatory Private Law – The Paradigm Tested', EUI Working Paper LAW 2014/04 (EUI-ERC Law 2014/04). With regard to financial services, see the editorial: H.-W. Micklitz, 'The Public and the Private – European Regulatory Private Law and Financial Services', 10 *European Review of Contract Law* (2014) 473. Ottow and Svetiev, 'Financial Supervision in the Interstices Between Private and Public Law', 10 *European Review of Contract Law* (2014) 496; H. Marjosola, 'What Role for Courts in Protecting Investors in Europe – A View from Finland', 10 *European Review of Contract Law* (2014) 545; Della Negra, 'The Private Enforcement of the MiFID Conduct of Business Rules: An Overview of the Italian and Spanish Experiences', 10 *European Review of Contract Law* (2014) 571.

³⁸ As analysed and promoted by Fischer-Lescano and Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal for International Law* (2004) 999.

regulated markets. The most advanced model was established through the banking union.³⁹ The out-of-court mechanisms are not accessible to consumers or businesses from non-EU countries. Article 2(1) requires both parties to have residence in the EU. However, what we do not know is whether and to what extent *in practice* non-EU regulatory agencies are involved in enforcement issues (surveillance of contractual practices) and what happens if non-EU litigants ask for access to the ADR bodies.

The first observation culminates in one single question: why is legal practice so important for understanding the external reach of European private law? What do all the rules, the Treaty, the competences in the Treaty, the directives and regulations, the few court decisions, all the publicly available knowledge tell us little about the ‘law’ – if we accept that law-making and law enforcement, that rules and practice are all belonging together to understand what the ‘law’ is? Without intensive empirical studies of out-of-court settlement bodies, without investigating reports of regulatory agencies, and – even more – without talking and speaking to those who are in charge of enforcement, there is no chance to get a realistic picture. K.-H. Ladeur is about to analyse the key role of ‘legal practice’. He questions the ‘imperialism of legal theory’ against legal practice. The key to understanding legal practice is claimed to be the ‘textuality of the law’.⁴⁰

Experimentalist governance vs. formal regulation

Firstly, European regulatory private law is much more appropriate for experimentalism than traditional private law. Secondly, the limits of EU competences are compensated for by innovative competence creeping through experimentalism. Thirdly, regulatory private law in external relations is a much better testing field than regulatory private law in and for the internal market. This is, last but not least, the consequence of the less tight democratic oversight. All in all, the EU is a laboratory for regulatory innovation.⁴¹

The ground-breaking article by Charles Sabel and Jonathan Zeitlin⁴² on experimentalist governance very much focussed on administrations and administrative law, in the European context linked to the multi-level governance structure of the EU, in the transnational context, renamed as global administrative law.⁴³ However, the model and the thinking behind it is gaining ever stronger legal ground in contract law through contract governance and in constitutional law through democratic experimentalism.⁴⁴ This is not the place to engage in a discussion about whether it is feasible to set a

³⁹ Compare the rules on energy (see A. Marhold in this volume) with the ones on the banking and financial services (J. Wouters and J. Odermatt in this volume). Art. 55 of Directive 2013/36 in combination with Art. 33 of Regulation 1093/2010 empowers EBA to conclude non-binding co-operation agreements with the supervisory authorities of third countries; Art. 8 of the SSM Regulation 1024/2013 – which establishes the Banking Union, allows the ECB to enter into non-binding administrative arrangements with supervisory authorities, international organisations, and the administrations of third countries ‘subject to appropriate co-ordination with EBA’.

⁴⁰ I would like to thank K.-H. Ladeur for letting me know of his recent book project. It will be a theory on legal practice, based on post structuralists such as Agamben, Derrida, Nancy, and Menke.

⁴¹ See on the EU model in the light of the debate around its philosophical foundations: Micklitz, ‘The European Union Project’, in J. Dickson/P. Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (2013), at 1-17.

⁴² Sabel and Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’, 14 *European Law Journal* (2008) 271; C. Sabel and J. Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (2010); Sabel and Simon, ‘Epilogue: Accountability Without Sovereignty’, in G. de Búrca and J. Scott (ed.), *Law and New Governance in the US and the EU* (2006), at 395; recently Svetiev, ‘Settling or Learning: Commitment Decision as a Competition Enforcement Paradigm’, 33 *Yearbook of European Law* (2014) 466.

⁴³ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15; and K.-H. Ladeur, ‘The Emergence of Global Administrative Law and the Evolution of General Administrative Law’, Osgoode CLPE Research Paper 16/2011.

⁴⁴ Joerges, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’, 30 *European Law Review* (2005) 461, at 483-484. Advocating the constitutionalisation of governance: M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (2011); E. Korkea-aho, *Adjudicating New*

legal frame for experimentalism or quite to the contrary whether experimentalism in whatever field of the law is undermining the law's integrity.⁴⁵ The purpose here is different. The intention of the analysis is to show how experimentalism has already become 'reality' in the external dimension of European regulatory private law.

In line with Möhle and Riesenhuber⁴⁶ I will distinguish between four forms of governance: the structural level, the procedural level, the content level and the instrumental level. The structural side of governance invokes the distinction between the public and the private, the global and the regional or the national. The procedural level deals with inclusion and participation. The content level has to deal with autonomy and regulation, the instrumental level with contracts as a means to implement codes, technical standards and/or public values.

Regulatory private law requires technical standards.⁴⁷ They are the key to get access to markets. Technical standards have multiple functions. They have a genuine technical component (unifying sizes and measuring systems), but they may go beyond the latter and lay down requirements on the quality of the products or, even further, enshrine social values on health and safety, on environmental protection, on human rights, or on complaint procedures. The line between product standards and services, between technical and behavioral requirements, between standards and codes of practice, is becoming blurred.⁴⁸ Technical standards are everywhere in contracts on foodstuff, on pharmaceuticals, on financial services, on energy, on telecom, and on transport. They shape the quality, the safety, and the environment. Non-compliance with standards may lead to warranty claims and, provided they define the level of safety, trigger liability. Provided they define the level of safety, non-compliance triggers liability. They serve as the blueprint for analysing the different levels of governance and a gateway to the integration of international standards into EU rules.

The most obvious experimentalism takes place at the *institutional* level. Technical standards are elaborated by standardization bodies. These bodies vary in the degree to which they enjoy an institutional status within the system of international organisations. They may be formally recognized or they may exist as informal bodies, they may have a firm structure of membership or not, they may have clear rules on who is allowed to participate or not, they may have formalised decision-procedures or not. The variety of institutions is hard to overlook and, once identified, the institutional setting has to be placed and analysed in the particular context in which it operates. The EU cavorts like a fish in the water, despite the rather tight competence structure, which still relies on enumerated powers. This is not to say that there is no link between formal competences entrusted to the EU and its institutional role in the transnational environment. The EU is certainly stronger where it has a clear competence. However, competence is not a necessary requirement for the EU to be involved, to be heard and to influence standardization. Here the door is open towards governance in external relations.

At the international level, the most well-known standard bodies are ISO and IEC as well as *Codex Alimentarius* in food safety. In financial services IOSCO is less known. The EU is making use of the work done by private parties and established international organizations in standardizing products and services, though to a different degree and in different roles and functions. The EU is strongest in the

(Contd.) _____

Governance, Deliberative Democracy in the European Union (2015); M. Dawson, C. Joerges and H. Enderlein (eds), *The Transformation of the European Union: Challenges of Functionality, Design and Legitimacy* (2015).

⁴⁵ The term has been coined by R. Dworkin, *Law's Empire* (1986); see now Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis', forthcoming in D. Patterson and A. Södersten (eds), *A Companion to European Union Law and International Law* (2015); in the same direction: Renner, 'Death by Complexity – The Financial Crisis and the Crisis of Law in the Modern World' in P. Kjaer (ed.), *The Financial Crisis in Constitutional Perspective* (2011), at 93.

⁴⁶ Möhle and Riesenhuber, 'Contract Governance - A Draft Research Agenda', 5 *European Review of Contract Law* (2009) 248.

⁴⁷ This statement deserves a much deeper explanation. I will leave this for another occasion.

⁴⁸ On the conceptual issues of self-regulation: F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (2006).

traditional field of standardization, meant to reduce non-barriers to trade. Here, it enjoys exclusive competence. The key institutions in Europe are CEN and CENELEC. The relationship between the EU and the standards bodies is laid down in a memorandum of understanding. There are institutional links between CEN/CENELEC and ISO/IEC.⁴⁹ The EU may influence technical standards making, either directly via CEN/CENELEC as a societal player benefitting from its weight in a regional economy of 500 million people or, more directly, via the EU institutions, provided the European Commission has mandated CEN/CENELEC to elaborate a particular standard for the Internal Market. Again this is a variation of the proclaimed *Brussels effect*.⁵⁰

The EU looks weakest in the field of banking and financial services. Here, the technical standards are elaborated within the Basel Committee and IOSCO, where the EU has ‘only’ an observer status and limited opportunity to formally influence the concrete working level. However, both operate on the basis of consensus and it seems that the particularities of the decision-making process allow for the institutions representing the EU in the two committees to have a say in the outcome.⁵¹ In IOSCO, the EU works more like a catalyst in the elaboration of standards which are integrated into MIFID I and MIFID II.⁵² The political decision of the EU Member States to establish the Banking Union has brought the European Central Bank into the picture, which has to co-operate with EBA in banking regulation. Currently the impact of the EU via EBA and ECB on the Basel Committee is hard to foresee, but the overall expectations seems to be that the EU’s influence is increasing. The problem remains that non-European members claim that Europe is over-represented already.⁵³

The *procedural* level is closely connected to the institutional level and the degree to which the institution in place is settled and established. Participation is first and foremost linked to economic power and political importance. That is why the EU is given a status in bodies like the Basel Committee and IOSCO. Politics (represented by parliaments in democracies) do not seem to matter so much, which is justified with reference to the mere technical character of the rules. This is a rather weak argument in light of the thin line between technical standards (for the executive) and standards with a societal impact (for parliaments) or, in the Banking Union, the difference between regulatory (European Parliament) and implementing standards (European Commission).⁵⁴ The growing public awareness of standardization is directed at the legitimacy of the standard-making bodies, which in turn raises questions about participation, not only of the most powerful countries or the most powerful companies, but ever stronger of civil society. In theory, the rather flexible institutional setting leaves room for experimentalism. In practice, there are only a few notable examples where standard bodies have opened their doors to non-governmental organisations representing civil society.⁵⁵ More prominent seems to be co-operation between institutions representing different policy fields, for example ISO and ILO in the elaboration of ISO 26000.⁵⁶

⁴⁹ CENELEC Guide 13 – CENELEC Agreement on Common planning of new work and parallel voting edition 1, 2001-01; ISO/CEN Agreement on Technical Co-operation between ISO and CEN Vienna Agreement, version 3.3. 2001-09-20.

⁵⁰ Bradford, ‘The Brussels Effect’, 107 *Northwestern University Law Review* (2012) 1.

⁵¹ Statement of Andrea Enria, Chairman of the European Banking Authority at the State of the Union (7 May 2015) within the panel on ‘Banking Supervision – Global Challenges and Opportunities for the EU after the Banking Union’.

⁵² See A. Marcacci, ‘Protecting Investors in Financial Times: The Design and Functioning of the Legal Protection of Retail Investors’ (PhD EUI, 2013) and his contribution to the book.

⁵³ For details on the Basel committee see J. Wouters and J. Odermatt in their contribution to the book.

⁵⁴ The Art. 290 TFEU procedure applies to binding regulatory standards, the Art. 291 TFEU procedure to binding implementing standards.

⁵⁵ Providing information in some areas: O. Dilling, M. Herberg and G. Winter (eds), ‘Transnational Administrative Rule Making, Performance, Legal Effects and Legitimacy’ (2011); more theoretically: C. Bratschi, *Transnational Law beyond Bi-Polarity: The FSB Key Attributes of Effective Resolution Regimes for Financial Institutions in National, European and Transnational Law* (Phd EUI, 2015).

⁵⁶ R. Schmidt, ‘Public-Private Cooperation in Transnational Regulation’ (Phd EUI, 2015).

The *content* level is the proof of the pudding. How are technical standards and private law interlinked in handling conflicts with non-EU litigants? Are these not two separate worlds, living apart from each other, challenging the rhetoric of regulatory private law? There is need to distinguish between the role and function of standards in regulatory private law and in traditional private law. In the former, there might well be an impact of international standards out there on European private law-making in regulated markets. This will be done in the context of the third observation, the shift from substance to procedure. Traditional private law comes in when issues arise that cannot be kept and solved within the regulated markets. In contract and tort, regulatory private law and traditional private law are coming together. In trans-border litigation, there is room for the European regulations on private international law, *within* the EU and *outside* the EU.

The bridge between technical standards and private law are contractual and tortious remedies.⁵⁷ The ideology of traditional contract is that the two parties individually agree on rights and duties, they agree on the price and on the quality. This is only half the truth. Since the industrial age, in the service society and now in the information society, goods and services are largely standardized. The quality of a product or service is pre-defined through standard bodies outside and beyond the individual contractual agreement. When it comes to whether or not there is non-compliance, the yardstick is more often than not the technical standard, to which the parties implicitly or explicitly refer. This might be a national, a regional or ever more often an international one. Contract doctrine is struggling hard with the economic reality of standardized quality – notwithstanding the level of origin.⁵⁸ Similar phenomena can be observed in tort liability. Here, technical standards, provided they exist, may serve as a benchmark against which the potential liability of the wrongdoer is measured. Compliance with a technical standard presumes that the potential infringer has done what needs to be done to ensure a reasonable level of safety. In practice, it is then for the victim to show that the standard in question was insufficient to guarantee the necessary level of personal integrity. The current litigation around PIP, the bankrupt French producer of defective breast implants, mirrors in a nutshell the interplay between technical standards (the breast implant as a medical device) and the opportunities and limits of transnational litigation in and outside the EU.⁵⁹

The *instrumental* level of governance can be demonstrated by the interplay between contracts, technical standards/codes of conduct and corporate governance. Technical standards, once they overstep the technical and enter into the social sphere, may easily turn into codes of practices, or more generally on codes that enshrine rules and obligations to be observed by those who subscribe to it. There are two ways to integrate these codes/standards into a governance structure, via contract governance – a prominent example are (transnational) supply chains⁶⁰ – or via corporate governance –

⁵⁷ The CJEU is about to develop a new type of remedies which is related to the procedural character of regulatory private law. Januek, Feryn and Invitel are outstanding examples of these tendencies, see B. Kas, 'A Socio-Legal Study on the Operation of Hybrid Collective Remedies in the Area of European Social Regulation', in H.-W. Micklitz, Y. Svetiev and G. Comparato (eds), 'European Regulatory Private Law – The Paradigm Tested', EUI Working Paper LAW 2014/04, at 19; European Regulatory Private Law Project (ERC-ERPL-09). However, these remedies have no external reach so far. That is why it might be premature to discuss them in the current context.

⁵⁸ It might suffice to recall the debate during the adoption of the Consumer Sales Directive 99/44 or during the elaboration of the respective rules in the Draft Common Frame of Reference. The dominating perspective in scholarship is that parties have to individually agree. The differences between the two types of agreements, individually or standardised are not thought through, see for an early account: Knieper, 'Eigentum und Vertrag' as well as 'Sachmängelgewährleistung und Verbraucherschutz', both in R. Knieper, *Zwang, Vernunft, Freiheit: Studien zur juristischen Konstruktion der Gesellschaft* (1981), at 54 resp. 144.

⁵⁹ See the different contributions in the Special Issue of the *Revue Internationale de Droit Economique* 1/201 'L'indemnisation des victimes de produits de santé défectueux en Europe – L'affaire PIP.

⁶⁰ Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures', 36 *Fordham International Law Journal* (2003) 1558.

via Corporate Social Responsibility.⁶¹ Contract governance in supply chains remains so far mainly on company level and has not yet reached a level of generalisation. To my knowledge there is no code on contract governance providing guidance for companies on how to use (social) standards (human rights standards) in supply chains.

Corporate governance is a well-established business strategy, which combines profit seeking with good conduct through institutional self-regulation. Companies started to impose codes of good conduct on themselves, which they announced to the outside world as business strategy. The EU, the OECD and the UN discovered CSR as a prominent field of political action, not least due to the failure of the international community of states to come to some form of an agreement for an international convention. The legal and legal-theoretical discussion concentrates on the regulatory nature of CSR⁶² and on its enforceability.⁶³ Much less attention has been given to the efforts of companies which try to enforce CSR standards through contracts. Here CSR and contract governance⁶⁴ combine an increasingly important field or regulatory private law, far beyond the internal dimension of EU private law.

Substance vs. procedure

First, in the supranational context, the clear-cut distinction between substance and procedure is vanishing. This is true with regard to law-making as well as with regard to law enforcement. Secondly, with an increasing relevance of the international dimension, there is an overall shift away from substance to procedure. Thirdly, the development of regulatory private law is characterized by an ever stronger fragmentation of sectors, which are only loosely interconnected. Fourthly, the biggest challenge is to develop cross-sectorial procedural requirements that may overcome the legitimacy deficit.

There is an explanation needed of the meaning and use of procedure in traditional and regulatory private law. Procedure is meant to cover the rights and remedies structuring the enforceability of contractual rights or of rights protecting property and personal integrity. In the transnational context the distinction reappears as one drawing a line between jurisdiction and applicable law. Regulatory private law is different. Here, law-making and law enforcement often go hand in hand. This has to do with the phenomenon that the laws adopted via parliaments set out a broad frame only, which then has to be given shape by the executive. The delegation of power from the legislature to the executive is the key to understand why the line between law-making via the executive and law enforcement via the executive becomes blurred.⁶⁵ Enforcement of rights granted under regulatory private law takes two forms: horizontally in the relationship between the parties, and vertically between the parties and the executive agencies. The duplication or even multiplication of enforcers (courts, ADR bodies,

⁶¹ A. Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-regulation and National Private Law* (2015).

⁶² Porter and Kramer, 'Strategy and Society: The Link between Competitive Advantage and CSR', *Harvard Business Review* (2006) 78. Good overview in: Carroll and Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice', 12 *International Journal of Management Reviews* (2010) 85. Path breaking: M. Herberg, *Globalisierung und Private Selbstregulierung. Umweltschutz in Multinationalen Unternehmen* (2007); Herberg, 'Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making', in O. Dilling, M. Herberg and G. Winter (eds), *Responsible Business – Self-Governance and Law in Transnational Economic Transactions* (2008), at 17.

⁶³ A. Beckers, *Enforcing Corporate Codes Codes, On Global Self-Regulation and National Private Law* (2015).

⁶⁴ S. Grundmann, F. Möslin and S. Riesenhuber (eds), *Contract Governance – Dimensions in Law and Interdisciplinary Research* (2015).

⁶⁵ Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century', 55 *University of Toronto Law Journal* (2005) 575.

arbitration, but also administrative agencies) is even more complex in the external dimension of European regulatory private law.

There is a paradox. In traditional private law, we may observe the overall tendency to use *internal* procedural rules to ‘impose’ *internal* substantive standards on the *outside* world. In regulatory private law, we may observe both the export to the rest of the world and the import into the EU. The most striking example in traditional private law is the Brussels I Regulation. The decision on whether a conflict between two parties comes under the scope of application is a purely procedural one in private law doctrine, clearly disconnected from the decision over the applicable law. In practice, however, there is ample evidence that the CJEU is using the procedural requirements of the Brussels I Regulation to submit international conventions and international rules more broadly speaking to a compatibility test.⁶⁶ The most striking example is the *Kadi* judgment.⁶⁷ Usually it is analysed from a constitutional human rights perspective. However, it should not be forgotten that the legal action of Mr. Kadi was directed against the claimed illegal seizure of his assets. The CJEU ‘defended’ higher European human rights standards against lower external international human rights standards. The same type of thinking – though without a reference to *Kadi* – may be found in *West Tankers*, *TNT and Gazprom*.⁶⁸ Whether they are international conventions in commercial law or international security regulation, what happens is a variation of what Bradford calls the ‘Brussels effect’, which generally describes the actions of legislatures and standard-setting bodies rather than courts.

The EU is shielding its higher standards. As a result, the rest of the world is faced with the problem whether to adapt its own rules to those of the EU, to create a conflict or to seek a compromise. The means the tool to extend EU standards beyond the EU territory – and this is the ‘trick’ – is the Brussels Regulation, not the Rome Regulation. By means of the former, the EU avoids sensitive discussions about how to amend international conventions, in particular about how to bring together the higher EU level with the lower international level. Lower and higher are difficult categories in themselves and they are even more complicated in an international environment. Provided they are kept legally separate, they suggest that there is a substantial difference between the inside and the outside of the EU (law). There is, however, a common characteristic of most of the EU cases. The EU rules provide for substantive law rules, which reach beyond the less developed and often much older international conventions. It might suffice to recall the differences between the Montreal Convention and the EU Regulation on passenger rights.⁶⁹ All in all, the EU rules are ‘more protective’ – be it to the benefit of EU travellers or of EU businesses. There seems to be a ‘status’ element enshrined in the judgments referring to the Brussels Regulation. This means the ‘better’ protection is not granted per se but is linked to the particular position of the EU consumer or business party in the business relationship with a non-EU party.

In external European regulatory private law the situation looks different. Here, no coherent approach and no coherent body of EU rules exist. Whether and to what extent EU law provides for rules regulating the external dimension differs widely and needs a sector-related analysis. The contributions in this book provide for insights on pharmaceuticals, energy, consumer protection, banking and financial services. As explained, the interplay between substance and procedure is very much related to the EU’s position of power. What remains to be explained is the suggested move from substance to procedure. Taking technical standards as a blueprint, there is a clear relationship between substance/procedure and the degree of internationalization. In supranational and international fora conflicts over substance are hidden in procedural compromises. A prominent example is IOSCO. The

⁶⁶ See N. Jääskinen and A. Ward in this volume.

⁶⁷ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, [2008] ECR I-6351.

⁶⁸ See references *supra* notes 28-30.

⁶⁹ Case C-344/04, *R v Department of Transport ex parte IATA*, [2006] ECR I-403.

broad guidance and direction enshrined in IOSCO rules is concretized in MIFID I and MIFID II.⁷⁰ The international level sets politically acceptable *procedural* standards, the *substance* is left to the states and the regions (EU). Co-ordination or even integration between the EU version of IOSCO and the US version of IOSCO bounces back to IOSCO or any other forum in which knowledge and information is exchanged beyond all national and supranational boundaries in a largely democratically uncontrolled safe harbour. U. Beck branded the phenomenon '*Weltinnenpolitik*' (the world's internal policy) – state representatives, international organisations, private standard bodies, NGOs from all over the world are coming together and are shaping 'standards', which then have to be reintegrated into national legal systems.⁷¹

When it comes to enforcement of these largely sectorial rules, the fine distinction between law-making and law application, between standard-making and standard application becomes blurred. *Internally*, the European Commission, the European agencies (in regulated markets) and, more recently, the European Central Bank (in banking) are mandated to ensure uniform compliance with the European standards (which might in fact be international standards). It is exactly through this mechanism that the borderline between law-making and law enforcement is disappearing. Provided the 'guidance' takes place at the EU level, the Member State authorities are turned into agents which execute what has been decided and agreed upon in the networks that tie the European agencies together with the rest of the world.⁷² *Externally*, the EU is not speaking with one voice. This would require an exclusive competence of the EU, although one may find evidence of unanimity in fields of shared competences.⁷³ When it comes to the enforcement of the EU rules beyond its territory, co-ordination is needed between the national enforcement authorities, the European agencies and the European Commission. Co-ordination points to procedure, not to substance. If there is substance, the benchmark will be what has been agreed upon *internally*. Interestingly enough, in regulated markets – the core area of European regulatory private law – there is very little case-law of the CJEU. This means – contrary to traditional private law – that there is 'only' and 'mainly' sector-related administrative practice. To put it bluntly, in order to understand the role and function of the EU in the external dimension of health and safety standards (*Codex Alimentarius*) and financial services (IOSCO), extensive empirical research is needed in order to get at least an idea of what is actually happening in the different sectors, whether the EU standards are applied, by what procedure and by whom. All what remains is the theoretically well-founded assumption that there is a shift from substance to procedure in private law rule-making and in private law rule application.

There is an additional layer for procedural law in the transnational environment. Traditional private law, enshrined in the grand codifications or in the common law on contracts and tort⁷⁴ provides for a coherent body of rules. This is also true for the common law. In theory we may know and we may study how the law looks like, what its state of affairs might be and what kind of role the judiciary is playing. Regulatory private law, even more so in its external dimension, is first and foremost fragmented, broken down into sectors, each of them determined and governed by a particular community of lawyers, economists, politicians, and sometimes even NGOs.⁷⁵ This community cuts

⁷⁰ See A. Marcacci in this volume.

⁷¹ U. Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (1986); English title: Risk Society.

⁷² In our project we have ample empirical evidence at least for the energy and the telecom sector as well as for financial services; information available at <https://blogs.eui.eu/erc-erpl/>.

⁷³ See the contribution of M. Cremona in this volume referring to the PFOS case on environmental standards.

⁷⁴ Setting aside the famous saying from Lord Goff who, when being asked to speak about the state of the common law, replied: 'there is no such thing as "the" common law'; 'The Future of the Common Law', 46 *International and Comparative Law Quarterly* (1997) 745.

⁷⁵ The famous findings of Bernstein, 'Private commercial law in the cotton industry: Creating Cooperation through Rules, Norms and Institutions', 99 *Michigan Law Review* (2001) 1724 can easily be generalized; with regard to the community of standards bodies see: Van Gestel and Micklitz, 'European Integration through Standardisation: How Judicial Review is Breaking down the Club House of Private Standardisation Bodies', 50 *Common Market Law Review* 2013 145.

across national and transnational boundaries and may easily reach the global level. With power and endurance it is possible to study the sectors and to identify the law and how it is operating in practice. However, there is no or extremely little interaction between the different sectors. From a birds' eye perspective there are obvious similarities in the regulatory design of the contract – e.g. for instance between telecommunications and energy. These similarities invite scholars to think about a more coherent approach to service contracts. What seems to be more realistic in an external legal environment is to promote co-ordination mechanisms across sectors. If there was willingness to embark on such an exercise, we would again be on the procedural side – technically within experimentalist governance.⁷⁶

Private law vs. trade law

Private lawyers will insist on the differences between the two domains. They may at best understand trade law as framing the international economic constitution,⁷⁷ as embedding private law (the 'private law society' (*Privatrechtsgesellschaft*) in the ordo-liberal sense). The discussion is most advanced at the EU level, where the relationship between the market freedoms and private law has attracted scholarly attention. However, in the elaboration of the Draft Common Frame of Reference and later the Common European Sales law, this dimension has been ignored. In trade law, in particular in its international dimension, private law relations are entirely off the radar. If taken into account of at all, private law is regarded as a tricky field which might interfere with the broad policy objectives of international organisations promoting free trade. So the undertaking to link the two areas and to find a joint language is not an easy task. The assumptions are the following: first, behind trade law conflicts there is more often than not litigation between two private parties; secondly, in traditional private law the interconnection between the two is operated through constitutionalization of private law; thirdly, in regulatory private law, the interconnection is condensed in private regulation which interferes into trade relations.

Gareth Davies opens his contribution in Weatherill/Leczykiewicz with the following words: 'If a party wishes to enter the market of a certain Member State, that is another way of saying the he or she wishes to conclude contracts with persons within that market. Sale and purchase of goods, services, labour or capital assets take place via contracts. Any restriction on free movement – understood to mean cross border economic activity – is therefore a restriction on the formation of contracts between domestic and foreign actors.'⁷⁸

He has the internal market in mind – the four economic freedoms in the Treaty, and how the CJEU used these four freedoms to shape and influence our understanding of private law. A similar statement could easily be made with regard to the EU Common Commercial Policy (CCP) and the GATT/WTO rules. Behind most of the cases pending before the CJEU, internally (internal market) and externally (CCP), as well as before the DSB and the Appellate Body, there is a contract. There are parties to a contract who are barred from access, from access to the internal market, access to the global market equated here with the market composed of the members of GATT/WTO. Regulations might prevent parties from fulfilling their contractual obligations, thereby affecting the validity of the contract and its enforceability. The party who is denied access might invoke remedies – to terminate the contract, to be relieved from payment and delivery, or to claim compensation.

⁷⁶ Private law or private regulation where the EU is involved constitutes no more than one facet of the overall debate on the EU and on private law making and private law enforcement beyond the state, its nature and its legitimacy. Here we are in the middle of the debate on transnational law, its theoretical, conceptual and philosophical foundations.

⁷⁷ See the writings of U. Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (2012).

⁷⁸ G. Davies 'Freedom of Contract and the Horizontal Effect of Free Movement Law', in S. Weatherill and D. Leczykiewicz (eds), *The Involvement of EU Law in Private Law Relationships* (2013), at 53.

The EU and the GATT have in common that private law conflicts about access must be given a twist towards statutory barriers in order to bring the case before the CJEU and DSB/AB. A well-known example – though again not analysed from the private law perspective – is the conflict about the ‘dollar bananas’, which involved national courts, constitutional courts, the CJEU and the GATT/WTO.⁷⁹ Before the CJEU, private parties can use the preliminary reference procedure, but this does mean that they no longer have to overcome the still existing hurdle of the lack of horizontal direct effect of primary EU law. A barrier to trade enshrined in statutory regulation is needed. Within GATT/WTO private parties have no right to access DSB/AB, they need to convince their home states to act on their behalf. The decisions taken by these bodies will usually not reveal the private law dimension behind the case. They are discussed as trade law problems dealing with tension of market freedoms vs. the legitimacy of national or regional regulation narrowing or limiting trade. The private law dimension is lost and can only be excavated by looking into the facts of the case and reconstructing the ups – the litigation from the national to the supranational and the downs – how the decision by the CJEU and or DSB/AB is re-translated into the national legal system. Some research has been done on the impact of primary EU law on private law,⁸⁰ though most of the research is outdated. I am not aware of any research undertaken to investigate systematically the relationship between international trade law (GATT/WTO) and private law/contract law.

If we look into the relationship between regulatory private law and trade law, standards, again, have a key role: standards on quality of products and services, standards on health and safety, ever stronger standards on all sorts of sectorial services, telecom, energy and financial services, and, last but not least, behavioral standards. There are two ways to look at the role and function of standards which interconnect private law and trade law. Along the line of traditional private law, standards might play a role in the enforcement of contracts and in the benchmark that triggers liability. From a regulatory private law perspective, the question is whether and to what extent the rules on regulated markets (to remain with that example) comply with the EU CCP, the WTO TBS and SPS Agreements and sectorial agreements inside or outside the GATT/WTO, or whether they can be justified via public policy concerns.⁸¹ It might suffice to remember the so-called hormone conflict or the GMO conflict between the US and the EU.⁸² Bringing both areas of law together, one should haste to add, does not mean separating the two from each other – i.e. to let the local private law dimension be decided internationally via arbitration, and the public law dimension before European courts and the DSB/AB. Instead, a holistic perspective is indispensable, one which combines the origin of the conflict (the contract) with the decision on the compatibility of trade restrictions with the market freedoms of supranational and transnational fora – upwards from the conflict to the international fora and downwards again to the decision taken by national courts or by international arbitration bodies.

⁷⁹ For a short summary of a complicated story: A. Shah, ‘The Banana Trade War’, *Global Issues* (2010), available at <http://www.globalissues.org/article/63/the-banana-trade-war>.

⁸⁰ E. Steindorff, *EG-Vertrag und Privatrecht* (1996); C. Schmidt, *Die Instrumentalisierung des Privatrechts durch die Europäische Union* (2010); S. Grundmann, *Europäisches Schuldvertragsrecht* (1999); A. Hartkamp, *European Law and National Private Law* (2012). Carla Sieburgh and I have a project under way which is trying to shed light on six different areas of EU law.

⁸¹ In Case C-122/95, *Federal Republic of Germany v Council of the European Union*, [1998] ECR I-973, the Court makes a distinction between discrimination between EU traders (not allowed) and discrimination between traders which simply reflects the discrimination between EU and non-EU countries (allowed), at para 56: ‘there is no general principle of Community law obliging the Community, in its external relations, to accord third countries equal treatment in all respects.’

⁸² There is an abundant literature on the topic, A. Bletschacher, ‘“Continued Suspension of Concessions”; “EC-Biotech” and the Proceduralisation of SPS Issues’ (Phd University of Bamberg, 2015); M. Weimar, *Constitutionalising EU Administrative Risk Governance - A Case Study of GMO Authorisations* (forthcoming 2015).



European Research Council
Established by the European Commission

This EUI Working Paper is published in the framework of an ERC-funded project hosted at the European University Institute.