Articles

The Future of Contract Law*

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Abstract: This contribution starts out with the fundamental changes society and law have undergone since 200 years ago with the 'discovery of consensus' and asks the question whether at the turn of our millennium, we are living similarly in a period of fundamental change. In this context, the contribution asks the question about the future of contract law. It does so primarily for Europe. To answer this question, it is argued that both institutionally and in substance contract law is indeed undergoing fundamental change, starting only a few decades ago. Contract law has become in its dynamic aspects largely European, decreasingly national, and will become over the next few decades, in substance, method and style, even primarily European. It has become a law in which party autonomy and instruments of order and protection have become similarly important and this process will continue. Standard contract terms, consumer protection, anti-discrimination are only three key elements; the financial crisis will trigger further thinking. The aim is to discover an equilibrium in which the material freedom of all parties concerned is best furthered. The article then argues that a trend towards codification comes together with a trend not to consider the code as 'universal order' any longer, that a trend towards generalisation comes together with a trend to differentiate more even in a general part of contract law: between different types of contract partners, different types of groups of contracts (spot contracts and long-term contracts), and different paradigms for the formation of contracts. The article concludes with an examination of some core areas where major steps of modernisation have been taken lately and it forecasts that contract law will be more international, interdisciplinary, more interested in the rule-setting process, more market and business oriented. In short it predicts that a similar discussion to that found within debates about corporate governance will develop for contract governance on a European level.

Résumé: Cette contribution évoque tout d'abord les changements fondamentaux que la société et le droit ont connus depuis 200 ans avec la "découverte du consentement" et elle soulève la question de savoir si, au tournant de notre millénaire, nous sommes également en train de vivre une période de changement fondamental. Dans ce contexte, cette contribution soulève la question de l'avenir du droit des contrats. Elle le fait principalement par rapport à l'Europe. Pour répondre à cette question, il est soutenu qu'à la fois institutionnellement et substantiellement, le droit des contrats est effectivement en train de connaître un changement fondamental, qui a commencé seulement il y a quelques dizaines d'années. Le droit des contrats est devenu dans ses aspects dynamiques largement européen, de moins en moins national, et il deviendra même, dans les prochaines décennies, essentiellement européen en substance, méthode et style. Il est devenu un droit dans lequel l'autonomie de la volonté et les

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instruments d'ordre et de protection sont devenus d'égale importance et ce processus se poursuivra. Les clauses contractuelles standard, la protection des consommateurs, la non-discrimination sont trois éléments clefs ; la crise financière déclenchera de nouvelles réflexions. Le but est de découvrir un équilibre dans lequel la liberté matérielle de toutes les parties concernées soit mieux sauvegardée. L'article soutient alors qu'une tendance à la codification va de pair avec une tendance à ne plus considérer un code comme un ordre universel, qu'une tendance à la généralisation va de pair avec une tendance à davantage distinguer, y compris dans la partie générale du droit des contrats : entre les différents types de partenaires contractuels, les différents types de groupes de contrats (contrats ponctuels et contrats de longue durée), et les différents paradigmes pour la formation des contrats. Cet article conclut avec l'examen de certains domaines cruciaux où des progrès majeurs dans la modernisation ont été récemment effectués et il prédit que le droit des contrats sera davantage international et interdisciplinaire, davantage intéressé par le processus d'établissement des règles, et davantage orienté vers le marché et les entreprises. En bref, il prédit qu'une discussion similaire à celle que l'on trouve dans les débats sur la gouvernance d'entreprise se développera pour la gouvernance des contrats à une échelle européenne.

Zusammenfassung: Ausgangspunkt für diesen Beitrag sind die grundstürzenden Umwälzungen, die Gesellschaft und Recht vor 200 Jahren mit der "Entdeckung des Konsenses" als gesellschaftsordnendes Grundprinzip erfuhren. Die Grundfrage ist dann, ob wir zum Jahrtausendwechsel an einer ähnlich signifikanten Schwelle stehen, vor allem in Europa. Die Antwort ist zweigeteilt, sowohl institutionell als auch inhaltlich erscheint der sich derzeit vollziehende Wechsel in der Tat ebenfalls grundstürzend. Vertragsrecht ist in seiner Grunddynamik inzwischen bereits großteils Europäisch beeinflusst, immer weniger national, es wird jedoch in den nächsten Jahrzehnten in Substanz, Methode und Stil wirklich Europäisch dominiert sein. Außerdem werden im Vertragsrecht zunehmend die Elemente der Freiheit und diejenigen der Ordnung breit in ein Gleichgewicht gebracht und dieser Prozess wird sich fortsetzen. Allgemeine Geschäftsbedingungen, Verbrauchervertragsrecht und Antidiskriminierungsrecht bilden nur drei Kernbausteine, die Finanzkrise stößt auch im Vertragsrecht weitere Überlegungen an. Ziel ist es, ein Gleichgewicht zu finden, in dem die materielle Freiheit aller Vertragsbeteiligter (ggf. auch betroffener Dritter) möglichst gut gefördert wird. Der Beitrag wendet sich dann dem verstärkten Trend zu (Re-)Kodifikation zu und sieht diesen in einem Spannungsfeld insofern, als zugleich Kodifikationen weniger als "universelle Ordnung" gesehen werden als früher, und dass ein Trend hin zur Verallgemeinerung ebenfalls parallel läuft mit einer zunehmenden Differenzierung nach Gruppen selbst im Allgemeinen Teil: verschiedenen Gruppen von Beteiligten, verschiedenen Gruppen von Verträgen (etwa Einmal- und Langfristverträgen), verschiedenen Arten der Vertragsbegründung. Abschließend werden einige Kernbereiche der Modernisierung in den Blick genommen. Die Vorhersage geht dahin, dass die Vertragsrechte (und vor allem die Vertragsrechtswissenschaften) internationaler, stärker interdisziplinär und stärker regelsetzungsorientiert werden, stärker eingebunden in eine allgemeine Diskussion von Märkten und spezifisch wirtschaftsrechtlich geprägt. Kurz, eine ähnliche Entwicklung wird vorhergesagt wie diejenige im Bereiche des Gesellschaftsrechts mit der Corporate Governance Diskussion.

I Introduction

When looking into the future, looking back first is probably a wise thing to do, and in the case of contract law – which is codified in (most of) Europe – two

hundred years may be a good period for doing so. Indeed, the decades around and right after the French Revolution and the formulation of the French Code Civil are founding years for contract law thinking. This may be true for quite a few areas of the law given that these decades are those which, in historical sciences, are seen today as the threshold period – the '*Sattelzeit*' as *Koselleck* called it – which initiated modernity.[1] And if this is the case – namely in social and political development –, what has been said for contract law could be expected for quite a few specific areas of the law. It speaks, however, for the high importance of contract law in social development and for its paradigmatic character that the claim is particularly true for contract law.

For Contract Law, the decades before and around 1810 are so important for, amongst others, the following reasons. Firstly, considering the core power for societal order (at that time), it is perhaps of the highest importance that it is in these decades that it has been interpreted very consistently with contractual thinking, ie hierarchical power and state order has been grounded in the idea of a social contract.[2] It is, of course, true that there were already roots for such thinking in Hobbes' writings, but the step from him to the Scottish moralists and then to Rousseau can hardly be overstated, both with regard to their moral and fundamentally positive evaluation of the concept of a social contract as the basis of co-existence in states and society and with respect to how absolute a term is chosen. Leviathan (which tames the people but has also to be tamed itself) is no longer at the centre of the concept, but a social contract in its constitutive force for society.

Of similar and perhaps even greater importance for private law and economic thinking is, of course, a second development of that time. This is the formulation of the concept of exchange as the core mechanism which guides economy and even society as a whole.[3] Man is no longer 'man's wolf', but akin to exchange and collaboration and this concept – alongside the parallel concept of competition – is seen in a fundamentally positive way. The idea is born that the

1 R. Koselleck, in O. Brunner, W. Conze and R. Koselleck (eds), *Geschichtliche Grundbegriffe*, vol 1 (4th ed, Stuttgart: Klett-Cotta, 1994), Introduction XV; and on the reception of this concept, for instance: K. Palonen, *Die Entzauberung der Begriffe – das Umschreiben der politischen Begriffe bei Quentin Skinner und Reinhart Koselleck* (Münster: LIT Verlag, 2004) esp 246–251, 314–317.

2 See, for instance: W. Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1996); W. Kersting, 'Vertrag, Gesellschaftsvertrag, Herrschaftsvertrag', in Brunner, Conze and Koselleck (eds), n 1 above, vol 6 (1990) 901; well opposed, however, a bit later F. Hegel, *Grundlinien der Philosophie des Rechts*, 1821 (edition: Moldenhauer/Michel, *Werke in 20 Bänden*), for instance § 75 (page 157 et seqq).

3 A. Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations*, first appeared in 1776; on this, for instance, R.P. Malloy, *Law in a Market Context* (Cambridge: Cambridge University Press, 2004) 27; earlier already in this direction B. Mandeville, *The Fable of the Bees: or, Private Vices Publick Benefits*, first appeared in 1714.

exchange mechanism produces positive results for both parties and also for society at large – steered by the 'invisible hand' although each partner is looking after his own interests and is acting selfishly. The mechanism produces these positive results without this being (and needing to be) the intention of the parties. Selfishness is (typically) the source of common welfare. What is paramount is that the content of exchange is decided by the parties themselves and no longer heteronomously (for instance by the guilds etc). Thus, *Adam Smith* laid the foundations of that social science (economics) which nowadays would seem to be dominant and he even foresaw that there might be a need in certain cases for the state to step in with regulation, in order to maintain the exchange mechanism intact and to safeguard the prerequisites of its smooth functioning. The idea that consent is a source of legitimacy has probably never been formulated more strikingly and more beautifully than in the famous Article 1134 of the French Civil Code of 1804 which states: 'Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.' The French Revolution of which this Code is the product has, however, also led to a significant change of importance between both organisational frameworks named so far – state and market. There are good arguments which speak in favour of *Franz Böhm's* interpretation – both historical and normative – that the time of the French Revolution brought about the transition to what he calls the Private Law Society and that this transition is to be seen positively if normative individualism is taken as a starting point. A characteristic of a such a private law society is, in principle, a supremacy – in quantitative and in normative terms – of those mechanisms for creating societal order which function on the basis of consensus (and equality) over those based on hierarchy.[4] Given all this, it is not surprising that the arts, this 'soul of society',

4 F. Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' *ORDO* 17 (1966) 75–151; C.-W. Canaris, 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft', *Festschrift for Lerche* 1993, 873–892; E. Mestmäcker, 'Franz Böhm', in S. Grundmann and K. Riesenhuber (eds), *Deutschsprachige Zivilrechtswissenschaftler des 20. Jahrhunderts in Berichten ihrer Schüler – eine Ideengeschichte in Einzeldarstellungen*, vol 1 (Berlin: de Gruyter, 2007) 31–54; K. Riesenhuber (ed), *Privatrechtsgesellschaft – Entwicklung, Stand und Verfassung des Privatrechts* (Tübingen: Mohr-Siebeck, 2007); W. Zöllner, *Die Privatrechtsgesellschaft im Gesetzes- und Richterstaat* (Cologne: Otto Schmidt, 1996). From the (less expanded) English literature: D. Gerber, 'Constitutionalizing the Economy – German Neo-liberalism, Competition Law and the "New" Europe' 42 *The American Journal of Comparative Law* 25–84 (1994); E.-U. Petersmann, 'Constitutionalism, Constitutional Law and European Integration' 46 *Aussenwirtschaft* 247–280 (1991); M. Streit and W. Mussler, 'The Economic Constitution of the European Community From "Rome" to "Maastricht"' (1995) 1 *European Law Journal* 5–30; W. Sauter, 'The Economic Constitution of the European Union' 4 *Columbia Journal of European Law* 27–68 (1998). For an extension of the concept to new forms of 'monopoly' power, private or public, see: S. Grundmann, 'The Concept of the Private Law Society after 50 Years of European and European Business Law' (2008) 16 *European Review of Private Law* 553–581; quite similar already H. Maine, *Ancient Law* (London: H.S.M.,

show similar developments and that all persons in the 'bourgeois drama' start to negotiate, start to form contracts, between different layers and classes in society; the agony for consensus is in the forefront, be it in Lessing's 'Minna von Barnhelm' or in Kleist's 'Broken Jar' or anywhere in Europe.[5]

Thus, the decades leading up to 1810 brought about three developments of fundamental importance for contracts and for contract law thinking. Everybody is negotiating and forming contracts and this is seen positively – from the philosophy of morals to bourgeois dramas. Even state power is seen, in principle, as rooted in consensus. And, in the relationship between the two, hierarchical rule setting and consensus, the relative weight of the latter increases dramatically at the expense of the former.

Coming back to our times, the question is, of course, whether there is a development with respect to contract law and contract law thinking – doctrinal thinking and contract law practice – which marks a step or threshold of at least some, if not of similar importance as the one described so far. This is the question raised in this contribution. And to summarise the answer given, it can be stated that indeed, with respect to what will be said sub 1 to 3 of section II, the developments, too, are seen as fundamental, and even dramatic: both with respect to the relevant levels of rule setting and with respect to contents and even style. They are fundamental enough to state that there is a real 'threshold' which is being crossed in our decades. On the other hand, of course, the 'discovery of consensus' as the universal steering mechanism around 1800 is a thunderbolt of such power that it can be found in similar intensity only very rarely in history.

II Institutional Questions and Questions Concerning the Overall Framework

When asking the question which 'future' can be envisaged for contract law and contract law thinking – and this is the question raised by this contribution – then it would seem quite obvious that, at least in Europe, it cannot be seen solely and not even primarily in national contract law. Therefore, the broader institutional setting has to be considered as well and even with priority. This setting, however, not only has to do with new regulators and standard setters (see below section 1), but also with content. And these are the more 'material' standards, in particular constitutional standards (see below section 2). 'Europeanisation' and 'materialisation' as the two single most important develop-

1885) 170: '… the movement of the progressive societies has hitherto been a movement from Status to Contract.'

5 See, for instance, J. Vogl, *Kalkül und Leidenschaft – Poetik des ökonomischen Menschen* (Zürich: Diaphanes, 2004).

ments – with respect to the institutional framework and with respect to content – will be placed in the first place. What follows are considerations on the concept of codification (see below section 3) and generalisation (see below section 4), two issues which are both about an ever increasing differentiation in an increasingly complex and differentiated world, and which are of prime importance for a potential European Codification. Finally, the relationship with 'neighbouring' or 'overlapping' areas such as consumer law, (mandatory) regulation and the law of organisation, is significant and is therefore to be discussed as well (see below section 6).

1 Starting Point: New Levels of Legislation and New Legislatures

a) Supranational Level

The future of contract law – in Europe – will almost certainly be much less national, perhaps a bit more international, but mainly more supranational – European – than today. Even today – due to indirect effect and due to broad transposition, even beyond the ambit of application of EU Directives –, the following areas of the law should no longer be interpreted primarily according to methods of national law, but in conformity with the standard set in European Law:[6] (i) the information regime governing the pre-contractual phase, including even at this point, advertising, which is typically the first step towards a contract; (ii) the law of formation of contracts in distance marketing, e-commerce and in doorstep situations (including duties of disclosure and rights of revocation), but not in traditional business in the presence of both parties; (iii) the law of standard contract terms (in which case, however, the point of reference from which parties may not deviate too much, ie the default rule, is not harmonised yet): (iv) the law on anti-discrimination; (v) the law on breach of contract, at least of sales contracts, but in some countries, such as Germany, of all contracts because the regime has been adopted as a general one; (vi) most banking law contracts, a large proportion of contracts related to tourism, partly also in insurance law and for contracts concerning intellectual property (software etc); (vii) important contract law phenomena from the whole area of distribution of goods and services. While all these areas still are not really interpreted in national practice 'on the basis of the European original', such 'European' interpretation, in principle, is accepted not only by

6 For references for the legal measures etc see: K. Riesenhuber, *Europäisches Vertragsrecht* (2nd ed, Berlin: de Gruyter, 2006). For the doctrinal tools, namely indirect effect, and for the conclusion that national implementation laws must be brought completely in line with the 'original' EC Law measure, see (with further references): S. Grundmann, 'Internal Market Conflict of Laws – From Traditional Conflict of Laws to an Integrated Two Level Order', in A. Fuchs, H. Muir Watt and É. Pattaut (eds), *Les conflits de lois et le système juridique communautaire* (Paris: Dalloz, 2004) 5–29.

the ECJ, but also by all national courts, including those of last instance. They accept that the interpretation given to the European standard really takes precedent over national modes of interpretation, for instance via indirect effect but also in cases of broader transposition. It is just a matter of time before enough case law by the ECJ has been built up because of preliminary references and that younger, more 'European' generations of lawyers really bring this idea to bear.

On the other hand, while the international level will still produce some material, it is highly unlikely in the near future that there will be such broad legislation at this level as with the UN Sales Law of 1980. Even as a model which is often displaced by party agreement, it is outstanding and will probably not find a 'successor' of similar importance on the international level. There are even important international legal measures which increasingly fall into decay, namely the Uniform Laws on Bills of Exchange and Cheques. The dominant level is the one in the middle, and at least in contract law, this type of a 'regionalisation of the world' may perhaps also serve as a model elsewhere.

The real question is not so much *whether* the European level will increasingly be the dominant, but *in which form* this will happen. Today, two developments would seem to be the most likely ones. It is possible that harmonisation will increase fruther, will become more detailed, cover the areas more densely and, because of increased recourse to the principle of full harmonisation, will more extensively displace national contract laws. It is this approach which is nowadays proposed mainly through the proposal of a EU Consumer Rights Directive. It is, however, also possible that, quite diversely, a European codification comes into being as it has most vigorously been proposed by the European Parliament and this as a so-called optional instrument; also, all (other) EU legislative organs would seem to favour it if they pronounce themselves in favour of codification.[7] In this second scenario, an additional question remains

7 The most important steps are the decision taken by the Council on the Tampere summit: European Council of Tampere 1999, *SI*(1999) 800, n 39; and then three 'communications' by the EC Commission: Communication of the Commission to the Council and the European Parliament on European Contract Law, *COM*(2001) 398 final = *OJEC* 2001 C 255/1; the international discussion can be found in: S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague et al: Kluwer, 2002); Communication of the Commission to the Council and the European Parliament – a more coherent European Contract Law, Action Plan of 12 February 2003, *COM*(2003) 68 final = *OJEC* 2003 C 63/1; Communication of the Commission, European Contract Law and the revision of the acquis: the way forward, *COM*(2004) 651 final. Then the First Progress Report on the Common Frame of Reference, *COM*(2005) 456 final; and Second Progress Report on the Common Frame of Reference, *COM*(2007) 447 final; on the (academic) rule/principle setting level: O. Lando and H. Beale (eds), *Principles of European Contract Law, Part I and II* (Dordrecht et al: Martinus Nijhoff, 2000, Part I 1996); O. Lando,

open and this is whether, because of a combination of approaches or at least in the long run, such codification does not, nevertheless, one day also lead to a very far reaching displacement of national contract laws, namely in these two ways: (i) the optional instrument may be combined with ongoing broad harmonisation (the effect then being the one described above) or the optional instrument may become in the long run an 'exclusive' instrument. Thus, the optional instrument remains a true alternative only, if (ii) such an instrument remains optional and harmonisation is not increased or even reduced, in which case the optional instrument really is an alternative to national laws which continue to exist, perhaps even more independent from supranational influence than today. In the first case, the European regime largely supersedes the national one or even displaces it completely (intensive harmonising effect), in the second case it serves mainly as an alternative to national laws (and thus serves as a paradigm for national laws, but without a claim to exclusivity). In my view, there are important arguments in favour of the second solution in the codification scenario, ie a co-existence of an optional instrument with relatively 'free' national laws – with full freedom of choice for the parties between both alternatives, even in purely domestic cases.[8] An argument in favour of codification (an 'optional instrument', in whichever form) would seem to be that system building for a modern contract law can be more coherent and more visibly advanced by such a coherent codification than by mere ongoing harmonisation, even if intensified. Codification could serve as a model – perhaps even world-wide – for a modern contract law of the 21st century, which harmonisation, because of its piece-meal approach, would seem to be less appropriate for. For contract law and its development, its substantial shape, a well prepared codification at European level would therefore be preferable to ongoing, progressive harmonisation.

Which of these paths of development supranational contract law will take may not be certain. It is, however, certain that those characteristics of style in

E. Clive, A. Prüm and R. Zimmermann (eds), *part III* (The Hague et al: Kluwer Law International, 2003); G. Gandolfi (ed), *Code européen des contrats – avant-projet*, (Milano: Giuffré, 2001); also Unidroit, *Principles of International Commercial Contracts* (Rome: Unidroit, 1994); this work is continued, see n 11 below.

8 Broad discussion (and references for the different opinions) in S. Grundmann and W. Kerber, 'European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-making', in Grundmann and Stuyck, n 7 above, 295–342; W. Kerber and S. Grundmann, 'An Optional European Contract Law Code – Advantages and disadvantages' (2005) 21 *European Journal of Law and Economics* 215–236; recently F. Gomez, 'The Harmonisation of Contract Law through European Rules – a Law and Economics Perspective' (2008) 4 *European Review of Contract Law* 89–118; and with quite some change: F. Gomez and J. Ganuza, 'An economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?' (2011) 7 *European Review of Contract Law* 275–294.

European Contract Law, which differ significantly from national law discussions, will be dominant with respect to the content and form of debates.[9] This feature relates in particular to the evaluation of solutions, which is more prominent in European Contract Law and therefore interdisciplinary approaches are more often applied as well in European Contract Law than with respect to national law. Moreover there would be an additional impact on the style of discussion if indeed a European Optional Contract Law Code could also be chosen in the purely domestic case as a substitute for national contract law and thus different sets of rules (not just standard contract terms) would compete – as is the case so far (only) in company law.

b) Private Ordering and Rule Setters?

Private ordering and rule setting is seen by some authors as an alternative or at least a supplement to Europeanisation of contract law. Some authors even think that the model contracts which large law firms develop and use in practice would render a European harmonisation or codification largely superfluous.[10]

If indeed a European Codification was to be drafted largely by (groups of) legal scientists,[11] it would still follow paths already known in state or interna-

9 On this, for instance: M. Hesselink, *The New European Private Law* (The Hague: Kluwer Law International, 2002); and below section IV.

10 In this sense, for instance, H. Merkt, 'Angloamerikanisierung und Privatisierung der Vertragspraxis versus Europäisches Vertragsrecht' *Zeitschrift für das gesamte Handels- und Wirtschaftrecht (ZHR)* 171 (2007) 490–518, esp at 506–508 (no European Contract Law needed for B2B); on private ordering more generally: R. Ellickson, *Order without Law – How Neighbours Settle Disputes* (Cambridge: Harvard University Press, 1991); G. Bachmann, *Private Ordnung – Grundlagen ziviler Regelsetzung* (Tübingen: Mohr-Siebeck, 2006).

11 Nowadays, of course, with the discussion of a Common Frame of Reference and an Optional Code: Ch. von Bar, E. Clive, H. Schulte-Nölke et al for the Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2008), now revised edition with commentaries; see now Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, *OJEC* 2010 L 105/109) and result published on the EU Commission's website 2 May 2011. In academia, it would seem, however, as if most authors did not see enough potential in the Draft to become really the model of a European codification: see, for instance, H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' *Oxford Journal of Legal Studies* 2008, 659–708; W. Ernst, 'Der "Common Frame of Reference" aus juristischer Sicht' *Archiv für die civilistische Praxis* 208 (2008) 248–282; S. Grundmann, 'The Structure of the DCFR – Which Approach for Today's Contract Law?' (2008) 5 *European Review of Contract Law* 225–247. See this whole issue of the

tional legislation. These paths could indeed also be followed by supranational legislation. In fact, such drafting scenarios are known from the history of the large Codes in France, Austria, Switzerland or Germany.

Except for such input in drafting, genuine 'private ordering' is known today in Europe, its Member States and worldwide much more in Company Law than in Contract Law, ie as sets of rules which stem from private standard setters, not state bodies, and which become positive law without modification, just by an act of incorporation, as can be seen in accounting law (IASB in London), corporate governance or the law of prospectuses (IOSCO). In contract law, the standard contracts drafted and used in practice by the large law firms are not really of comparable shape; they are not formulated in a uniform way for whole markets and published as such. These are just contract rules often used in the same way ('forms' or 'model rules'), in part standard contract terms – even though there is obviously some convergence. What comes closest to the sets of rules named for Company Law are standard contract terms which associations representing the different stakeholders in markets have negotiated and agreed upon, such as those applied in the German construction business, which in the future may well be negotiated not only at the national level, but for the whole of Europe. To create a level playing field for this development, ie to allow for free circulation of such negotiated standard contract terms in Europe, which would also be based on a consideration of the protective needs, is one of the prime questions in the further development of the EC Standard Contract Terms Directive, as well as of the application of the EU fundamental freedoms.[12] On the other hand, beyond labour law, it seems rather unlikely that, in the near future, private sets of rules as such will be applied in the same way as objective law as this has been the case in Company Law over the last few decades, and this not only for particular sectors, but broadly and generally for a particular area of the law.[13] The group of stakeholders does not seem

ERCL. At international level the parallel rules in the Unidroit Principles (first 1994, see n 7 above) on which work progresses also today, again.

12 H. Collins, 'The Freedom to Circulate Documents: Regulating Contracts in Europe' (2004) 10 *European Law Journal* 787–803; Communication of the Commission to the Council and the European Parliament – a more coherent European Contract Law, Action Plan of 12 February 2003, *COM*(2003) 68 final = *OJEC* 2003 C 63/1, n 37–39; and moreover S. Whittaker, 'On the Development of European Standard Contract Terms' (2006) 2 *European Review of Contract Law* 51–76.

13 There are, of course, trade practices, and the old discussion on a lex mercatoria, which can be recalled. Perhaps most important today is private standardisation. On this, see, for instance, Th. Möllers (ed), *Standardisierung durch Markt und Recht* (Baden-Baden: Nomos, 2008); Th. Möllers (ed), *Vielfalt und Einheit – Wirtschaftliche und rechtliche Rahmenbedingungen von Standardbildung* (Baden-Baden: Nomos, 2008); and as well H. Micklitz, 'Services Standards – Defining the Core Elements and Their Minimum Requirements' http://www.anec.eu/attachments/ANEC-R&T-2006-SERV-004final.pdf; broad survey, also on parallel phenomena, in J. Köndgen, 'Privatisierung des Rechts –

sufficiently homogeneous and so clearly 'organised' as in accounting law, in the law of prospectuses or in corporate governance of listed companies. And if consumer law created similar dynamics for contract law over the last few decades as capital market law did for company law, this does not imply that market forces and self regulation were seen in a similar way as well. Indeed, they are seen here by the core decision makers and in the public perception much more sceptically as was traditionally the case in the company law setting and capital market law.

2 Optimizing Freedom via Tightening Protective Standards

The concept of 'optimizing freedom via tightening protective standards' – which in my view is the most important substantive legal development over the last few decades – would seem like a contradiction in itself. This refers to the phenomenon which some authors have described as 'materialisation' of the law or also the 'death of contract'.[14] What is meant can best be illustrated by first describing some core examples of such 'optimizing freedom via tightening protective standards'. The overall tendency is to guarantee more material freedom for *both* partners to the contract (at least in the overall aggregate) – abandoning on the other hand increasingly a concept of (purely) formal freedom.

a) Core Examples Today

Cases of 'optimized freedom via tightening protective standards' can be seen today mainly in four types of examples.

The first type is about an intensification of those traditional limits which party autonomy encountered in the standard of good morals and in the case of fraud and duress. These traditional limits are largely undisputed and are supported from a comparative law perspective. Increasingly, however, courts and doc-

Private Governance zwischen Deregulierung und Rekonstitutionalisierung' *Archiv für die civilistische Praxis (AcP)* 206 (2006) 477–525, at 481–494.

14 C.-W. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' *Archiv für die civilistische Praxis (AcP)* 200 (2000) 273–364; and marked parallels with the following explanations already in F. Bydlinski, *Fundamentale Rechtsgrundsätze* (Vienna/New York: Springer, 1988) 186–202; F. Bydlinski, *System und Prinzipien des Privatrechts* (Vienna/New York: Springer, 1996) 71–74 (stressing the interplay between the two poles named), 147–164, 624–628; and the idea of 'deluted freedom' ('verdünnte Freiheit') in L. Raiser, 'Vertragsfunktion und Vertragsgerechtigkeit', *Festschrift 100 Jahre deutsches Rechtsleben* 1960, 101–134, at 126; my view of the following is exposed more extensively in S. Grundmann, 'European Contract Law(s) – of What Colour?' (2005) 1 *European Review of Contract Law* 184–210 and more on the business law side and for market law: Grundmann, n 4 above. See also references in n 25.

trinal developments go beyond these limits and apply stricter standards of protection. In Germany (and similarly in Italy and increasingly also in other European countries), this trend seems even particularly prominent given that doctrinal contract law thinking sees in it one of the major inroads of other areas into contract law – if not *the* most important one. In the most prominent decisions, fundamental rights have been instrumentalised, taking them as standards the core of which any (national) judge (or other state body) must bring to bear also when adjudicating in a purely private law case between private parties (on a theory of a duty to protect those standards actively).[15] The German Constitutional Court speaks in this respect of a 'structural imbalance' between the parties in which case there arises a state duty to protect the standards actively, at least in principle, in favour of the weaker party. In its content, this is, however, by no means a development which can be found only in Germany. In other countries, if they do not follow the 'fundamental rights path' in this respect, very similar results are reached by broadening the concept of fraud ('guarantee given [which is only] necessary for our files', as had been said in the surety case of the German Constitutional Court) or the concept of duress ('this is the moment to show your husband your love', same case).[16]

The second type of examples are 'information rules', which have become dominant in contract law over the last two decades[17] – after a similar develop-

15 Ground breaking in the German Constitutional Court's case law the so-called sales agent and the surety cases: Constitutional Court (Bundesverfassungsgericht) *Official Reports (BVerfGE)* 81, 242–263; 89, 214–236; path breaking in German literature: C.-W. Canaris, 'Grundrechte und Privatrecht' *Archiv für die civilistische Praxis (AcP)* 184 (1984) 201–246 ('Schutzpflichttheorie'); C.-W. Canaris, *Grundrechte und Privatrecht – eine Zwischenbilanz*, (Berlin: de Gruyter, 1999). On the different theories of how fundamental rights take effect in private law, see, for instance, J. Neuner, *Privatrecht und Sozialstaat* (Munich: C.H.Beck, 1999) esp 158–161, 170–173; also S. Grundmann, 'Constitutional Values and European Contract Law – an Overview', in S. Grundmann (ed), *Constitutional Values and European Contract Law* (Alphen: Kluwer International, 2008) 3–17 (also with a comparative law survey).

16 Broad comparative law panorama in O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party – a Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions* (Munich: Sellier, 2007); O. Cherednychenko, 'EU Fundamental Rights, EC Fundamental Freedoms and Private Law' (2006) 14 *European Review of Private Law* 23–61. See also the book edited by S. Grundmann, n 15 above; for the 'revolution' the Human Rights Act 1998 caused in this respect in the United Kingdom, see S. Whittaker, in *Chitty on Contracts* (30th ed, London et al: Sweet & Maxwell/Thomson Reuters, 2011) Introductory para 1-035 through 1-066.

17 On the information model in contract law see: H. Fleischer, *Informationsasymmetrie im Vertragsrecht* (Tübingen: Mohr-Siebeck, 2001); S. Grundmann, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 *Common Market Law Review* 269–293; S. Grundmann, W. Kerber and S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin/New York: de

ment had already taken place some time before in company law with the intensification of accounting and capital market law. The theory of the economics of information, which became well developed in the 1970s had some influence on this.[18] Therefore, comparing the beginning and the end of this century for sales law, a transition from the *caveat emptor* principle to a *caveat praetor* (or: *caveat venditor)* principle has been sensed, and this is even true for English Law which, in tendency, ranks among the less protective regimes.[19] Two core ideas can indeed be derived from the EC Sales Directive: the seller is subject to detailed disclosure obligations if he wants to offer quality below market standards (the 'defect' has to be specified rather precisely), and the seller has to live up to any information about the product given in public by a member of the distribution chain including the producer himself, even those contained in advertising. This is a rather 'comfortable' regime for the client which he can recognise and observe quite well, and in core respects, the seller is under a duty to deliver information. Thus information delivered then forms part of the contract, irrespective of when it has been given, and performance can be asked for. While this has been regulated directly only for sales law, the model has been or is about to be generalised at the national level in some Member States and potentially also at European level. If duties of disclosure have been violated, the client's remedy to rescind the contract or to ask for expectation damages are those which typically put the heaviest burden on the supplier, on the other hand they often are the most attractive ones for the client as well, even if only for questions of proof. Yet another development which is already a bit older has, of course, much to do with the economics of information and an information model: this is the evolution of a generalised and more

Gruyter, 2001); R. Schulze, M. Ebers and H.C. Grigoleit (eds), *Informationspflichten und Vertragsschluss im Acquis Communautaire* (Tübingen: Mohr-Siebeck, 2003). Survey on the rules as well in H. Schulte-Nölke, Ch. Twigg-Flesner and M. Ebers, *EC Consumer Law Compendium* (Munich: Sellier/European Law Publishers, 2008).

18 Path breaking: G. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' 84 *Quarterly Journal of Economics* 488–500 (1970); and before already G. Stigler, 'The Economics of Information' 3 Journal of Political Economy 213–225 (1961); broad survey (legal and on economics) in Fleischer, n 17 above; moreover W. Magat, in Newman (ed), *The New Palgrave Dictionary of Economics*, vol 2 (1998) 307–310 ('Information regulation'); and the broad compendium on contract law and business law by Grundmann, Kerber and Weatherill, n 17 above.

19 S. Hedley, 'Quality of goods, information, and the Death of Contract' (2001) *Journal of Business Law* 114–125, esp 123. This change can well be justified on economic grounds (institutional economics): see F. Gomez and S. Grundmann, in C. Bianca and S. Grundmann (eds), *EU Sales Directive – Commentary* (Leuven/Oxford: Intersentia, 2002); Introduction para 74–77 and art 2 para 4 respectively; the standard interpretation in countries such as the United Kingdom is, of course, much more reserved: see Whittaker, n 16 above, 1-022 through 1-034 (good faith and its protective implications no general principle or trend).

stringent substantive control standard in the case of (pre-formulated) standard contract terms.[20]

A third kind of example should be seen in the increasing number of rights of revocation. Some authors have seen them as a nucleus of more 'competitive' contract law,[21] others have insisted on their functioning as an unconditional right of the client to 'repent himself'.[22] Two policy foundations would seem to exist for them which can be distinguished. Insofar as rights of revocation are granted because the contract has been formed in a doorstep or distance marketing situation (and also in the case of time-share contracts), the guiding principle would seem to be that these marketing techniques differ substantially from traditional marketing in shops which gives to both parties at least the chance to inform themselves before the deal. Conversely, in these alternative marketing techniques, the client does not have the possibility to compare or inspect the product and/or his decision whether to enter into such a contract at all is – often – not a sufficiently free one. In some case patterns of distance marketing, this is more difficult to justify or even questionable. In principle, however, it would seem fair to conclude that the simple answer to the problem in these cases is to provide the chance to acquire information (comparison of products) or the freedom of formation of will afterwards, and to do so by giving the client a right of revocation (without any need of justification) for the (short) period of time that is typically needed for getting such information or for freely deciding the matter. It is paramount that the decision on whether to form the contract can indeed be revised without considerable disadvantages (costs), and that, on the other hand, this be only for as short a period of time as needed – in order to reduce as much as possible the risk of ex post opportunism from the side of the client. The second case pattern in which

20 For the reasoning – also economic – why standard contract terms have to be scrutinised so narrowly: M. Adams, 'Ökonomische Begründung des AGB-Gesetzes – Verträge bei asymmetrischer Information' *Betriebsberater (BB)* 1989, 781–788, at 787; and H.-B. Schäfer and C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed, Berlin: Springer, 2005) 513–515; and as well E.G. Furubotn and R. Richter, *Institutions and Economic Theory – The Contribution of the New Institutional Economics* (2nd ed, Ann Arbor: University of Michigan Press, 2005) 241–246.

21 H. Micklitz, 'Perspektiven eines Europäischen Privatrechts – Ius Commune praeter legem?' *Zeitschrift für Europäisches Privatrecht (ZEuP)* 1998, 253–273, at 265–267 (the client can choose competing offers for a longer period of time); critical in this respect, for instance, K. Riesenhuber, *Europäisches Vertragsrecht* (2nd ed, Berlin: de Gruyter, 2006) para 943–945.

22 S. Lorenz, *Der Schutz vor dem unerwünschten Vertrag* (Munich: C.H.Beck, 1997) 167 et passim; going well beyond the short comments on questions of systemization presented in the following: S. Kalss and B. Lurger, 'Zu einer Systematik der Rücktrittsrechte insbesondere im Verbraucherrecht' *Juristische Blätter (JBl)* 1998, 89–97, 153–174 and 219–233; summarized in B. Lurger and S. Augenhofer, *Österreichisches und Europäisches Konsumentenschutzrecht* (2nd ed, Vienna/New York, Springer: 2008) 221–226.

revocation rights are granted is quite different. Here, informing was well possible before formation of contract, and the right to revoke without cause has to be seen as a form of protection against decisions which are taken too easily and without precaution. This is so in those contracts which (can) produce existential risks – for instance in the case of life insurance or large loans – and again a revocation right is granted. The justification is more difficult in this case, because the issue arises whether other forms of such protection would not be more suitable. This, however, does not affect the overall characterisation of the development described.

The fourth type of examples is to be seen in anti-discrimination law which, in the last decade, has been expanded beyond the frontiers of labour law, at least with respect to discrimination based on sex and race, in Germany also with respect to (old) age (taken up also in the case law of the ECJ) and ideological beliefs.[23] In Germany in particular, this development has been seen as the 'death of contract', ie of party autonomy,[24] and indeed these prohibitions are paradigmatic for the development and its characterisation.

b) Characterising the Two Poles and Their Interplay

All developments described – and perhaps most strikingly anti-discrimination law and the fundamental rights control of contracts, but also the development

23 Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJEC* 2000 L 180/22; Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJEC* 2004 L 373/37. See on this, and also on the theories on anti-discrimination philosophies briefly named in the following text, Ch. McCrudden and H. Kountouros, 'Human Rights and European Equality Law' *Oxford Legal Studies Research Paper No. 8/2006* = in H. Meeman (ed), *Equality Law in an Enlarged European Union* (Cambridge: Cambridge University Press, 2007) 73–116 (available as free download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899682); S. Fredman, 'Equality: A New Generation' (2001) 30 *Industrial Law Journal* 145–168; E. Howard, 'Anti Race Discrimination Measures in Europe: An Attack on Two Fronts' (2005) 11 *European Law Journal* 468–486; D. Mabbett, 'The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 *Journal of Common Market Studies* 97–120; A. Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13 *European Law Journal* 152–168; for my own conception of these issues see Grundmann, n 4 above, 571–575.

24 See, for instance, E. Picker, 'Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie?' *Juristenzeitung (JZ)* 2002, 880–882; J. Braun, 'Übrigens – Deutschland wird wieder totalitär' *Juristische Schulung (JuS)* 2002, 424–425; K. von Koppenfels, 'Das Ende der Vertragsfreiheit?' *Wertpapier-Mitteilungen (WM)* 2002, 1489–1496, F.-J. Säcker, '"Vernunft statt Freiheit!" – Die Tugendrepublik der neuen Jakobiner – Referentenentwurf eines privatrechtlichen Diskriminierungsgesetzes' *Zeitschrift für Rechtspolitik (ZRP)* 2002, 286–290.

leading to an information model – have often been understood as an ever further-reaching reduction of freedom of contract (party autonomy).[25] These developments can, however, also be understood in a different way. They can all be seen as an endeavour which is aimed at maximizing substantive freedom – not only formal freedom – of *both* parties to the contract. The most important element would then be that the legislature tries to isolate those cases in which one party, in substance, has to decide in a situation of relatively reduced substantive freedom of choice or cannot act at all (anti-discrimination), and that the price for (state) intervention is to curtail the freedom of the other party, but only to a considerably lesser extent than what is gained on the other side. Whether the balance is always struck correctly, may be questionable, but that this is indeed the core motivation in all developments described would seem to be rather obvious and incontestable.

Thus, for instance, it is a characteristic of information rules that, formally, they form mandatory law, but that they produce effects which differ substantially from those of other (substantive) mandatory rules. Mandatory information rules, contrary to what mandatory substantive rules do, do not fix the contents of contracts, but leave the parties leeway to decide themselves. Mandatory information rules, on the contrary, are designed to enable *both* parties to take their decision in as meaningful a way as possible, to enable them to understand the implications of the contract – thus creating the best conditions for material freedom in the choices to be taken. As far as revocation rights are designed to provide the client with the chance to inform himself after formation of con-

25 Apart from the references in the last footnote, see, from the disucssion on the influence of the constitution on private law, a discussion which probably is most prominent in Germany: W. Zöllner, 'Regelungsspielräume im Schuldvertragsrecht – Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen' *Archiv für die civilistische Praxis (AcP)* 196 (1996) 1–36, 3 et seq et passim; and for information rules M. Martinek, 'Unsystematische Überregulierung und kontraintentionale Effekte im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr', in S. Grundmann (ed), *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts – Gesellschaftsrecht, Arbeitsrecht, Schuldvertragsrecht* (Tübingen: Mohr-Siebeck, 2000) 511–557. In the international discussion: P.S. Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford: Oxford University Press, 1979); H. Beale, 'Inequality of Bargaining Power' 6 *Oxford Journal of Legal Studies* (1986) 123–136; S.N. Thal, 'The Inequality of Bargaining Power Doctrine – the Problem of Defining Contractual Unfairness' 8 *Oxford Journal of Legal Studies* (1986) 17–33; G. Gilmore, *The death of contract* (Columbus: Ohio State University Press, 1974); opposite F. von Hayek, *Law, legislation and liberty – a new statement of the liberal principles of justice and political economy, vol 2, the mirage of social justice* (Chicago: University of Chicago Press, 1976); as well F.H. Buckley (ed), *The fall and rise of freedom of contract* (Durham: Duke University Press, 1999); and as well Grundmann, Kerber and Weatherill, n 17 above; very nuanced M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993).

tract (because before this was impossible), the reasoning is of course a very similar one – and this is the case in the majority of revocation rights. Even for the case law based on fundamental rights, namely in the cases on sureties, similar explanations can be given. When balancing the gain of freedom for the potential surety on the one hand and the loss of freedom on the side of the credit institution on the other, the overall 'gain' would seem quite palpable. The surety in the cases decided had been put under massive psychological pressure to serve as guarantor for amounts which he or she would most likely not be able to pay back and he or she had also been informed very 'optimistically' about the consequences. The credit institutions on the other hand, without such surety, would potentially have lost the chance to form this loan contract, not more. Even anti-discrimination law, can be seen from this perspective. Its application has deliberately been restricted to 'public' contracts, in part also mass transactions, in which the aim to choose on the basis of very 'individual' criteria is typically less important. Moreover there has been intensive discussion about the grounds for justification of the law, and broad areas have been totally exempted. Finding an optimum of freedom remaining and freedom gained was quite clearly an aim. At the same time, with discrimination on the basis of sex and of race, two criteria have been chosen for which it is difficult to deny that they have been the grounds for considerable amounts of actual discrimination. This, on the other side, also implied that freedom of access to quite important goods – such as housing or insurance – has been massively reduced or that persons have been considerably humiliated on these grounds. Whether this has the same weight in the case of public offers of goods and services as in employment relationships[26] may be open to discussion, but the overall scope is nevertheless quite evident. The gain of freedom on the one side tends to outweigh quite clearly the loss of freedom on the other. This at least would seem to be the intention. The scope is not to loose the chances of a gain in material freedom for *both* parties by sticking to a more formal concept of freedom of contract. Some loss of (formal) freedom of contract on the one side has to be accepted for the overall gain, ie for the much higher gain of material freedom of contract on the other side. This would seem to be the prime scope even in anti-discrimination law although here, it may be argued, one additional scope is to change the discourse in society by subjecting private

26 For discrimination based on race (also in contract law) see again, very recently and provoking considerable interest or scandal in Germany: G. Wallraff, 'In fremder Haut' *ZEITMagazin* 15 October 2009; a very nuanced discussion, for instance, in H. Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (2009) 5 *European Review of Contract Law* 109–131, esp 121–123; K. Riesenhuber, 'Verbot der Geschlechtsdiskriminierung im Europäischen Vertragsrecht' *Juristenzeitung (JZ)* 2004, 529–538; K. Riesenhuber (ed), *Das Allgemeine Gleichbehandlungsgesetz – Grundsatz- und Praxisfragen* (Berlin: de Gruyter, 2007) (with an introduction to the European Law bases).

parties to the duty to behave more rationally in these respects. This search for potential gains in material freedom increasingly not only refers to the phase of contract formation, but also to the phase of execution. A characteristic example would seem to be section 490(2) of the German Civil code, introduced in 2002, which codified case law already existing: credit institutions should no longer be allowed to hold a client to a loan if the client was prepared to pay for the damages incurred by the credit institution because of early termination. Formerly banks had charged in addition a surplus for their consent to such termination.[27]

If the question is asked which framework conditions seem to favour such a search for additional gains in material freedom and for increasingly refined solutions furthering this scope, the following may be characteristic. These solutions came into being in situations of rich competition. Several courts participated in the search: national Supreme Courts, national Constitutional Courts and the European Court of Justice; the latter mainly in the area of anti-discrimination and of an information model. Moreover, yardstick competition via increased comparative law research seemed to exercise its influence (see later), but also the interplay between different disciplines, in which economic theory was particularly important with respect to information rules – just as is possibly the case today and in the future with bounded rationality and with the influence of behavioural sciences. Thus, the intensive search or even the 'race for more material freedom' could be regarded as the fruit of a competition between institutions, jurisdictions and disciplines.

There is one development which accompanies this search for ever new potential for material freedom via a balancing of the freedoms of all parties concerned. This is that traditional facilitative contract law is increasingly interwoven with (mandatory market) regulation. In the beginning, with antitrust law as the old paradigm of market regulation, traditional facilitative contract law seemed far removed from regulation. Today, however, both aspects – rules,

27 From German case law: Supreme Court *(Bundesgerichtshof) Official Reports (BGHZ)* 136, 165–172; Supreme Court *Neue Juristische Wochenschrift (NJW)* 1997, 2878–2879. This is today one of the accepted cases of efficient breach which, in fact, can be supported from a policy perspective (only) in the cases where all damages caused by the breach can, typically, be easily proven to the full amount (which is far from always being the case): see S. Grundmann and A. Hoerning, 'Leistungsstörungsmodelle in Europa im Lichte der ökonomischen Theorie – nationales, europäisches und internationales Recht', in Th. Eger and H.-B. Schäfer (eds), *Ökonomische Analyse der europäischen Zivilrechtsentwicklung – Beiträge zum X. Travemünder Symposium zur ökonomischen Analyse des Rechts* (Tübingen: Mohr-Siebeck, 2007) 420–470, 429–439; more generally for the concept of efficient breach Kronman, 'Specific Performance' 45 *University of Chicago Law Review* 351 (1978); W. Rogerson, 'Efficient Reliance and Damage Measures for Breach of Contract' *The RAND Journal of Economics* 15 (1984) 39; S. Shavell, *Specific Performance versus Damages for Breach of Contract* (Cambridge/Mass: 2005).

typically default rules, which are primarily aimed at facilitating the use of party autonomy and rules which regulate markets and are aimed at maintaining the pre-conditions for free choices by all stakeholders – are increasingly interwoven. Contract law – just as has been the case in company law for some time already – contains in its very core a substantive amount of regulation as well. The search for more freedom for all partners (in aggregate dimensions) leads as well to a closer relationship between the parts of contract law primarily related to the use of party autonomy on the one hand and of the regulatory parts of contract law on the other. This would seem to imply that modern contract law scholarship has to enter even more into an exchange with business law, and namely company law, discussions and scholarship (see n 43).

If it is convincing that today's contract law tries to optimise (aggregate) freedom of all parties concerned via a tightening of protective standards, it may well be that this is too vague a description. In other words, one might criticize the fact that this is so general a trend that it is not really concrete enough and therefore meaningful as a development. If the criticism is that similar trends can easily be found in other areas of the law, the criticism is unfounded because in this case, it would only say that the trend is characteristic for many areas of the law and therefore even more important. It might even amount to a real 'threshold criterion'. If, however, the criticism is that similar trends have always existed and are not characteristic only for the recent two or three decades, the criticism would indeed be relevant for our discussion of contract law and its future. The question therefore is whether this trend differs in a significant way from what can be seen in the 19th and in large parts of the 20th century. In my view, the answer is clearly positive. Information rules, revocation rights and anti-discrimination rules clearly did not exist or at least not to a considerable extent in contract law before the 1980s. And in addition, the case law based on the fundamental rights and on the good faith principle differs considerably from the older development based on the application of the good faith principle which most resembles the modern one. This is the evolution of a case law for a change in circumstances. In these cases, however, the aim was not to protect the material freedom of one party against inroads from actions taken by the other party, ie to regulate in a mandatory way the different spheres of freedom (this is the aim of the case law based on fundamental rights). Conversely, in these older cases, the aim was to re-construct the parties' intentions under fundamentally changed circumstances.[28] Apart from this, the doctrine of changed circumstances as developed by German courts has never strongly appealed to other jurisdictions. Conversely, the case law based on fundamental

28 For this reason, in German literature, this legal institute is often seen as a case of implied terms interpretation or at least as coming close to it: See, for instance, H.-J. Musielak, *Grundkurs BGB* (11th ed, Munich: C.H.Beck, 2009) para 369; T. Lettl, 'Die Anpassung von Verträgen des Privatrechts' *Juristische Schuldung (JuS)* 2001, 248–251.

rights was quite successful, namely on the supranational level (see below section 4) – and according to what has been said, this is likely to be the most relevant level for the future of contract law.

3 Codification – Without an Idea of Universality

Just as is the case with the idea of 'optimizing freedom via tightening protective standards' (see above section 2), the concept of 'Codification without universality' would seem to be contradictory in itself. It would at least seem to contradict the underlying assumptions of codifications since the *Allgemeines Preußisches Landrecht* of 1780/94 and even more so that of the French *Code Civil* of 1804 (and later the *Allgemeines Bürgerliches Gesetzbuch* in Austria, the *Bürgerliches Gesetzbuch* of Germany, the *Zivilgesetzbuch* of Switzerland and the *Codice Civile* in Italy, etc) all the way to the Dutch *(Nieuwe) Burgerlijke Wetboek*. Did the prime scope to depict all the important questions arising in relationships between private law subjects not exist?[29] Therefore the first question to be raised is whether, under today's conditions, the idea of codification is still valid at all, and the second question then being which shape a Code should have at the beginning of the 21st century (in Europe).

a) Codification – Still a Valid Concept?

It may of course not be clear whether the European Union really will be capable of drafting a convincing modern codification of contract law. With a view to establishing a coherent, modern system of contract law and of making it 'visible', however, codification on the supranational level would seem to have considerable advantages over its alternatives, ie over a supranational contract law developed by courts. Namely, on the supranational level, the concept of codification even seems to be unrivalled – if there is a need for a level playing field at all in the form of a uniform contract law which can be used all over Europe in the same way. The difference between developing such

29 For this aim and the relevance of the codification idea today, see: B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna/New York: Springer, 2002) 36 et seq; W. Schreckenburger, 'Die Gesetzgebung der Aufklärung und die Europäische Kodifikationsidee', in D. Merten and W. Schreckenburger (eds), *Kodifikation gestern und heute* (Berlin: Duncker & Humblot, 1995) 87–111, at 89 et seq; K. Schmidt, *Die Zukunft der Kodifikationsidee* (Heidelberg: C.F.Müller, 1995); J. Münch, 'Strukturprobleme der Kodifikation', in O. Behrends and W. Sellert (eds), *Der Kodifikationsgedanke und das Modell des Bürgerlichen Gesetzbuches* (Göttingen: Vandenhoeck & Ruprecht, 2000) 147–173; C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz – entwickelt am Beispiel des deutschen Privatrechts* (Berlin: Duncker & Humblot, 1969); R. Zimmermann, 'Codification: history and present significance of an idea' (1995) 3 *European Review of Private Law* 95–120.

a level playing field via codification and via (supranational) case law would seem to be that the latter develops much more slowly and requires a highly homogeneous body of courts, with very similar approaches and basic understandings. Experience today already shows that creating (pieces of) a uniform body of law on the basis of a uniform text, namely directives or fundamental freedoms, is indeed possible if one supranational court is competent. Even under such circumstances, this is not an easy task. It would seem that for a European contract law, even a supranational private law Supreme Court would be advisable. Conversely, without such a uniform text basis – best possible in a codified, broader way – the task is much more difficult and in fact unrealistic. Both with respect to consistency and with respect to the time needed, codification has evident advantages. Experience would seem to indicate this. Outside textual bases, ie namely outside sales law, uniform contract law models have not developed world-wide, and similarly not in the US outside the Uniform Commercial Code (although between the courts in the different jurisdictions, a common understanding is certainly more developed than between the courts of the different Member States of the European Union).

b) No Idea of Universality

If indeed codification is without alternatives for the development of a coherent supranational contract law, the second question is that of size and shape. The answer to this question would seem to be paradoxical: while codification is paramount for the development of a coherent contract law and all the more so as this development is to happen on the supranational level, on the other hand the traditional claim for universality coming with codification has to be cut back radically. This latter concept persists only in a very reduced form. The future, namely on the supranational level, would seem to be that of more narrowly focused and highly differentiated codification(s). This development would at least be desirable. For contract law more precisely, this would imply the following. The claim for universality would already be highly compromised, if indeed the (European) Code was enacted (only) on an optional basis, ie if it always had to compete with alternative sets of rules (not just in cross-border cases via conflict of laws rules, as is the case traditionally). There is also a greater feeling of having to compete with time nowadays; the codification is no longer seen as an eternal model, as had still been the case with the German Civil Code,[30] but rather as a picture of a certain moment in time. The main

30 See G. Planck in his speech in 1896 to the Reichstag: "Geben Sie dem deutschen Volk in dem bürgerlichen Gesetzbuch, ohne an den Einzelheiten zu mäkeln, sein gutes, sein deutsches, sein einheitliches Recht, und das deutsche Volk wird Ihnen die That danken in aller Zeit." ('Give to the German people, without criticising all the details, their good German all-encompassing Law, and the German people will thank you for this in eter-

challenge to a claim for universality stems from the fact that the classical form of codes can not be reconciled with the complexity of a modern, globalised world. This has two consequences mainly: (i) Those who want to codify more than just contract law, ie a law of obligations or even of all patrimonial law, including property law, will no longer cope with the complexity of contract law. The Draft Common Frame of Reference shows this quite clearly.[31] Moreover, (ii) the same contract law for all types of contract partners and for all types of contracts is no longer possible. Whoever wants to combine consumer contract law and general contract law, a law for spot contracts and a law for long-term contracts, a law for contracts which have been negotiated and adhesion contracts (standard term contracts), a law for individual contracts and a law for contracts pertaining to networks, ie 'organisational' contracts (on all this see below section III), a law which is mainly facilitative and a law which sets regulatory standards for markets (see above section 2), will have to arrange for a differentiated and already highly complex system in his Code. This Code must be based on such poles and differentiations and establish a system within which the multitude of interests and case patterns can be well depicted. Such a legislature cannot, because of mainly formal similarities, again create a law of obligations. The challenge of re-grouping contracts with a view to making it match with a modern contract law world and practice is too complex a task to add still more complexity for the sake of a new law of obligations (which is not necessary for Internal Market reasons). The core criterion is what can sensibly be handled. Hence, the Code should be of such size that modern reality can be properly depicted, with all differentiations needed, including all of what is really the 'same' substance – but not more, in order to optimize the chances of coherence. Such a unit is contract law, ie one of the two large areas in which planning via autonomous choice and consensus (party autonomy) is absolutely dominant, and this one large area then in its whole. The difference with other areas where party autonomy does not have this overarching power, but also with the law of organisations (namely company law), is so big that a cut at this point is possible … and needed, if complexity is to be properly handled. On the other hand, with respect to contract law, while all those differentiations named are needed and should even guide the organisation of the codification, no area should be cut off. Outsourcing whole areas of contract law would bring about a high danger of non-coherence in the values enshrined. Combining all in one Code has the big advantage of forcing the legislature to justify all differentiations with substantial reasoning, not just because an area formally remains outside the scope of legislation. Such areas which should be integrated are, for instance, consumer contract law – as opposed to 'general' contract law

nity'), quoted after P. Oertmann, 'Das bürgerliche Gesetzbuch im Deutschen Reichstag' (1896) 11 *Archiv für Bürgerliches Recht*, 4–25, at 7.

31 See references above n 11, most focused on the questions discussed here my contribution quoted there.

(see below section 4) –, but also financial services (both largely outsourced, for instance, in Italy, see next paragraph).

Increasingly, examples for such a differentiated 'codification' also do exist. On the European level, investment services are particularly impressive. In a first generation of harmonisation, rules of conduct were introduced which applied in a fairly similar way to all transactions. The understanding that different groups of clients have diverse protective needs led to a change in approach in the second generation of harmonisation, to a highly differentiated system of more stringent and less demanding duties on the side of the provider of investment services. Now there are at least three different degrees of duties in the core area, namely advice in investment transactions (see section 13, 18–24 of the EC Directive on Markets in Financial Instruments [MiFID], and in Germany, for instance, §§ 31–31d, 33–34a, 37a *Wertpapierhandelsgesetz*).[32] The differentiated set of duties comes, however, within a system, guaranteeing coherence and unity of approach. Moreover, there is a trend towards smaller codes, at least in the old member States, namely with the codifications of consumer (contract) law in many Member States,[33] and perhaps even more paradigmatic with the rather recent series of small codifications enacted for different areas of the law in Italy – for instance in the *Codice (Testo) Unico della Finanza*, in the *Codice del Consumo*, in the *Codice delle assicurazioni private* and in some other similarly shaped, smaller codes.[34] In my view, however, the appropriate size – which is now discussed for the supranational level – would be that of a contract law code, not a more narrow one. The development is interesting mainly because it puts the question of the best size on the table (without giving in to a complete trend of de-codification) and because it would seem to indicate that grand, complete codes are rather on retreat. Some aspects of this development will have to be taken up later, namely the relationship between a general contract law and consumer contract law.

32 Descriptions of the MiFID and of this mechanism, for instance, in H. Fleischer, 'Die Richtlinie über Märkte für Finanzinstrumente und das Finanzmarkt-Richtlinie-Umsetzungsgesetz – Entstehung, Grundkonzeption, Regelungsschwerpunkte' *Bank- und Kapitalmarktrecht (BKR)* 2006, 389–396, at 394; G. Ferrarini, 'Contract Standards and the Markets in Financial Instruments Directive (MiFID): An Assessment of the Lamfalussy Regulatory Architecture' (2005) 1 *European Review of Contract Law* 19–43; N. Moloney, 'Building a Retail Investor Culture through Law – The 2004 Markets in Financial Instruments Directive' *European Business Organisation Review* 2005, 341–422; T. Seyfried, 'Die Richtlinie über Märkte für Finanzinstrumente (MiFID) – Neuordnung der Wohlverhaltensregeln' *Wertpapier-Mitteilungen (WM)* 2006, 1375–1383, at 1375–1378.

33 Descriptions in Schulte-Nölke, Twigg-Flesner and Ebers, n 17 above; and the national country reports in the *European Review of Contract Law* 1 (2005) 373–383 (France); 3 (2007) 214–222 (Austria); 4 (2008) 175–192 (Greece); 5 (2009) 357–367 (Portugal).

34 Descriptions in A. Zaccaria, 'Dall'età della de-codificazione alla ricodificazione' *Studium iuris* 2005, 697–703; this is as well an answer to Natalino Irti's famous book: *L'età della decodificazione* of 1979 (4th ed, Milan: Giuffrè, 1999).

In essence, the answer would seem to be that codifications in an increasingly complex world which brings about an increasingly complex contract law can no longer be 'universal'. 'Think slim and consistent first!' – would seem to be the best motto for the future. On the other hand, coherence should not be reduced at too early a stage by choosing too narrow a scope for the codification.

4 More General, Yet Also More Differentiated

Finally, even the idea of 'more general, yet also more differentiated' would seem to be contradictory in itself at first sight. This idea can indeed be seen as a particular aspect of the developments discussed in sections 2 and 3 above. Again, the tension between the two aspects is due to the fact that increased complexity has to be dealt with.

a) Increased Importance of General Clauses

On the one hand, the number and the importance of general clauses would seem to have increased over the past few decades. The general clause is, of course, particularly important in the German legal system, since the times of the great recession in the 1920s.[35] The 'heroic' times, at least for Germany, date back a few decades already. This was the moment in which the general clause of good faith (section 242 *BGB*) was used to justify a more intensified substantive control of standard contract terms – some time before special legislation had been enacted.[36] The standard of control was much more demanding than under the rather lax standard of good morals (section 138 *BGB*). The development is by no means merely repeating what had happened already between the two wars, when *Hedemann* criticized an abusive recourse to general clauses (n 40). At that time, the general clause was still used to cope with an exceptional situation of crisis. Conversely, with the control of standard contract terms, the general clause became the basis of regulating typical mass phenomena, a market phenomenon which is occurring often and at all times: the standard contract terms. Almost in parallel, there is a large increase in substantive law control in company law, with respect to the charters of partnerships in dispersed ownership, but more generally also an intensification

35 See S. Grundmann/D. Mazeaud (eds), *General Clauses and Standards in European Contract Law* (The Hague: Kluwer International, 2006); R. Zimmermann and S. Whittaker (eds), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).

36 Ground breaking: (German) Supreme Court (Bundesgerichtshof), *Official Reports (BGHZ)* 38, 183 (applying the good faith standard, and not the much less demanding general standard of good/bad morals, to standard contract terms irrespective of whether the offeror was in a monopoly position).

of minority protection,[37] again on the basis of general clauses, again a mass phenomenon, occurring often and at all times, not as an exceptional phenomenon of crisis of rare circumstances.

This development, however, as has been said, is no longer a very recent one in Germany. What is its relevance for the 'future' of contract law? The developments described were mostly based on the good faith principle.[38] Besides that, 'general clauses' contained in fundamental (constitutional) rights were made operational to similar ends. Thus general clauses have been the basis for two core developments, if not *the* two most important ones via which protective needs have first been furthered. This is first true (only) for Germany. Considering these two developments, however, it would seem as if their importance for the 'future' of contract law resides less in Germany than in many, perhaps in most, other European states. In fact, these two developments range among the – rather reduced – number of developments in which German contract law has indeed become influential over the past few decades for the whole of European contract and private law development: with respect to the substantive control of standard contract terms and with respect to an (indirect) impact of fundamental rights on private and contract law, ie between private law subjects.[39] This is certainly true for the EU level, but also in national laws of

37 Ground breaking on the one hand: (German) Supreme Court (Bundesgerichtshof), *Official Reports (BGHZ)* 64, 238; 84, 11, 13 et seq; 104, 50; (German) Supreme Court (BGH) *Neue Juristische Wochenschrift (NJW)* 1982, 2495, 2495 (all applying the good faith standard to control the content of such clauses); and on the other hand on minority protection and the duty of loyalty between shareholdes (the so-called 'Treupflicht'): (German) Supreme Court (Bundesgerichtshof), *Official Reports (BGHZ)* 103, 184, esp 194 et seq (Linotype); *BGHZ* 129, 136, 142–144 (Girmes); (German) Supreme Court (BGH) *Neue Juristische Wochenschrift (NJW)* 1992, 3167, 3171 (IBH/Scheich Kamel); see now the comprehensive study by Ch. Hofmann, *Minderheitsschutz im Gesellschaftsrecht* (Berlin/New York: de Gruyter, 2010).

38 There is, in addition, a stricter duty of loyalty. On the relationship between good faith standards and duty of loyalty standards in (German) company law, see, for instance: S. Grundmann, in *Großkommentar Aktiengesetz* (4th ed, Berlin: de Gruyter, 2008) § 136 para 50–52; S. Grundmann, 'Trust and Treuhand at the End of the 20th Century – Key Problems and Shift of Interests' 47 *The American Journal of Comparative Law* 401–428, at 412–427 (1999); H. Henze and R. Notz, in *Großkommentar Aktiengesetz* (4th ed, Berlin: de Gruyter, 2004) Anhang (annex to) § 53a para 53 et seq; Ch. Windbichler, *Gesellschaftsrecht* (22nd ed, Munich: C.H.Beck, 2009) § 26 para 26.

39 In the area of standard contract terms see art 3 of the EC Unfair Contract Terms Directive. For the use of open-textured concepts in unfair contract terms law see also H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) 266–274; the questions of impact of fundamental rights on private law, see references above n 15 et seq. For Italy which has been similarly prominent as Germany in this respect, see S. Grundmann and A. Zaccaria, *Einführung in das italienische Recht* (Frankfurt: Recht & Wirtschaft, 2007) V et seq and 261 et seq; for the horizontal application of fundamentals rights and freedoms, see, for instance: Cherednychenko (2006), n 16 above, at 34 et seqq;

other Member States parallel developments can increasingly be found. A further element in this – pan-European – rise of general clauses can be seen in the fact that proposals for codification by groups of scholars rely heavily on general clauses, even in the more detailed DCFR, and that an overarching catalogue of principles is increasingly discussed and envisaged. This is in marked opposition to the traditional scepticism against general clauses in countries such as France and England. Moreover, general clauses are paramount in an area with increased importance, ie the pre-contractual phase and duties arising in it.

b) A More Differentiated Approach Within a Uniform Regime

The general clause is primarily an invitation to judges to develop the law, possibly on the basis of overarching principles. The most severe criticism in this respect would seem to be that general clauses also imply that the legislature did not want to take the responsibility to take the decisions itself (also establishing more legal certainty).[40] This criticism will be taken up later.

This 'longing for generalisation' and also for undefined standards is in stark contrast with another development which, in my view, is just as strong and characteristic for today's doctrinal thinking and codification proposals ... and certainly will constitute a challenge in the future. This is conceiving a unitary contract law – also in legislation – which at the same time, also in its general part, is ordered such that the guideline is *differentiation between various types of groups* – different groups of contract partners, different groups of contracts, and different groups of contract situations.

This development is most evident in the *differentiation between various groups of persons* which is visible namely in the relationship between consumer contract law and general contract law, perhaps also a law of commercial transactions. Today, many authors distinguish between business to consumer (b2c), business to business (b2b) and other contracts (person to person, p2p). At first sight, this would seem very similar to a rather old distinction which is between civil and commercial law which dates back to the French Code Civil of 1804 and Code de Commerce of 1807. This distinction can be based on a subjective criterion or on an objective one. In the one case, the status of the persons involved is decisive, in the other, the type of contracts. In German Commercial Law, for instance, there are only relatively few contract-related rules which really follow the subjective system (section 343 et seqq Commercial Code).

W. Kluth, 'Die Bindung privater Wirtschaftsteilnehmer an die Grundfreiheiten des EG-Vertrages – eine Analyse am Beispiel des Bosman-Urteils des EuGH' *Archiv für öffentliches Recht (AöR)* 1997, 557–582; Riesenhuber, n 21 above, para 70 et seq and 80 et seq.

40 Grundmann, n 11 above, 227, 239 et seq et passim; and already J.W. Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr-Siebeck, 1933) 68 et seq.

These rules are applicable, in principle, only to contracts with a participation of merchants, and even these rules, however, are mostly applied today by analogy also in purely civil law relationships.[41] This rather small set of rules which (at least in theory) apply only to merchants is followed by sets of rules for some types of contracts which are characterised as being 'commercial', which, however, are also open in principle to persons not subjected to the Commercial Code. In a purely objective system, only this second system applies, ie there is only a distinction between civil law contracts and commercial law contracts (which, however, can be formed by anybody, although they are more typical for professionals). This system of civil law and commercial law contracts is different from the one between p2p and b2c contracts in two respects. The first is about how much the more specific contracts – commercial law contracts or b2c contracts – are integrated into the general regime: it is possible that only the b2c contracts have been integrated into the general Civil Code (as in Germany after the *Schuldrechtsmodernisierung*) or only the 'commercial law' contracts (as in Italy with the *Codice Civile*, flanked since a few years by a *Codice del Consumo*, but no *Codice Commerciale* which had been abandoned in 1942). With integration into one code, there are not only advantages of coherence, but there is the need for a differentiation within the general part of contract law according to groups of persons, for instance professionals and consumers. Particular duties – particular norms – can then apply only to one type of persons or the other. If there is a large common core of rules for all groups of persons, this integrated solution has considerable advantages over the alternative of split sets of rules, namely that legislatures have to justify much more consciously each solution which they apply selectively. The second point is on the scope of the differentiation. The differentiation between b2c, b2b and p2p has mainly developed over the last few decades, and it is, in tendency, even richer than that between just Civil and Commercial Law. What is more, the motivation became richer (first mainly with ease of transactions, now much more the question of needs of protection, the non-systematic character of a transaction etc). A differentiation which had been primarily formal has become one in which a differentiated system of interests has become the underlying rationale. Such differentiation according to different constellations of interests has become paradigmatic in the system of investment services (as explained above section 3 b). There, the second generation of EC Law differentiates for all duties according to which type of client is in-

41 S. Grundmann, 'Generalreferat – Internationalisierung und Reform des deutschen Kaufrechts', in S. Grundmann, D. Medicus and W. Rolland (eds), *Europäisches Kaufgewährleistungsrecht – Reform und Internationalisierung des deutschen Schuldrechts* (Cologne: Heymanns, 2000) 281–321, at 286 et seq; P. Kindler, *Gesetzliche Zinsansprüche in Zivil- und Handelsrecht – Plädoyer für einen kreditmarktorientierten Fälligkeitszins* (Tübingen: Mohr-Siebeck, 1996) esp 12–19; K. Schmidt, in *Münchener Kommentar HGB* (2nd ed, Munich: C.H.Beck, 2009) (Introduction to) Vor § 343 para 1 et seq, 5, 8, 20.

volved (advice, mere disclosure, mere standardised disclosure or execution only), but also with respect to the question of whether the regime is mandatory or with respect to duties to retrieve new information (for instance the 'know your customer' rule) (see n 32). It should, however, be stressed that general contract law, consumer contract law and purely commercial contract law can very often be reconciled and can be brought into a differentiated, orderly system. The best example is the supranational and international regime on sales law. Although the UN Convention of 1980 applies only to purely commercial sales, the EC Directive of 1999, which applies only to b2c sales, takes virtually all substantive solutions from this Convention. This would imply that the regimes are by no means completely opposed and irreconcilable.[42]

A differentiation within the general part – and not only within Specific Contract Law where different contract types are regulated one after the other – should, however, not only be made according to types of persons in the future, ie b2c, b2b, p2p. It will probably be just as important and perhaps even more important for a principle-based evolution of contract law to *differentiate between groups of types of contract and situations* already in the general part. This is obvious if one considers the fundamental differences between spot contracts on the one hand and long-term contracts on the other, which are not just gradual differences (see below section III 4), and similarly between negotiated contracts and standard term contracts (see below section III 3). In 1900, it may have been possible to see the negotiated contract as the one basic model of formation of contract (and only make some adaptations for standard contract terms) and similarly with the spot contract and the long-term contract. As, however, the standard term contract and the long-term contract have become a mass phenomenon and perhaps even the dominant form in practice and in trade volumes, neither one just forms a variant of the phenomena densely regulated in the codes. Therefore, they can be seen (and regulated) only as independent poles of similar weight: spot contracts and long-term contracts as two independent poles, and negotiated and standard contract term contracts as two independent poles. The question is whether

42 J. Drexl, 'Verbraucherrecht – Allgemeines Privatrecht – Handelsrecht', in P. Schlechtriem (ed), *Wandlungen des Schuldrechts* (Baden-Baden: Nomos, 2002) 97–151; S. Grundmann, 'Consumer Law, Commercial Law, Private Law – how can the Sales Directive and the Sales Convention be so similar?' (2003) 14 *European Business Law Review* 237–257; E. Hondius, 'Consumer Law and Private Law – the case for integration', in W. Heusel (ed), *Neues Europäisches Vertragsrecht und Verbraucherschutz – Regelungskonzepte der Europäischen Union und ihre Auswirkungen auf die nationalen Zivilrechtsordnungen – New European Contract Law and Consumer Protection – the concepts involved in Community regulations and their consequences fordomestic civil law – Le nouveau droit des contrats et la protection des consommateurs – concepts de la réglementation communautaire et leurs conséquences pour le droit civil national*, (Cologne: Bundesanzeiger, 1999) 1–19, at 19.

even networks of contracts form an individual pole besides individual contracts (see below section III 5), perhaps also contracts in one's own interest, in another person's interest and in the joint interest. Differing from what happened with respect to the differentiation *ratione personae*, the German *Schuldrechtsmodernisierung* and the DCFR have not given much guidance with respect to integration and differentiation *ratione materiae*. This is a question which needs to be distinguished from that of whether one should have a general *and* a specific part of contract law – a question to which I give a positive answer, in order to allow for still further differentiation of a higher number of types of contracts than just two (poles). Harmonising (ie rendering consistant) the regime for the different types of contracts as much as possible is, of course, still a desirable objective.

The advantages of general clauses on the one hand and of a more differentiated system within the general part on the other – these advantages can be combined when, on the one hand, principles are made explicit as far as possible but, on the other hand, typical cases are as well regulated quite intensively in precisely drafted rules. Leaving it with general clauses even for mass transactions and phenomena (as has often been done in the DCFR) means that the legislature has capitulated in front of today's contract law problems and reality.

5 Interim Results

It is difficult to doubt that the core of contract law development will be at the supranational level – even though doctrinal thinking in the EU is still mainly national. The impact of this development on style and content will be dramatic, although it is difficult to forecast the details. The complexity which has built up in contract law over the last few decades speaks in favour of codification on an international level, but not in a grand Civil Code. A codification of contract law is much more appropriate, but then for all contract law. This may even be the most likely outcome. In substance, the core characteristic of the last few decades would seem to be that legislatures and courts strive for optimizing material freedom for all parties concerned and, for doing so, not to rely (almost) exclusively on formal party autonomy, but not on paternalistic approaches either. It would instead seem characteristic that restrictions of freedom on the one side are accepted only if the gain of material freedom on the other side is considerably higher and if the restrictions are tolerable, respecting the principle of proportionality. This would seem to be true even though there may be some exceptions in legislation and case law in both directions. In essence, all three pairs of concepts described as characteristic (above sections 2–4) have one thing in common: they are constitutive for a modern contract law which reacts to a more complex world and which tries to seize the multiplicity of interests more appropriately. This also implies that the weight of regulatory aspects in contract law has considerably increased –

however mostly, as in antitrust competition law which is the paradigm of market order philosophy, with a view to increasing material freedom. Regulatory parts and facilitative parts of contract law are increasingly intertwined.

6 Looking Beyond Contract: Market and Firm

If contract law is seen in conjunction with other areas of the law, in legal scholarship or codification projects, the closest nexus is typically seen with torts (the two types of obligations) or also with all civil 'patrimonial' law, namely also property law. If the core characteristic – the *proprium* – of private law is seen today primarily in the value of party autonomy, the traditional concept of the core and of unity of private law is by no means evident, but is rather owed to the tradition of the Civil Codes. Conversely, the areas of the law which are most based on party autonomy and bring it to bear are actually contract law and company law – much more so than property law or family law, and certainly more than torts or restitution (unjust enrichment), insofar as it is not just an annex to contract law. It is not by chance that in company law, the concept of a 'nexus of contracts' is prominent. Moreover, it is between these two areas, contract law and company law, that overlaps have evolved in a very prominent way, going so far that true new areas of the law have evolved such as capital market law. Other examples are outsourcing or networks of contracts. If, in this article, the cross-roads between contract law and company law are not at the centre of interest and if, therefore, the question of whether one should perhaps even consider company law when codifying contract law cannot be discussed, this is due to restrictions in space, but it is also aimed at narrowing down the argument.[43] What is important too though in this context is to show that the *proprium* of Private Law by no means supports the composition which can be found in the grand national Codes and that this composition is inspired by tradition rather than by substantive structures of today's private law. Conversely, this traditional composition has reduced the inclination to discuss the links between the two (or three) areas of private law which are the most paradigmatic for the use of party autonomy (and its limits), namely contract law and company law. In quite a few questions of high practical importance, this has led to weaknesses in the discussion (see below III 4). If for reasons of practicability, only contract law is discussed here, one point needs nevertheless to be stressed. It is very important and in fact without alternative to conceive contract law as the nucleus of a 'market law' which is broadly conceived, including the regulatory parts as well. This would have important consequences for the style of the discussion. If the focus of discus-

43 For my ideas on the whole array of questions in relation to this see S. Grundmann, 'On the Unity of Private Law – From a Formal to a Substance Based Concept of Private Law' (2010) 18 *European Review of Private Law* 1055–1078; on contract and organisation already, for instance, Collins, n 39 above, 246–254.

sion is both on the use of party autonomy and on the regulatory order which limits this use, this gives the contract law discussion an imprint which, in the past, has instead been characteristic for company law or business law. Contract law has to be seen as business or economic law in the broad sense.

III Some Core Areas and Examples of the Development

1 Starting Point: Areas of Modern Developments and Areas of Tradition

The second part must be much shorter, but some core areas of modern developments should be addressed nevertheless. Such areas would seem to be primarily those which are of high practical importance and where possibly there is already some theoretical discussion as well, but where the phenomena and solutions are rather recent and where areas have not yet been structured substantially in sets of rules and codification. The latter is of such importance for the reasons given in favour of codification which, at least at the supranational level, is seen as a core promoter of new structures in the contract law discussion. In one of the areas named below (section 5), even doctrinal discussion is still at a very early tentative stage – despite its highly practical relevance.

2 Information as the Core of Consensus

There is a very dynamic development in the law of formation of contracts – as one of the two core areas besides performance and breach of contract. This development can be summarized as the transition from a regime in which (freedom of) will was dominant, owing a lot to the thinking of Kant and von Savigny, and with it also 'consensus', to a regime in which information has become much more dominant or rather: the realistic chance to act on a sufficiently informed basis.[44] The multitude of disclosure rules (and revocation rights with similar scope) have been named. There is a parallel development which is that the relevant pre-contractual phase has been extended well beyond concrete negotiations, and this extension is due largely to the fact that relevant information is given well before and outside negotiations, namely in the case of advertising. Questions of information have also been paramount with respect to the question of which forms of marketing and of presentation should be regulated in a particular way. Overall, it would seem to be fair to

44 See the references above in n 17 and text accompanying it; for a short (critical) comment on the progress which the Draft Common Frame of Reference reaches (or does not reach) on the questions discussed in the following, see Grundmann, n 11 above, at 238–241; see also E. Kramer, 'Bausteine für einen "Common Frame of Reference" des Europäischen Irrtumsrechts' *Zeitschrift für Europäisches Privatrecht (ZEuP)* 2007, 247–259.

summarize these developments in the following way. The doctrine on formation of contracts is heavily influenced by a new array of advertising and marketing forms – from TV and internet publicity via alternative marketing techniques, including also call-by-call, down to the large area of new information technologies, namely e-commerce. In all this, one thing is obvious: the information society – and its law – had become a reality at the end of the 20th century. Besides these rules, rules on the inner formation of will and of consensus seem a bit more 'dated', but also of less practical importance. In fact, this development forms part, more generally, of a development in the direction of a contract formation model in which reliance caused is of core relevance for binding parties. No longer the freedom to express one's own will, but responsibility with respect to the world outside, the planning and reliance caused in the other party, would seem to serve as the core justification for the binding force of contract. In this respect, of course, the fact that each party can get the information needed is the core condition. There is a general trend to reduce the importance of the paradigm of the will in private law. The information model in contract law is rather recent not only because the rules are young (at least, they had been much less numerous before). It is 'young' and partly 'undigested' also insofar as the relationship between information rules and the (old) law of will problems (mistake, fraud etc.) still awaits clarification. This is still a task for the future.

3 Individually Bargained For Contracts and Standard Contract Terms

The 'oldest' of the 'modern' topics discussed here is standard contract terms. They have, of course, already developed as a phenomenon in the first half of the 20th century, and some ground breaking discussion has already taken place then with the large inquiries, for instance, by Ludwig Raiser and Großmann-Doerth. Legislation in this area, however, dates only from the 1970s through to the 1990s, first in many national laws and in 1993 also on the EC level.[45] Although the development is rich, including in case law (namely in Germany), there are still core developments to be expected in the future. This is a substantive legal control for which really European standards develop. As is well known, the European Court of Justice, with respect to the general clause contained in Article 3 of the Directive which sets the standard for substantive

45 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, *OJEC* 1993 L 95/29. See also the 'technical report' leading to the first proposal: *COM*(90) 322 final – SYN 285, 6–64; E. von Hippel, *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 41 (1977) 237–280 (comparative law expert opinion for the EC Commission); summary in *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 45 (1981) 353–376; E. Hondius, 'Unfair Contract Terms – New Control Systems' 26 *The American Journal of Comparative Law* 525–549 (1978).

control, often refers the decision back to the national courts; only in some cases has the ECJ adopted an EU unitary approach in this respect. Moreover, it is well known that the point of reference from which a major deviation would imply the unfairness of a clause, is national (!) contract law, namely its default rules. National default rules, however, mostly differ from one Member State to another. The task for the future is to guarantee the level of protection needed, but still to arrange for a possibility that the sets of standard contract terms can circulate freely within the European Union. Today, they are exposed to substantive law control in each Member State anew. This is completely different with respect to accounts, prospectuses or similar sets of information in Company Law – all documents which are the fruit of a 'legally' preconditioned drafting procedure, leading to a document which contains promises and provisos and whose setting-up follows one national law. In the case of company law, the product then can 'travel', but in the case of standard contract terms it cannot. Finally, it is also a task for the future to understand that formation of contract with standard contract terms is really a form of formation on its own and not mainly a variant of negotiated contract. This is a task both for codification and for doctrinal system building. In fact, the consequence of the findings in information economics, namely on adverse selection in the case of structural information asymmetries, would seem to be that, in this case, we are really confronted with a case of heteronomous rule-setting. The second type of formation of contract, the formation with standard contract terms, is by far not as 'simple' at the European level as the individually negotiated contract. Still today in doctrinal theory, it poses more questions.

Just as with information rules, standard contract terms regulation (which is also about information, namely in a market for lemons situation) is one core example for the trend already mentioned to integrate regulatory parts into contract law, namely into the law on formation of contracts. There are quite a few more, namely the law on unfair trade practices, regulated mostly by the EC Directive of 2005 on such practices,[46] the importance of which for contract law is far from being thoroughly – let alone fully – discussed.

46 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), *OJEC* 2005 L 149/22; on this directive see, for instance, H. Collins (ed), *The Forthcoming EC Directive on Unfair Commercial Practices – Contract, Consumer and Competition Law Implications* (The Hague: Kluwer International, 2004); F. Gomez, 'The Unfair Commercial Practices Directive: a Law and Economics perspective' (2006) 2 *European Review of Contract Law* 4–34. For this trend to integrate facilitative and regulatory aspects in modern contract law see already Collins, n 39 above, 46–52; but

4 Spot Contracts and Long-Term Contracts

Focusing now on performance and breach of contract, the second core area of contract law, it would seem that doctrinal thinking does not completely reflect the transition from the industrial age to the services age (or a combination of both). The contract type of the former is the sales contract, and this type of contract has been the object of extensive international and supranational harmonisation, while the same is not true for services contracts. The picture is similar on the national level in many countries, for instance in the large recodification endeavour of the German *Schuldrechtsmodernisierung*, in which the general regime on breach of contract has been completely modelled after the (international regime of the) sales contract (transposing, it is true, the EC Sales Directive). Long-term (services) contracts received little attention, basically in one rule on termination (section 314 German Civil Code). Irrespective of whether national law has just one overarching type of services contract or distinguishes between service contracts, works contracts and agency contracts – in all cases, the area of services is taken much less into consideration in the general parts of national contract law than the sales (spot) contract paradigm, and the same is true for supra- and international harmonisation.[47] Even payment as the 'neutral' obligation in contracts has been taken care of much more intensively. This is all the more remarkable as the case patterns in this area are more varied, as the assessment of quality is typically even more difficult (*obligations de moyen*, obliging only to do proper work, and *obligations de résultat*, obliging to reach a defined result), and finally also as non-performance may typically be of existential importance for the other party more often in the area of services. All this has to be seen against the background that in all modern market economies, the share of services nowadays exceeds that of industrial production,[48] and that the distribution of industrial production and the networks needed for this typically include a good share of services as well. On the other hand, it is not so astonishing that legislatures lag behind, because the boom dates only from the last decades of the 20th century.

Two aspects would seem particularly meaningful with respect to the topic of the 'future of contract law' and contract law thinking. The long-term contract

also Whittaker, n 16 above, 1–193 through 1–197 (for the majority view in the United Kingdom).

47 The EC Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, *OJEC* 2006 L 376/36) contains little contract law, according to its drafters it (almost exclusively) served the purpose of deregulating administrative impediments (see 4th recital). On the little of contract law in the directive see, for instance: M. Schauer, 'Contract Law of the Services Directive' (2008) 4 *European Review of Contract Law* 1–14.

48 See, on a summary basis: P. Love and R. Lattimore, in *OECD Insights: International Trade: Free, Fair and Open?* (OECD Publishing, 2009) 51.

discussion is also weak in doctrinal thinking.[49] The prevalent image would still seem to be that the rules on content, performance and breach basically follow that of simple spot-contracts. As, however, the future is ignored by the parties and therefore the possibility to fix the core contents of the contract are fundamentally different in long-term contracts,[50] and as, moreover, the incentive structure is also substantially different in contracts where each party has to 'perform in continuity', thus giving each party the possibility immediately to 'punish' improper performance on the other side,[51] the underlying idea (the *presumtio similitatis*) is erroneous. The second point has to do with the first one; it is a simple point on the sociology of legal science. Company lawyers are amazed about the idea that long-term contracts are just a variant of spot transactions – and are not treated as a second, independent pole of contract law. This is so because, for company lawyers, dealing with the long-term nature of relationships is core business. Company lawyers are, however, very rarely contract lawyers; hence discussion of the overlap is weak. Publications on networks of contracts or long-term contracts indeed often stem from business or company law scholars – with their particular interest in the 'organisational' and not merely transactional aspect. Perhaps the financial crisis, with its cross-sections between company and contract law, may change this to some extent.

5 Larger Numbers of Partners (Networks of Contracts)

A particularly young field of scholarly consideration is of the highest practical importance; this is networks of contracts. Long-term contracts are often, if not mostly, arranged in such networks. Doctrinal discussion is still in its infancy here.[52] There is dispute namely on whether classical contract law should be

49 For the contractual long-term relationship, literature on the continent is not very rich, see: J. Jickeli, *Der langfristige Vertrag* (Baden-Baden: Nomos, 1996); F. Niklisch (ed), *Vertragsnetzwerke komplexer Langzeitverträge* (Munich: C.H.Beck, 2001); H.-G. Kern, 'Ökonomische Theorie der Langzeitverträge' *Juristische Schulung (JuS)* 1992, 13–19; and more specifcally on the important issue of termination: H. Oetker, *Das Dauerschuldverhältnis und seine Beendigung* (Tübingen: Mohr-Siebeck, 1994); seminal works by I. MacNeil (n 50 below) and S. Macaulay, 'The Use and Non-use of Contracts in the Manufacturing Industry' *Practical Layer* 9(7) (1963) 13; see also, for instance, Collins, n 39 above, 140–143; J. Haley, 'Relational Contracting: Does Community Count?', in H. Baum, *Japan, Economic Success and Legal System* (Berlin et al: de Gruyter, 1997) 167–184.

50 On these questions: O. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' 22 *Journal of Law & Economics* 233–261 (1979); O. Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985) 43–63, 68–84.

51 See, for instance, I. MacNeil, 'The Many Futures of Contracts' 47 *Southern California Law Review* 691–816, 738–740 (1974); G.K. Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' 42 *Stanford Law Review* 927–992 passim (1990).

52 R. Buxbaum, 'Is "Network" a Legal Concept?' (1993) 149 *Journal of Institutional and*

applied basically unchanged, whether there should be a separate law of networks between company and contract law, nourished in part from the one area and in part from the other, or whether one should take contract law as the starting point, namely an assumption of doing business separately and not pooling efforts and sharing gains, but use contract law instruments to respond to the peculiarities of networks and the integration of contracts into them. After all, all members of the network, even though doing business separately, have a common interest in a functioning of the network.[53] While the discussion is in its infancy, the phenomenon as such already dominates practice (and has done so for quite some time). It is of prime practical importance and therefore a modern contract law would have to see it as a test field for its conceptual force and would have to take it into consideration when discussing system building. Indeed, production, but also distribution, are unthinkable without networks – and this is the backbone of economy –, but also large parts of financial services (payments, syndicated loans, marketing and trading of shares and bonds etc). So far, networks of contracts have been an area of research for specialists in these subsets and some more general studies. It would be important for contract law to consider this phenomenon more, and more generally the inside and the outside effects of contracts. The insufficient discussion of the external effects and network effects of contracts has proven very problematic in the financial crisis.

IV Style

The developments discussed also have their impact on the style of contract law scholarship and discussion. Very cautiously – as seems always appropriate in questions of taste and style – one may summarize: (i) The discussion has become (and will continue to become) more international. While it is true that solutions in national contract law disputes are still not justified coherently and in all cases by reference to and in comparison with parallel solutions which can

Theoretical Economics 698–706; F. Cafaggi, 'Contractual Networks and the Small Business Act – Towards European Principles?' (2008) 4 *European Review of Contract Law* 493–539; S. Grundmann, 'Die Dogmatik des Vertragsnetzes' *Archiv für civilistische Praxis* 207 (2007) 708–767; C. Ott, 'Contract Network in Distribution Systems' (1995) 151 *Journal of Institutional and Theoretical Economics* 212–217; G. Teubner, *Netzwerk als Vertragsverbund – Virtuelle Unternehmen, Franchising, Just-in-time aus sozialwissenschaftlicher und juristischer Sicht* (Baden-Baden: Nomos, 2004). Recently Secola Conference 2009: F. Cafaggi and S. Grundmann (eds), *From Exchange to Cooperation – Long-Term Contracts and Networks of Contracts in European Contract Law* (Alphen: Kluwer International, 2010).

53 In the first sense the large majority of traditional contract law writing which, even more often, is completely tacit on the issue. In the second sense most prominently Teubner, n 52 above. In the third sense my own contributions, n 52 above.

be found in the 'international' discussion, it is most likely that this step will happen in the foreseeable future in Europe (as well). This is already the approach in many leading writings, although not yet in the majority. (ii) This also implies that comparative law considerations will still become more important, but more generally: thinking of alternative solutions. (iii) If such a comparison of alternative solutions becomes paramount, this implies a change from legal sciences in which interpretation and doctrinal thinking dominate, to legal sciences in which the shaping of solutions, including legislative solutions, becomes just as important. (iv) This brings about, almost inevitably, a more interdisciplinary approach, an approach which is open to questions about regulatory techniques (including questions of legitimacy), legal scholarship which includes neighbouring sciences, hopefully without undergoing domination by them, which in contract law are mainly economic theory, behavioural sciences, in part also sociology and philosophy, but also an increased dialogue with traditional public law areas. (v) If then contract law is seen more in context also with market regulation,[54] this would also imply that in style the contract law approach resembles more traditional business and company law approaches where the importance of doctrinal system building is not denied and should not be denied, but where other aspects, in tendency, gain just as much importance, namely practice, comparison and inter-disciplinarity – one reason possibly being that in company law, with the plurality of possible forms, comparison and choice has always been a prime issue. (vi) All this will lead to an orientation towards questions of governance in contract law too, where a prominent role can be foreseen for the topic of *'Contract Governance'*. In this respect, it may be important that the big financial crisis has been provoked to a large extent by the irresponsible shaping of contract relationships (subprime loans, lack of transparency in the passing on of risks via securitisation, complete lack of transparency because of a mixing and bundling of contracts, adverse incentives in the contract relationships with rating firms and the investment banks acting).

In essence, all this implies – rather surprisingly – that a contract law scholarship of our days which concentrates less on interpretation of existing law only and which transcends frontiers with some nonchalance is perhaps closer in style to that in von Savigny's times than to contract law scholarship around 1900 – all this despite the important differences between the situation in 2010 and in 1810.

54 This is the approach and concept of S. Grundmann, *Europäisches Schuldvertragsrecht* (Berlin: de Gruyter, 1999) esp para 15–17, 203–210 and part 5; for the EC Unfair Practices Directive Secola Conference 2002: Collins (ed), n 46 above; and to appear in near future: S. Augenhofer, *Vertragsrecht und Wettbewerbsrecht*.

V Summary and Conclusions

1 Contract Law of the future, in the European Member States, is primarily supranational, even more so than international.

2 Its content is characterised by an increasing, subtle and nuanced search for an optimal equilibrium between the (contractual) freedoms of *both* parties or, more generally, *all* parties concerned.

3 Thus, there is an increasingly inseparable combination and mix of those parts of contract law which have enabling character (facilitative law) and the regulatory parts, establishing and safeguarding (market) order.

4 The general part of contract law – also with respect to legislation – is more principle oriented, but more important still, is more nuanced and bi- or multi-polar in several respects: because within contract law, rules apply differently to different groups of persons, different groups of types of contracts, and different modes of formation of the contract.

5 A codification on the supranational level is desirable; it would be a particularly good place to render visible what may be seen as characteristic for a European social model in which the manifold interests of all stakeholders are taken care of. It is, however, paramount for such codification that it remains manageable – confined to contract law but at the same time encompassing all contract law – and that such codification properly depicts the current status of society and of contract law development. Just to lift the system of the German Civil Code (the *Bürgerliches Gesetzbuch*) to the supranational level, does not solve the problem that this system represents the status of 1900.

6 Core areas of modernisation have been named and discussed. They should encounter particular attention in discussion and in a modern codification.

7 The style is increasingly richer: more international, more interdisciplinary, more oriented towards a comparison of solutions and to practical consequences (outcome related interpretation) and also more oriented towards the process of rule setting ('Governance'). It may be that the exchange between contract law and company law will be more intense in the future.