Rules for the Transfer of Movables

A Candidate for European Harmonisation or National Reforms?

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edited by
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Introduction to the Project ‘Transfer of Movables’: Organisational Framework, Basic Issues and Goals

Brigitta Lurger*

Our Conference ‘Rules on the Transfer of Movables – A Candidate for European Harmonisation or National Reforms?’ pursues several goals: It is a general conference open to everybody – academic or practitioner – who is interested in the development of property law. But it is also a Conference with special guests and speakers: We are particularly happy to be able to welcome to this Conference the reporters of our working group ‘Transfer of Movables’. Their information is vital to our project and they took enormous efforts to answer our sometimes picky and complicated questions in extensive reports. Many of them will also contribute to this Conference as speakers. We are also very happy and honoured to welcome here the members of the ‘Ius Commune Group’ on property law. In this research group renowned experts of property law of several European countries co-operate to publish a European ‘Case Book’ on the whole of property law. This conference, therefore, aims at bringing together the different views and experiences of lawyers dealing with issues of property law in their academic or practical work, and to initiate a general discussion on persistent problems and recent developments in this area of law. And the conference shall also provide a forum for discussions and exchange among the members and exponents of European research groups who concentrate their activities on comparative research in European property law, especially the Ius Commune Case Book Group and the working group on ‘Transfer of Movables’ as part of the Study Group on a European Civil Code.

A. The working group ‘Transfer of Movables’ as part of the Study Group on a European Civil Code (SGECC)

The first initiative to establish a new working group on the ‘transfer of ownership in movables’ within the network of working groups within the ‘Study Group on a European Civil Code’ (SGECC)¹ was taken by Prof Michael Rainer, Salzburg, and Prof Willibald Posch, Graz, in 2001. Until 2004, to-

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¹ See http://www.sgecc.net.
together with Wolfgang Faber, Salzburg, and Prof Brigitta Lurger, Salzburg, the first comparative studies and draft proposals on the transfer of ownership in movables on the basis of a contract or obligation and on good faith acquisition of movables were elaborated.

The main fields covered by the work of the SGECC are part of the law of obligations: general rules for obligations and for contract law, specific types of contracts, tort law, unjust enrichment, and benevolent intervention. However, also some issues of property law were identified as closely related to the law of obligations or contracts (sales, leases). In their study of 2004 on the interaction between contract law, tort and property law, commissioned by the European Commission, von Bar and Drobnig argued that the Internal Market needs a uniform regime of security rights and probably, not necessarily, also a uniform regime for the transfer of ownership in movables. The 2004 Contract Law Communication of the Commission concluded from this study that the Common Frame of Reference and the optional instrument should cover retention of title clauses, the transfer of title of goods, security rights in movables and other related property law issues.

As for all working groups of the SGECC, the goal of our working group on the ‘Transfer of Movables’ is the publication of a proposal of black letter rules together with comments and comparative notes (Sellier European Law Publishers). In addition to that, we plan the publication of all our country reports in several volumes.

B. The working group since 2005: The FWF-project and the Commission’s Network of Excellence project ‘Common Principles of European Contract Law’ (CoPECL)

Since 2005 (until 2009) our research project is financially supported by the Austrian Forschungsförderungsfonds, the ‘FWF’, and the European Commission’s Network of Excellence Project ‘Common Principles of European Contract Law’ (CoPECL) on the basis of the 6th Framework Program for Research and Technological Development. Our main financial investments are assistants, country reports, this conference, and travel expenses.


\[4\] See http://www.copecl.org.

Our working group has two centres: a bigger one in Graz – headed by Brigitta Lurger, and a smaller one in Salzburg – headed by Wolfgang Faber. We currently employ four research assistants in Graz (Rui Cascao, Anastasios Moraitis, Ernest Weiker, Alessio Greco) and two research assistants in Salzburg (Martine Costa, Ferenc Szilagyi). ‘Advisors’ to our working group are Prof Matthias Storme (Belgium), Prof Michael Bridge (Great Britain), Prof Torgny Hästad (Sweden), and Prof Anna Veneziano (Italy).

Thus, our working group is part of the SGECC, the SGECC is the biggest academic group within the CoPECL Project (other groups: Acquis Group, Insurance Law Group et al), and the CoPECL Project forms part of the Commission’s Network Project on European Contract Law which comprises apart from the academic CoPECL network of excellence also a ‘network of stakeholders’ (interest groups) and a ‘network of national experts’ (representatives of the ministries of justice of the Member States).

The Network Project as a whole is a fascinating, but at the same time also a disputed and obscure project.6 On the one hand, the broad coverage of private law by an official EU project is new and impressive (law of obligations, parts of property law (chattels); only the procedural law, the law of succession and family law are completely excluded). A lot of pioneer work in comparative law is accomplished by numerous researchers within the project stemming from all jurisdictions of the present EU. There is no doubt that the comparative studies and extensively commented rule proposals published by the numerous participants of the project will constitute an important (historically probably unprecedented) contribution to the discipline of comparative private law in Europe and will have a great impact on the further development of academic research and teaching.

On the other hand, the concrete goals and desired outcomes of the EC Network Project are uncertain and disputed among EU officials as well as among politicians, researchers and practitioners. According to its communication of 11 October 2004,7 the Commission envisages the ‘Common Frame of Reference’ (CFR) as a ‘tool box’, to consist of fundamental principles of contract law, of definitions of legal terms, and of coherent model rules of contract law. Although this tool box should have a non-binding character, some discussion has taken place suggesting that the CFR may lead to the

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6 See the contributions to the ZEuP-Symposium 2006 in Graz in ZEuP (Zeitschrift für Europäisches Privatrecht) 2007, pp 109-303, among others, by Reiner Schulze (p 130), Norbert Reich (p 161), Gerhard Wagner (p 180), Dieter Martiny (p 212), Jürgen Basedow (p 280).

conclusion of an inter-institutional contract, which then obliges the EU institutions to adhere to its definitions and rules. The CFR is supposed to be used mainly for two purposes: to improve the existing acquis and to form the basis for elaborating additional legal instruments in the field of contract law. The Commission stated that one of these additional legal instruments could be a so-called ‘optional instrument’, which horizontally covers wide areas of general and specific contract law and related areas of private law. As to the nature of the optional instrument, the Commission favours the legal form of a regulation that will establish a 28th legal order, which can be chosen by the parties. The optional code will contain both non-mandatory and mandatory provisions, particularly those protecting consumers. These will – following the preference of the Commission – exclude the application of any national mandatory provisions on the basis of Articles 5 and 7 of the Rome I Convention.

The Commission reacted to critique expressed within the Commission as well as critique from outside, by practitioners, interest groups, academics and others, by reaffirming its position that no ‘European Civil Code’ should be drafted and by officially removing the optional code from the agenda of the Network Project. Contrary to its initial plans, it currently concentrates its activities merely on the revision of the so-called ‘Consumer Acquis’, ie on the amendment of only eight EC directives. This ‘Acquis Review’ has no connection to roughly 90 per cent of the rules of the CFR which are currently drafted by the academic groups in the CoPECL Project. It is hard to imagine that the Commission would invest large sums of money in producing a CFR of thousands of pages, with no intention of ever using the roughly 90 per cent of it, which does not deal with consumer protection.

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11 See, for instance, the Commission declarations on the second workshop of the stakeholder network on 31 May 2005.
13 This judgment is shared by the European Union Committee of the House of Lords, 12th Report of Session 2004-05, European Contract Law – the way forward?, 5 April 2005, HL Paper 95, p 23: ‘We doubt whether it is correct to describe the CFR as envisaged in the Communication as a thesaurus. It would be more than a book of synonyms or a book of specialized vocabulary. We hope the Government has not underestimated what the
really intends to do or will do with the results of CoPECL Project remains unclear. The European Parliament, on the other hand, still strongly supports a horizontal harmonisation or unification of contract law (and related areas of law).\textsuperscript{14}

In the general discussion about the Network Project, the democratic legitimacy of a further harmonisation of contract law (and other fields of private law) on the basis of the CFR is put into question.\textsuperscript{15} Even though the Commission established two additional networks of ‘stakeholders’ (interest groups) and of national experts (representatives of the ministries of justice of the Member States), which are supposed to comment on the draft CFR as the researchers present it to them, piece by piece,\textsuperscript{16} the involvement of the \textit{demos}, the people outside the EU bureaucracy and the academic circles involved, is perceived as unsatisfactory.\textsuperscript{17} In addition, no clear competence of the EC for the harmonisation of contract law seems to exist.\textsuperscript{18} At the same time, no scenario of a Europeanisation of contract law can be envisaged which will \textit{not} result in a reduction of national sovereignty. Alternative models of rule-making – like soft law, an ‘optional instrument’, the ‘open


\textsuperscript{17} Gerhard Wagner, ‘Die soziale Frage und der Gemeinsame Referenzrahmen’ (2007) Zeitschrift für Europäisches Privatrecht ZEuP 180, 189 et seq.