

David Edward, 'Concluding Observations' in Vogenauer & Weatherill (eds.) *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart 2006.

In seeking to summarise the results of the conference, there are five points that need to be emphasised.

First, although the European Commission is taking the lead in promoting the harmonisation of contract law, the Commission is not itself the legislator. No legislation binding on the Member States can come into existence without the active concurrence of the Council, representing the governments of the Member States. Even if it wished to do so, the Commission cannot force a change in the law.

Second, we should accept that there is no hidden agenda. There is no master plan for extensive harmonisation – far less complete harmonisation - of the laws of the Member States.

Third, in a field such as this, careful choice of terminology is crucial. In every legal system, the words and phrases that lawyers use encapsulate concepts and definitions that have developed over years – in some cases, over centuries. While words in one language (for example, “good faith”) may appear to be synonymous with equivalent words in another language (*bonne foi*), the underlying concepts or their application may differ to such an extent that it would be misleading, in a legislative context, to treat them as adequate translations of each other.

That is why, for example, in the context of the Brussels Convention on Jurisdiction and Judgments the European Court of Justice has insisted that the words used by the Community legislator are to be treated as “autonomous concepts” that have their own Community-law meaning and do not necessarily incorporate all the underlying meanings they have acquired in the national legal systems. For the same reason, in its judgments relating to state liability for damages, the Court avoided using the word “fault” although, at first sight, it might seem to be the obvious word to describe the circumstances in which liability should arise.

In the present context, therefore, it will be important, either to adopt new terminology that is clearly different from the customary terminology of the national legal systems, or alternatively, if customary terminology is adopted, to spell out what it is to be presumed to mean (or, in some cases, what it is to be presumed not to mean). Detailed analysis and classification of terms and concepts will be an essential preliminary.

Fourth, this cannot be purely a technical lawyer’s exercise. At various stages, it will be necessary to make political choices. For example, it will be necessary to decide how far the legislator should go in protecting the weaker party to a contract against the consequences of his or her own stupidity or folly. The role of the legal expert is not to make the choice, but rather to help the legislator to make a well-informed choice, and thereafter to choose appropriate terminology with which to define the choice that has been made and its consequences.

Fifth, it should be remembered that it will be the judges that interpret and apply the legislation once adopted. The British constitutional lawyer, A.V. Dicey, writing about what he called “judicial legislation” (development of the law through case-law), observed that “Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law”¹. The interplay between judges and academic lawyers is an essential part of this process. The wise legislator will not seek to answer every question in advance.

The present context is one in which the technique of the directive, prescribed by the Treaty, will be particularly appropriate, concentrating on “the result to be achieved” rather than “the choice of form and methods”.

More generally, the conference has touched upon some fundamental issues.

All legal systems develop, in some cases through the search for a better formulation of a legal rule or principle, in others through the search for a rule or principle that is better adapted to changing political, economic or social realities, preconceptions or values. Systems react, more or less speedily, to what the actors want. In some cases there will be direct borrowing from another system, in others two systems will come to a common or similar solution through a sort of osmosis, often as a result of discussions at conferences such as this. On the whole, smaller jurisdictions are more likely to be influenced by larger ones than the other way about.

It is not surprising that, in the context of a developing internal market in Europe and a wider global market, the commercial actors should look for a common set of rules to govern their commercial relations, as indeed happened in the Middle Ages. The search for common rules in the field of contract law should therefore be seen as a normal and natural part of the development of the national legal systems, and not as an impertinent assault on their autonomy or the purity of their principles.

It is important, too, to recognise that the territory of traditional “contract law” has been invaded by new forms of law – notably competition law and other forms of modern regulatory law. In many respects, the parties’ freedom is restrained, restricted or even excluded to such an extent that it is open to question whether the traditional conception of a “contract” as an agreement freely entered into remains adequate as a starting point.

In addition, some areas of the law have effectively been excluded from the territory of the law of contract. The legal relationship of employer and employee now owes little or nothing to conventional concepts of contractual relationships. To some extent the same is true of the status of commercial agents and consumers and, for different reasons, of the law governing securities, guarantees and insurance.

So the question arises, what is left for the conventional law of contract? To what legal relationships would a European “code” of contract law relate? That is perhaps a rather unsettling question, but one that is none the less worth asking as work continues.

¹ Law and Public Opinion in England, London 1926, p.364.

