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# The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe

## Introduction

The creation of a new Civil Code as undertaken in Estonia, and the reform of parts of an old Civil Code as under way in the Federal Republic of Germany need acceptance not only by the legislative bodies and organs competent to enact new laws but also by the wider community of those who have to apply and interpret the law in general and in the particular areas to be reformed: lawyers, practitioners and scholars, therefore, have to participate in the discussion preceding the enactment of the new law, and their concerns and criticism have to be taken seriously by the drafters. Both in Germany and in Estonia one line of critical arguments was based on the claim that the respective reform projects did not sufficiently take into account the new developments towards unification or harmonisation of the law in Europe and on the international level, in particular of the law of obligations which is of overriding importance for commerce.*[1] If the claims of these critics were well-founded, the new reform projects would indeed be faulty and outdated, for the time of insular developments of codes and legal systems has passed with the fall of hurdles and barriers for commerce in regions of Europe and beyond. The emerging body of key concepts and basic structures common to the law of obligations of market-oriented economies of the European states in general and the

[1] As to critical voices in Germany, see M. Lutter. – Frankfurter Allgemeine Zeitung, 9 December 2000; Huber. Das geplante Recht der Leistungsstörungen. – Ernst/Zimmermann. Zivilrechtswissenschaft und Schuldrechtsreform. Tübingen: Mohr Siebeck, 2001, p. 31 *et passim*.

member states of the European Union in particular mandate that every new codification, every project of reform or amendment of a legal system has to be tested whether it is in tune with these developments or falling behind. But are these critics right, and are their arguments well-founded? To answer that question, this paper will compare basic features of the new Estonian law of obligations and the reform project for the German law of obligations with the basic structures and key concepts of the various developments towards unification and harmonisation of this area of the law in Europe and on the international level.

# 1. Institutions and projects

If developments towards common principles and structures for the law of obligations in Europe are used as a yardstick for measuring the reform projects in Estonia and Germany, it has to be considered first, how and where, *i.e*. driven and undertaken by which institutions these developments take place, and how far they have come already.

First of all, legal acts of the European Community are a source of unification and harmonisation. While in the field of private law, *regulations* which are directly binding for all citizens of member states of the EC, are still extremely rare — an example being the regulation on overbooking by airlines —, **directives** are more and more reaching and harmonising central parts of private law; sales law and the EC directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC) of 25 May 1999 and, furthermore, the directive on delayed payments, are just two, albeit the most important, examples.

Another road to unification or harmonisation is attempted by model codes (in the widest sense). The main objective of some of these model projects is the hope for a European code of obligations (or the like). But short of that, they offer very useful tools for educating European lawyers, *i.e.* those jurists who will have and must have a command of the common legal language to be developed in order to facilitate cross-border communication.

Last but not least, one of the model projects, the UNIDROIT Principles of International Commercial Contracts, which are not confined to Europe, have mainly gained recognition and importance in arbitration proceedings, when the parties in the arbitration clause had not determined the applicable domestic law, but had rather loosely referred to the *lex mercatoria* the general principles of law, *etc*. But they are also a source of inspiration for domestic reformers and legislators.

## 1.1. Drafting and drafters

Model codes and similar projects are rarely drafted by single persons. Usually they are elaborated by groups of experts from many countries, the number of countries represented and the selection of experts being mainly a matter of the respective framework — and not least the financial basis — for the project and a more or less informal co-option of the group members. Let me name just some of these drafting groups.

The prestigious project of the Commission on European Contract Law, which had published the Principles of European Contract Law in two parts in 1995 and 2000, edited by the Danish scholar Professor Ole Lando together with Professor Hugh Beale of Warwick, England, is nominally a private initiative instigated by the editors and some others and was funded by private and public institutions, but it has the moral and to some extent the financial backing of the EC Commission and the European Parliament, which on several occasions has emphasised the need for a European Civil Code. The group, often named after its *spiritus rector* the "Lando Commission", co-opts its members and tries to have a fair representation of, if not all legal systems of Europe, at least the main European law "families".

UNIDROIT, the Institute for the Unification of Private Law, is a creation of the League of Nations in 1926, and now an international juridical entity, financed by member states; it has promoted a number of important uniform law conventions and has — in 1994 — published the first part of the Principles of International Commercial Contracts. The working group elaborating the mentioned Principles consists of representatives of countries of all five continents, some of the European members being members of the Lando Commission, too.

The most ambitious project to date is the so-called Study Group for a European Civil Code. It consists of a number of working teams in several European countries and is financed by research foundations in the Netherlands, Germany, Sweden and other sources. The general idea is to build on the Principles of European Contract Law as a kind of general part of the law of obligations and supplement them

by more specific topics such as sales and services, insurance contracts, secured transactions, transfer of property, torts, *negotiorum gestio*, restitution and unjust enrichment. The working teams draft proposals with the help of expert advisers — again striving for a representation of all major European legal systems —, and twice a year the so-called co-ordinating group convenes in a kind of plenary meeting, discusses and refines the draft proposals and aims at formulating black letter rules, which were later to be backed up by comments to be prepared by the working teams.

What also deserves mentioning is the Academy of European Private Law Scholars founded and guided by Professor Gandolfi of Pavia, who presented a draft for a European Contract Code in competition to the European Principles only last year.

As to directives of the EC, their drafting and drafters are somewhat shrouded in the fog of the bureaucratic institutions of the EC and the complicated procedure of co-decision of the Commission and the Council of the EC on the one side and the European Parliament on the other side. Simplified, the creation of a directive usually begins with an initiative from the European Parliament or the Commission to take legal action in order to address a certain problem, *e.g.* an impediment to the free flow of commerce within the EC. This often leads to the commissioning of outside experts, who prepare papers on what could and should be done, which in turn might become the basis for a Green Book of the commission or its respective department outlining legal proposals and stating the law in the member states more or less complete. While the further procedure is guided partly by the rules under the EC treaty for the co-decision of the organs of the EC, partly by considerations of political and economic opportunity, advanced by national governments in the Council or lobbyists in private lunch meetings with members of the Commission's administration, in the end it is very often a rather small and informal group of administrators and members of the European Parliament that hammers out black letter rules and the necessary compromises, and sometimes one can detect traces of their background in their respective domestic legal systems in the end product, *i.e.* their proposals and the directive based on them.

### 1.2. The influence of the UN Convention on the International Sale of Goods (CISG)

Even the most creative experts in these groups and commissions do not start from scratch, but need inspiration. Since most of them know their own law best, it is understandable and legitimate that their domestic legal system is their first source of inspiration. The representation of experts from different legal systems should ensure that the drafts elaborated are the result of a careful weighing and evaluating of competing solutions, of selecting the most fitting ones or merging them into new rules.

In the field of contract law, such an amalgamated result has been achieved already more than 20 years ago by the United Nations Convention on the International Sale of Goods, now in force in almost 60 countries and in all major trading nations except the UK and Japan. This Uniform Sales law was based on an unprecedented effort of comparing and analysing the sales laws of the world, of predecessors (ULIS and ULFIS) and their "test run" in several countries, and of the guiding convictions of its drafters that the best solutions had to be selected for the various issues, and that one had to find concepts and structures encoding these solutions acceptable and understandable to lawyers all over the world. The stunning success of this Convention is evidence that this was achieved, the success being shown not only by the ever-increasing number of contracting states and the hundreds of court decisions applying the convention, but also by the influence of the CISG on the development of the Law of Obligations in Europe, on directives such as the Consumer Sales Directive as well as on projects like the Principles mentioned above, the first draft proposals of the Study Group's team on Sales and Services, and the German reform draft. This will be explored further in the next part (II).

## 2. CISG and European sales law

### 2.1. General remarks

Three developments of sales law in Europe are markedly influenced by the UN Sales Convention.

Firstly, the Consumer Sales Directive[*2] is probably the most important example; it expressly pays tribute to the influence of the CISG in its recitals.

Secondly, the Dutch working team of the Study Group for a European Civil Code in charge of Sales decided at the very beginning that they should stick to the CISG as closely as possible, deviating only from such rules which in the CISG were clearly tailored to the needs of international sales only, which were already outdated or — as an exception — questionable.

Thirdly, for more than 20 years the German Ministry of Justice has worked on a proposal to reform parts of the German Civil Code in the area of breach of obligations, the provisions on sales and service contracts and limitation periods, topics on which the existing code provisions are regarded as inadequate and partly misbegotten. Since the Consumer Sales Directive which has to be implemented by the end of this year, requires an amendment of the existing sales law anyway, it was decided to use the implementation of the directive as a kind of tug boat to pull the super-cargo ship of a reform of the law of obligations through the treacherous waters of public debate and the legislative process: the Ministry of Justice, therefore, presented a new reform proposal last autumn which right now is heatedly discussed in circles of academic scholars and practitioners.[*3] What interests here is, that again, the provisions for a new sales law in particular as well as those on remedies for breach of contract in general are partially influenced by the CISG, so that one could state already at this point that the reform of the German law of obligations will bring these parts of the German private law into line with European and international developments.

## 2.2. Sales law and beyond

The influence of sales law is not restricted to sales, but serves as a model for the rules on other topics such as formation of contracts and — in particular — general rules on contract, breach of contract and remedies in case of breach. While some Civil Codes such as the German BGB have laid down these rules in general parts, other legal systems such as those of the Scandinavian countries derive their general rules on breach of contract from the explicit provisions of sales law. Therefore, the Convention on the International Sale of Goods has not only bearing on the development of modern and harmonised sales laws in Europe but also on the so-called general part of the law of obligations. Reading through the UNIDROIT Principles of International Commercial Contracts or through the main parts of the Principles of European Contract Law, the influence of the model "CISG" is visible throughout. Despite divergences in details, the basic structures and key concepts are quite similar in CISG and these Principles, so that it is no exaggeration to point out a common core of concepts and solutions in these attempts at unification of the law of obligations. One of the reasons for this is that some scholars and specialists have been involved in the preparation of all three of these projects — and sometimes in the amendment and reform of their domestic laws as well —, so that they were "spreading the word", *i.e*. the key concepts of CISG to the Principles. But they would not have succeeded if the key concepts and solutions would not have spoken for themselves, in other words, would not have been as convincing to encode solutions of common problems as, in fact, they are. And it is this — in German — "*Sachgerechtigkeit*", *i.e*. the obvious reasonableness and fairness of solutions to common issues that make the respective provisions persuasive and appealing to drafters of other reform projects such as the commissions which prepared the first reform draft for the German law of obligations in the eighties and lately guided and counselled the German Ministry of Justice in its recent efforts to bring about a reform of the law of obligations in Germany.

I dare say, therefore, that any new codification of the law of obligations has to be measured against the unification projects mentioned before: their key concepts and basic structures — and the basic solutions encoded in them — represent a kind of yardstick for reformers and drafters. They have to explain, if not to justify, if and where they deviate from this body of common convictions and their materialisation in black letter rules. I think the new Estonian law of obligations will pass this test convincingly.

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2 *Ibid*.

3 In the meantime, the Ministry with the assistance of a commission of experts has presented a revised draft (*Konsolidierte Fassung des Diskussionsentwurfs eines Schuldrechtsmodernisierungsgesetzes* = KF), and as of now – April 2001 – it seems to be certain that the reform will be accomplished by the end of the year.

# 3. The Estonian law of obligations: details and key solutions

Though I cannot give an exhaustive report and analysis of the Estonian law of obligations, a concentration of the central points of the new act may suffice to prove my point. Since the CISG and the Principles only deal with contracts and obligations created by contracts, I shall first concentrate on the comparable provisions of the new Estonian law.

The backbone of any law of obligations are the remedies of the obligee in case of a breach of a contractual obligation by the obligor, which is generally called "non-performance" in the UNIDROIT and European Principles, while the CISG — although not generally — uses "breach of obligation" as the respective key concept.*[4]

In the continental legal systems as well as in the uniform law projects, the first and main remedy of the obligee is always his or her or its right to claim specific performance. Although in practice, other remedies, such as a claim for damages may be used more frequently, the right to claim performance is the dogmatic centrepiece of the system of remedies, often described as the primary remedy in comparison to secondary remedies such as a claim for damages. But the claim for specific performances must have its limitations, the most common one being impossibility of performance: a legal theory granting a claim for performance in case of impossibility might be appealing for a dogmatist but violates common sense. Therefore, the rule in article 79 V CISG, a misbegotten provision, is heavily — and rightly so — criticised, and both the UNIDROIT Principles (in articles 7.2.1 and 7.2.2) and the European Principles of Contract Law (in articles 9:101 and 9:102) calibrate the right to performance: while monetary obligations are generally unlimited, specific performance of an obligation other than one to pay money cannot be obtained, where performance would be unlawful or impossible, or would require unreasonable effort or expenses of the obligor, or where services or a work of a personal character are owed or where the obligee may reasonably have obtained performance from another source. These restrictions apply also to a claim for performance to cure a defective performance. Estonian law is fully in conformity with these rules: section 99 of the (draft) Law of Obligations Act provides an unlimited claim for performance, if the obligor is obliged to pay money, but limits the claim for performance in other cases, *i.e.* where performance would be unlawful or impossible, or would impose an unreasonable burden on the obligor or where the obligee could fairly obtain performance from other sources, or where the obligation is of a highly personal character. As in the Principles, this applies to the right to cure as well, subsection 99 (4).

Breach of a contractual obligation jeopardises the existence of the contract. Legal systems, therefore, have to find an answer, how and under what circumstances the contract could be terminated. The uniform law projects follow a common model: the contract can be terminated (avoided) by the obligee, hurt by the breach of the obligor, either if the breach is "fundamental", or if the obligee has set an additional period of time, which has lapsed without the obligor having performed. Thus, even if there are doubts whether the breach of the obligor amounts to a fundamental breach, the obligee principally can get out of the contract by setting an additional period of time, the lapse of which is regarded as making a breach a fundamental one. This interplay between gravity of breach and the instrument of an additional period of time cannot only be found in the CISG (article 49 (1) a) in regard to the seller's breach, article 64 (1) a) in regard to the buyer's breach), but also in the European Principles (articles 9:301, 8:106 (3)) and the UNIDROIT Principles (articles 7.3.1 (1) and (3)), both projects specifying what constitutes a fundamental breach.

The Estonian Law of Obligations Act is based on the same model: termination is allowed, if the breach is fundamental, subsection 107 (1), and what constitutes a fundamental breach is concretised in similar terms as in the uniform law projects. In addition, the lapse of an additional period of time, granted by the obligee under section 105, is regarded as a fundamental breach, subsection 107 (1) 5); the Estonian Act thereby uses the dogmatically most consistent solution to rationalise the consequence of termination in case of a futile additional period of time.

In the central provision for the remedy of a damage claim — section 106 —, the Estonian Act is based on the notion of "breach of obligation" as a general concept, and on the basic policy that damages could be claimed only if the obligor is responsible for the breach of his or her or its obligation. "Responsibility" is a requirement for liability in damages defined in section 94. In addition, subsection 106 (2) provides for an additional period of time to be set by the obligee, if he or she or it asks for damages "instead of performance", *i.e*. the so-called "performance interest". The

[4] So does the German Reform Draft, see section 280 KF: Pflichtverletzung.

setting of an additional period of time is not required if it would be obviously futile or unnecessary as a requirement for termination of the contract. These — basic — structures of the claim for damages are fully in line with modern developments in Europe: although the European Principles as well as the UNIDROIT Principles use as a key concept "non-performance" instead of "breach of obligation" — which, however, is the key concept in the new German draft for the reform of the German law of obligations —, the essential features of the new Estonian Law of Obligations Act are the same as in the projects for Uniform Principles projects: the obligor is liable only, if he or she or it is responsible for the breach, and he or she or it can excuse himself or herself or itself (only), if the impediment to performance is beyond the obligor's control and could not reasonably have been expected to be taken into account at the time of the conclusion of the contract or creation of the obligation, and could not have been avoided or overcome later. The basic elements of responsibility in section 94 are the same as in article 79 I CISG, article 8:108 (1) European Principles or article 7.1.7 (1) UNIDROIT Principles. The special norm for damages instead of performance — subsection 106 (2) —, however, seems to be based on the German reform draft and a general distinction between performance interest and reliance interest.

Price reduction: the remedy of price reduction is — unlike in German or other domestic laws, but in conformity with the European Principles — a general one and not restricted to sales, construction contracts and leases as, *e.g*. in Germany. Section 102 of the Estonian draft, allowing price reduction in all cases of non-conforming performance — as article 9:401 European Principles — reflects the policy that in case of non-conforming performance the contract has to be adjusted, *i.e*. the price has to be adjusted to the value of the non-conforming counter-performance. This is common stock in Europe in regard to sales contracts and is in so far based on the old Roman *actio quanti minoris*, but it is an impressive improvement to have a general norm for price reduction, which also applies to contracts for services, *etc*.

Although the limits of time and space preclude me from a more detailed comparison, I feel confident and justified to summarise that the system of remedies for breach of an obligation in general and breach of contract in particular are not only compatible with the modern solutions to be found in the European Principles, in the UNIDROIT Principles and in the Convention on the International Sale of Goods, but also with modern reform projects such as the draft for a new law of obligations in Germany.

# 4. Unjust enrichment

While in the law of contracts there are the European Principles, the UNIDROIT Principles and the Sales Convention as models and yardsticks for any reform, matters are quite different in the law of unjust enrichment. The territory of "Restitution and Unjust Enrichment", in other words, is far less explored and mapped out in comparison to contracts and torts. If one attempts to harmonise the law of unjust enrichment (in Europe) or to codify this area of the law on the domestic level, some basic issues have to be decided at the outset: the first question, which arises when one analyses the law of Restitution and unjust enrichment comparatively is whether unjust enrichment as a category of its own is really needed. Since, however, there is at least a strong continental tradition to codify remedies for unjust enrichment, the drafters of the Estonian Law of Obligations Act did not really have a choice to deviate from this common heritage of European legal systems. The next question, however, is a more tricky one: should the law of unjust enrichment be codified by distinguishing several types of unjust enrichment or would it be sufficient to have a general principle along the line of the famous Pomponius dictum that nobody should enrich himself or herself to the detriment and injury of another? The Estonian drafters have based their proposals on a compromise, which could be found in other European jurisdictions as well: they start with a general clause in section 1131, but then go on to distinguish between enrichment by conscious transfer of assets without legal cause, *i.e*. the old *condictio indebiti*, and regulate content and extent of the restitutionary action and the defences of the enriched who has changed his or her or its position. Special regard is paid in this context to exchange contracts, section 1139. The difficult balance between protection of commerce on the one side and protection of the disenriched plaintiff on the other side is struck — in conformity with other legal systems — by distinguishing good faith acquisition for good value on the one hand and acquisition by a third party free of charge: only in the latter case is the third party bound to surrender the enrichment to the disenriched person. In contrast to the enrichment by conscious transfer, sections 1142 *et passim* deal with enrichment by infringement of the plaintiff's right — sections 1142–1145 — and enrichment by improvements of another one's goods, sections 1146 and 1147. Although I cannot report and analyse details here, it must suffice to state that the structure of this concept of remedies of unjust enrichment is not only in line with the basic structures of the European law of

unjust enrichment as revealed by comparative law research, but also very progressive and drafted with intimate knowledge of issues and policies.

# 5. Torts

To codify the law of torts poses a similar basic question at the outset as a codification of the law of unjust enrichment: should the law of torts be based on a general clause or on several provisions distinguishing special torts? Europe is divided on this question: while *e.g.* the French Civil Code is based on a general clause, the German Civil Code codifies a number of special torts. Of particular interest is the Swiss solution, for the Code itself is based on a general clause, while the courts and scholars have followed the German model and have interpreted the general clause as if it contained several types of delicts. The new Estonian Act, again, tries to strike a compromise by starting out with a general clause, whereby any wrongful causation of damages triggers a respective tort remedy, but goes on by qualifying the wrongfulness in form of several types such as causing death, injury to person or property, *etc*., sections 1149 and 1150. Although seemingly thereby following the German model, the drafters have included several types of wrongfulness which the German Code does not know, but which were developed by courts and scholarly contributions, *e.g.* the interruption of another one's business activities by strike, *etc*. The most modern part of the new Estonian law of torts, however, is the introduction of a general clause of strict liability for typical risks of a dangerous thing or doing, section 1160. This general clause is then exemplified by special provisions on certain dangerous things and activities, and the position of the plaintiff is strengthened by a right to information from the owner or possessor of the dangerous thing. Although these very artfully drafted provisions should have been sufficient, the authors of the draft have added special provisions on product liability, doubtlessly anticipating the implementation of the respective EC directive.

While it is still too early to compare this draft with the first attempts to codify a uniform tort law on the European level, I dare say that the concept and structure of the new Estonian law of torts is very modern, well-drafted and adjusted to the European solutions to be expected in the near future. It must be hoped, therefore, that the members of the study group for a European Civil Code take account of this progressive piece of legislation in Estonia.

# Conclusions

If I may take up my preliminary remarks about the necessity that a new law must be acceptable to the wider community of those who have to apply and interpret it, I feel entitled to summarise that the parts and provisions of the new Law of Obligations Act which I have compared and analysed here with the developments on the European level, deserve respect and admiration and should without doubt be acceptable to those who have to apply and follow them in the coming years. And if the noble project of a European Civil Code should be successful, Estonian jurists who had to study the new Estonian Law of Obligations Act should have no problems in understanding the coming European law, for their domestic law is fully in conformity with the tendencies and basic structures of the European law to come or having arrived already in the form of Directives of the EC. One has to congratulate all those jurists who took part in the drafting of the Estonian Law of Obligations Act, and it is to be hoped that it will find the recognition it deserves not only in Estonia but throughout Europe.