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The Continued Resonance and Challenge of the “Ius Commune” in Modern European Contract Law

MARTIN J. DORIS*

ABSTRACT

The need for a more consistent and coherent European contract law is a current priority of the EC institutions. Despite decades of pointillistic legal harmonization, cross border transactions within the Internal market of the European Union continue to take place in the shadow of divergent procedural and substantive law rules, differing legal cultures and significant linguistic diversities. Whilst national contract law systems function more or less efficiently internally, it is their partial non-compatibility with other Member States' private laws that provokes isolated distortions on the market. As a consequence, the European Commission has presented its 'Common Frame of Reference' research strategy aimed at fostering common contract law principles, model rules and uniform legal terminology, which, it is believed, will better facilitate commercial actors. The European Parliament has moved a step further by lending institutional credibility to the case for a European civil code. However, this clamour for codification of private laws – an idea premised on two formalisms, legal and economic - has in many respects overlooked the mechanics of modern commercial contracting in particular, the importance of contract drafting and the complex negotiations that lead to deals both domestically and cross border. This paper therefore provides an alternative assessment of the development of a European *ius commune*, or 'common law' of contract, and considers the urgency of improved means of legal information exchange in order to better facilitate the ongoing harmonization effort.

Introduction

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“... no other area better than the law could epitomise the past and present history, the glories and decays, the hopes and the fears, and above all, the present titanic challenge of Europe ... Twenty-one countries - to count, quite artificially, only those in the 'West' from Iceland to Cyprus - each with a distinct legal system, represent an irrational, suicidal division within a modern world which demands larger and larger open areas of personal, cultural, commercial, labour and other exchanges. Harmonisation, co-ordination, interdependence are absolute needs of our time; and history is there to provide clear evidence that division is not an eluctable fate, that indeed division is a relatively recent phenomenon in a Continent which, for centuries in past epochs, was characterised by a law common to all its people.”¹

A quarter of a century has passed since the preceding words of the late Professor Mauro Cappelletti were delivered in an opening address to participants at a colloquium entitled *New Perspectives for a Common Law of Europe*² at the European University Institute in Florence, and they serve as a helpful introduction to the contemporary debate regarding the future direction of European contract law.³ Despite these noble sentiments, however, contract law systems in the EU are not converging. Cross border transactions continue to take place in the shadow of divergent substantive and procedural law rules, differing legal cultures and significant linguistic diversities.

Whilst Member States' national contract law systems function more or less efficiently internally, it is their partial non-compatibility with other Member States' private laws that provokes isolated distortions on the market

¹ Cappelletti, M. (ed.), *New Perspectives for a Common Law of Europe*, Reports from the symposium inaugurating The European University Institute, Badia Fiesolana, Florence, 1976 (1978).

² Id.

³ Whilst this terminology is used by the primary European institutions and is now 'de moda' in academic literature, it is important to remind ourselves that at present 'EC contract law' remains a 'work in progress'. Cynics will argue that time-honored bureaucratic wisdom provides that the less inclined you are to act in a particular field, the more you have to talk about it; and that this alone explains the flurry of activity in Brussels. Such a view is evidently shortsighted and minimises the degree of legitimate interest within the Community institutions. Moreover, as Grundmann stresses, the emerging body of Community private law rules increasingly impacts upon the formation, the content and the termination of contracts and thus can no longer be ignored by practitioners. See Grundmann, S., *The Structure of European Contract Law*, 4 *European Review of Private Law* 505, 2001.

and reduces the attractiveness of cross-border commerce both for business and consumers. As a consequence, the European Commission has presented its 'Common Frame of Reference' research strategy aimed at fostering common contract law principles, model rules and/or uniform legal terminology, which, it is believed, will further facilitate commercial actors.⁴ The European Parliament has moved a step further by lending institutional credibility to the case for a European Civil code.⁵

⁴ It is anticipated that the Common Frame, or CFR, ought to comprise general principles complete with commentary, model rules and definitions of abstract legal terminology. The decision to draft the CFR has gained the full endorsement of the Council and Parliament and represents the first prong of a tripartite strategy. In July 2001, the Commission of the European Communities (the "Commission") initiated a comprehensive debate with stakeholders in industry, the business and academic community, legal practice and consumer organizations on the potential negative impact of divergences in contract law on the proper functioning of the internal market. See Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, 11.07.2001. (Hereinafter cited as the 2001 Communication). Stakeholder feedback prompted a subsequent 'Action Plan' in February 2003 (hereinafter cited as the 2003 Action Plan) and a Follow-Up Communication in 2004 (hereinafter cited as the 2004 Follow Up Communication). See respectively, Communication from the Commission to the Council and the European Parliament, 'A More Coherent European Contract Law, An Action Plan', COM (2003) 68 Final, 12.02.2003 and Communication from the Commission to the European Parliament and the Council on 'European contract law and the revision of the acquis: the way forward', COM (2004) 651 final, 11.10.2004. These three primary Commission discussion documents on general European contract law ought further to be read in light of the Green Paper on European Union Consumer Protection, COM (2001) 531 final, 02.10.2001. The relevant documentation, and additional background material, is currently accessible via the 'European Contract Law' website of the Directorate General for Health and Consumer Protection at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

⁵ For a critical examination of those primary market forces, both economic and legal, which promote harmonisation and legal uniformity see, *inter alia*, Mistelis, L., 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Fletcher, I. & Mistelis, L., *Foundations and Perspectives of International Trade Law*, Sweet & Maxwell Publishing, London, 2001. Rossett suggests that these forces are too powerful to resist and as such will ultimately "force the success of European regional unification", see Rossett, A., 'The Unification of American Commercial Law: Restatements and Codification' in *il Diritto Privato Europeo: Problemi e Prospettive*, a curria di Luigi Moccia, Atti degli Convegno Internazionale, Macerata, June 8-10, Guiffre Editore, Milano, 1989.

The idea of codification, as an undertaking of ‘legal rationalization and democratization’⁶ remains topical despite fundamental differences in systematic structure, procedure and legal culture prevailing between the common and civil law communities, allied to “the deep-seated fears of common lawyers about codification.”⁷ Doubt has further been expressed as to whether the harmonization of rules serves to promote convergence in

⁶ Chamboredon, A., ‘The Debate on a European Civil Code: For an *Open Texture*’, in van Hoecke, M. & Ost, F., *The Harmonisation of European Private Law*, Hart Publishing, 2000, pp.63-99, at p.82.

⁷ See Clarke, M., *Doubts from the Dark Side - The Case Against Codes*, Journal of Business Law, pp.605-615, November, 2001; see also Malaurie, P., *Le Code Civil Européen des Obligation - Une Question Toujours Ouverte*, La Semaine Juridique Édition Générale, No.6, pp. 281-285, 6 février, 2002. The constitutional significance of private law discourse is seldom appreciated by public law communities. In turn, European private law scholars rarely forage deep into areas of public law. The absence of such an interdisciplinary dialogue is doubtless one of the primary reasons why private law specialists, in discussing the regulatory framework required for contractual relations to flourish in the new Europe, have tended to promote codification as a definitive solution. However, the process of consolidating the modern Dutch Civil Code of 1992 began in 1947. The time-scale required in order to agree upon and to fashion an equivalent comprehensive supra-national code, covering civil and commercial law matters (and leaving aside corporate, consumer and labor law which a number of academics suggest should be codified) suggests that the Code would greet the world still-born, unable to adequately meet the challenges of technological and commercial innovation. For possible means of negating such drawbacks, see Doris, M.J., *Beyond a Still-born European Civil Code*, Position paper presented at conference on ‘European Contracting’, Centre for the Study of the Lex Mercatoria, Tromsø, May 2003. Moreover, the current position of hegemony enjoyed by the common law of contract as *the* law of commerce has allowed law firms from the United Kingdom and United States to gain “a distinct advantage in cross border legal transactions”, an advantage that will not be relinquished gently. See Becker, W.M., *Lawyers get down to business*, The McKinsey Law Review (2001) at p.46. Resistance would undoubtedly increase in the event of heightened Community regulation of commercial contracts. It has been noted that the UK’s commercial and maritime legal services attract business to the value of £800 million in invisible earnings. Submissions from the Commercial Bar in London and the Law Societies of England and Wales to the European Commission (see Commission website, op cit, n.2) contend that the ‘privileged position’ of English contract law in international commerce may be threatened by the development of a uniform European contract law. Sound judicial decision-making, enforceable judgments and the location of London, in particular, are just some factors cited in support of English commercial contract laws and dispute resolution procedures, see Patchett-Joyce, M., *Why London is and will continue to be a Centre for the Resolution of International Commercial Law Disputes*, article accessible via the website of Monkton Chambers, London.

practice.⁸ It is therefore apparent that any developments toward a greater harmonization of substantive EU-wide rules will require similar advances towards a common European legal method.

An analysis of the ‘*ius commune*’ naturally evokes contract law’s rich historical tapestry and the various classical, materialized and procedural visions that continue to shape modern doctrinal debate. It further calls to mind the quest for a satisfactory supporting ethic for modern practice. Fleeting references to the age of classical contract law, to codification and to modern Europe being divided between *Thibauts* and *Savignys*⁹ currently rhyme with a general concurrence among contemporary common lawyers that the early formation of the English law of contract owed much to the “creative plagiarism” of earlier civil law jurists.¹⁰ This knowledge may add little to the current harmonization debate but retains a certain modern charm since it may be argued that Restatements are likewise the product of similar acts of “creative plagiarism”, seeking to extract, rationalize and synthesize the “common core” of European and transnational contract law from existing national legal systems. For Samuel, the harmonization debate should therefore be “[t]he catalyst for rethinking legal theory, since the theories that are presently underpinning legal analysis are, arguably, incapable of handling the epistemological complexities presented by unification.”¹¹ This view is reinforced by Benson who observes that:

at the close of the twentieth century, the situation of contract law presents the following contrast. On the one hand, in both the common

⁸ Scott, R.E., *The Uniformity Norm in Commercial Law - A Comparative Analysis of Common Law & Code Methodologies*, in pp.151-171 in Kraus, J.S. & Walt, S.D., *The Jurisprudential Foundations of Corporate and Commercial Law*, The Cambridge Studies in Philosophy and Law Series, Cambridge University Press, 2000.

⁹ Lando considers the ‘codifiers’ to be modern-day *Thibauts*, after Professor *Anton Friedrich Justus Thibaut* who, in 1814, advocated the enactment of a civil code in Germany and the ‘cultivators’ as *Savignys*, after *Friedrich Carl von Savigny*, who in the same year published a manifesto opposing such a project, see Lando, O., *Why does Europe need a Civil Code?*, Position Paper presented at Leuven Society of European Contract Law conference, 2001.

¹⁰ Adams, J. & Brownsword, R., *Understanding Contract Law*, 2nd Edition, 1996, at p.32. See also Doris, M.J., *Did we lose the baby with the bath water? The Scholastic Contribution to the Common Law of Contracts*, 11(2) *Texas Wesleyan Law Journal* 556 (2005). Grossi, P., ‘Historical Models and Present Plans in the Formation of a Future European Law’ in Gambaro, A. & Rabello, A.M. (eds) *Towards a New European Ius Commune*, Jerusalem, 1999.

¹¹ Samuel, G., *English Private Law in the Context of the Codes*, in *The Harmonisation of European Private Law*, *ibid*, at pp.47-58.

law and civil law the definitions of and mutual connections between the various principles of contract law are for the most part well-settled and no longer subject to controversy. Indeed, despite differences in formulation, the main elements of the law of contract are strikingly similar in both legal systems, and these systems, whether directly or by derivation, prevail throughout most of the contemporary world. The authoritative public articulation of the law of contract has achieved a certain apparent completeness and acceptability. The same cannot be said, however, of efforts to understand the law at a reflective level. In common law jurisdictions at least, there is at present no generally accepted theory or even family of theories of contract. To the contrary, there exist only a multiplicity of competing theoretical approaches, each of which, by its very terms, purports to provide a comprehensive yet distinctive understanding of contract but which, precisely for this reason, is incompatible with the others. Moreover, we seem to lack a suitable criterion by which to adjudicate among them, let alone to combine them in an ordered and integrated whole. The point has come when we appear to doubt the value and indeed the very possibility of a coherent and morally plausible general theory of contract, one that could gain wide acceptance. Yet, in the absence of such a theory, how can we vouchsafe the internal consistency and reasonableness which the law claims for its doctrines and principles? Unless we are able to make explicit the conception of contract that underlies these doctrines and principles, we do not fully understand them and whatever understanding we may have of them must of necessity be partial and deficient. At a time when the public authoritative articulation of the main elements of contract is relatively settled and complete, this failure is particularly unsatisfactory.¹²

It has further been suggested that the current perceived frailty of modern European contract doctrine, in both civil and common law jurisdictions, derives from the fact that the philosophical foundations of contract were lost as the theological and philosophical certainties of early and middle age legal theory met the free-thinking rationalism of the late eighteenth and nineteenth centuries. This analysis provides that the iconoclasm of the Enlightenment thinkers allied to the exigencies of the early development of *laissez faire* liberalism in effect produced something of a “legal mutation” and bequeathed a more practical but theoretically

¹² Benson, P., ‘The Unity of Contract Law’ in Benson, P (ed), *The Theory of Contract Law ~ New Essays*, Cambridge Studies in the Philosophy of Law, Cambridge University Press, 2001, at p.118.

impoverished doctrine to the European contract lawyers who succeeded them. Whilst we may not wish to clone these earlier more philosophically rooted species, we may presume, *prima facie*, that, in seeking to rationalize the modern phenomenon of contract, the existing theoretical disorder owes much to the severing of the umbilical cord of its philosophical life-support.¹³ This alternative historical analysis further reveals important lessons with regard to the partial success and failure of legal transplants and the emergence of dominant legal positions/theories in legal mainstream thought due to their wide distribution and accessibility.¹⁴ Evidence of a partial legal fusion of the common and civil law worlds and the emergence of a novel system also lends much greater support to Vivienne Grosswald Curran's convincing argument that the new emerging body of EC contract laws will display fragments of both systems.¹⁵

THE CONTINUED RESONANCE AND CHALLENGE OF THE 'IUS COMMUNE'

The European Commission has consistently reinforced its view that "freedom of contract" or party autonomy remains the guiding principle for its ongoing harmonization strategy. The Commission's 2003 Action Plan and 2004 Follow Up Communication adopted a narrowly restricted approach to contract law based on the need to address "concrete and practical problems" impeding the proper functioning of the internal market. The removal of

¹³ See Gordley, J., *The Philosophical Origins of Modern Contract Doctrine*, Oxford University Press, Oxford, 1994., at p.73. Gordley makes the startling claim that modern theories of contract law cannot function logically without much of the Aristotelian and Thomistic concepts that were purged from the law during the Enlightenment era. For this reason, "[t]wo hundred years later, when we theorise about contract law, we still find ourselves at the same crossroads" in Gordley, J., 'Contract Law in the Aristotelian Tradition' in Benson, P. (ed), *The Theory of Contract Law - New Essays*, Cambridge University Press, 2001. See also, Ibbettson, D.J., *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford, 1999. Zimmermann, R., *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford University Press, Oxford, 2001.

¹⁴ Watson, A., *Legal Transplants*, p.12, Harvard University Press, 1987. For a contrary opinion, see Legrand's view of a divergent legal 'mentalité' or 'moralité', which act to prevent the harmonisation of common and civil law legal systems. Legrand contends that a synchronization between common and civil law systems is impossible due to their being founded on distinct 'volksgeist' or 'moralité', see Legrand, P., *The Impossibility of Legal Transplants*, 111 Maastricht J. of Eur. & Comp. Law, 1997.

¹⁵ Grosswald Curran, V., *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, Columbia Journal of European Law, Volume 7, Number 63, Winter, 2001.

technical and legal impediments to cross border trade and the improvement of existing and future legislation therefore form the frontispiece of the Commission strategy and, as a consequence, debate on wider fairness and distributive justice concerns in private law,¹⁶ and the political and symbolic significance of unified civil legislation¹⁷ are largely circumscribed.¹⁸

In line with this restricted vision, current difficulties in European contracting will arguably be considered and confronted as mere 'interoperability' problems. Code making and the isolation of common rules

¹⁶ It barely merits repeating that soft law instruments, code-making and the building up of the *lex mercatoria* has become synonymous with business inspired and business-driven private law. Indeed, it is commonly overlooked that in initial discussions in the 1970's it was towards a European commercial code that Professor Ole Lando and members of the DG Internal Market were aiming and this idea continues to find expression in the writings of leading 'codifiers'. Illustrative of this trend is Bonell, M.J., *Do we need a global commercial code?* [2000] 5 Uniform L. Rev. 469. For many of this persuasion, as Zumbansen neatly puts it: "political problems of exclusion and freedom have allegedly been resolved by the universal spread of private autonomy" per Zumbansen, P., *Piercing the Legal Veil: Commercial Arbitration and Transnational Law* [2002] 8(3) ELJ 400. The building up of a transnational private law society or "privatrechtsgesellschaft" has thus far come at the expense of consumer interests and behind *softened* globalised private laws, Mattei perceives a narrow conservative political agenda subservient to business self-interest. Somewhat perversely his solution to combat 'corporate rapacity' through a surrender of the law is a "hard" European civil code that imposes binding legal rules. For equally strong academic criticism of the technocratic agenda promoted via the CFR, see *Social Justice in European Contract Law – A Manifesto*, 10(6) European Law Journal 2004, and Cohen, E.S., *Allocating Power and Wealth in the Global Economy: The Role of Private Law and Legal Agents* [2002] CSGR Working Paper, 101/02.

¹⁷ The decision to ratify a European Civil Code has strong political dimensions - see Hesselink, M., *The Politics of European Contract Law*, 10(6) European Law Journal 2004, Wilhelmsson, T., *The Legal, the Cultural and the Political - Conclusions from Different Perspectives on Harmonisation of European Contract Law*, European Business Law Review, 2002, at pp.541 et seq. Schmid suggests that in order to quell opposition to the idea of codification, the Commission has adopted the euphemistic term 'Optional Instrument', see Schmid, C. & Doris, M., EU Tenancy Law and Procedure, EC Official Publication, 2004; at. p.9.

¹⁸ Action Plan, *Identified Problem Areas*, point 3.14. Importantly, as Basedow observes, 'contract law, in the eyes of the Community, does not exist as a body of law per se, but as an instrument to attain specific goals of the EC Treaty' in Basedow, J. *The Case for a European Contract Act*, position paper presented at the Centre for a Common Law of Europe, K.U. Leuven and Society of European Contract Law (Secola) Conference, *Communication from the Commission on European Contract Law - Harmonisation, Code, Optional Code*, Leuven, November 30 & December 1, 2001.

and principles has a natural appeal to legislatures and bureaucratic institutions which typically display a diminished interest in traditionally *academic* peculiarities. Much to the chagrin of many in the Trento 'common core' group, for example, the Commission has largely overlooked their insistence upon the need for 'legal cartography' research aimed at pinpointing points of divergence and convergence without any underlining political agenda. Yet, as Nottage noted in 2001, the most rational strategy must involve parallel research on both common rules and 'underlying context'.¹⁹ What is missing in the current climate of *rule-fixation* is a supplementary institutional analysis of harmonization strategies and a closer attention to the social, economic and political context of private law rules.²⁰

Unearthing the Common Core of 'European Contract Law' and a Salutary Lesson for the Present

Traditional common and civil law opinion provides that the doctrines underpinning orthodox or classical contract theory, were creations of the late eighteenth and nineteenth centuries and it has been widely suggested and repeated that the concept of freedom of contract was "the inevitable counterpart of a free enterprise system".²¹ Common law opinion, in particular, has almost universally accepted that the emergence of the doctrine of freedom of contract in English law owed much to the dominance of classical liberalism and *laissez faire* economics in the late eighteenth and nineteenth centuries.

The leading proponent of this analysis is Atiyah,²² who argues that, "the fact is that freedom of contract was at the very heart of classical economics, and there is ground for thinking that the common lawyers may have taken over the concept from the economists in the early part of the

¹⁹ See Nottage, L., *Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law* (2001) EUI wps, Law 2001/01 and Blanc-Jouvan, X., *Reflections on the "Common Core of European Private Law" Project* (2001) 1(1) Global J.F.

²⁰ Niglia has been particularly active in this regard, particularly in his assessment of the implementation of the Unfair Terms directive into Member States law. See Niglia, L., *The Transformation of European Contract Law*, Kluwer/Aspen (2002).

²¹ Pound, R., *Liberty of Contract*, 18 Yale Law Journal, 1909.

²² Atiyah, P.S., *The Rise and Fall of Freedom of Contract*, Clarendon Oxford Press, Oxford, 1979., pp.294 et seq. Atiyah's analysis of the historical development of the doctrine of freedom of contract and the 'will theory' is predicated upon this observation which forms the basis of his work. Undoubtedly, the author has had a seminal influence on the majority of modern commentators.

nineteenth century.” Indeed, in the majority of European jurisdictions, a similar analysis prevails. It would appear that contract theorists have universally accepted that the pillars of classical contract theory were, “the masterpiece of the philosophy of law that dominated the nineteenth century: that of legal individualism.”²³ Or as Williston suggests, “freedom of contract and the will theories arose because [a] *gospel of freedom* was preached by both metaphysical and political philosophers in the latter half of the eighteenth century.... It was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract.”²⁴ The law did so by requiring a meeting of the minds – or ‘accord de volontés’ – for the formation of a contract and by allowing the parties to contract on whatever terms they might choose.

This view of contract as an emblematic institution encompassing the various economic and liberal philosophies of the nineteenth century evidently appeals to many legal historians.²⁵ Nevertheless a novel historiography of the genealogy of European contract law, as articulated in part by Wieacker, Watkin and Ibbetson, and most notably by Gordley, provides that reverence for Romano-Canon contract doctrine and in particular the principle *pacta sunt servanda* endured throughout continental Europe and enjoyed a renaissance in the sixteenth and seventeenth centuries, under the influence of the “School of Salamanca” or “Spanish Late Scholastics.”²⁶

²³ See, *inter alia*, Ossorio Morales, J., *Crisis en la Dogmática del Contrato*, Tomo I, ADC, 1952, pp. 1175-1176; Ranouil, V., *L'autonomie de la volonté: naissance et évolution d'un concept*, 9, 10., Paris, 1980.

²⁴ Williston, *Freedom of Contract* (1921) 6 Cornell Law Quarterly 365, 366-9. Traditional European legal historians and contract theorists commonly view the French theorists Jean Domat, the great initiator, to whom we owe the concept of ‘natural equity’ and Robert Pothier, whose analysis of contract formed the basis of the French Code civil of 1804, as the founders of the ‘will theory’. Where discussion exists of the French theorists’ legal ancestry, those most commonly cited as being influential upon their thinking are the German natural lawyers Grotius and Pufendorf.

²⁵ See *inter alia*, Orduña Moreno, F.J., *Contratación y consumo*, pp.261-265, Tirant lo Blanch, Valencia, 1998; and Lete del Rio, M., *Derecho de Obligaciones*, Cáp I, p 22 et seq., Madrid 1995.

²⁶ “La Escuela Escolástica Salmantina” per De Castro y Bravo, F., *Derecho Civil de España*, Madrid, 1949; and Gordley, J., to whom we owe the term ‘the late scholastics’ in *The Philosophical Origins of Modern Contract Doctrine*, Oxford Clarendon Press, Oxford, 1991. See also Perez Luño, A.E., *La Polémica sobre el Nuevo Mundo, Aproximación al Iusnaturalismo Clásico Español*, Ed. Trotta, Madrid, 1992, at pp.32-33. Other prominent Spanish humanists of the era included Diego de Covarrubias y Leyva, ‘the Spanish Bartolo’ (1512 – 1571), Francisco de Vitoria (1480-), Francisco Suárez (1489 – 1546), and to a lesser extent Melchor Cano, Martín

Influenced by the moral teachings of Aristotle and St. Thomas Aquinas,²⁷ and imitating the progress made in other European law faculties or legal *scuola* which were flourishing throughout Europe, a corpus of scholastic humanists, led primarily by Luis de Molina (1535-1600) and Domingo de Soto (1494-1560), sought to further moralize private law and additional legal concepts with Christian principles. The late scholastics meticulously analyzed the phenomenon of contracting in its entirety, including the binding force of promises, consent and its vitiation, the requirement of “una justa causa” or “just cause” for the enforceability of agreements, the theory of offer and acceptance, the content of contracts and the concept of equality in exchange, ultimately outlining a complex and intricate contractual system with detailed, specific rules²⁸ to govern particular sale, hire, barter and loan contracts²⁹ which found its justification not solely with recourse to the will of the parties - though this was evidently an important factor - but rather on the basis of virtues such as promise-keeping, liberality and substantive justice.³⁰

de Azpilcueta, Juan de la Peña, Domingo Bañez, etc. See respectively, Weiacker, F., *A History of Private Law in Europe - With Particular Reference to Germany*, Transl. per Weir, T., Oxford Clarendon Press, 1996. Glyn-Watkin, T., *An Historical Introduction to Modern Civil Law*, Aldershot, 1999. Ibbetson, D.J., *An Historical Introduction to the Law of Obligations*, Oxford University Press, 1999. Gordley, J., *The Philosophical Origins of Modern Contract Doctrine*, Oxford Clarendon Press, Oxford, 1991.

²⁷ “Los grandes humanistas españoles fueron influidos por la doctrina de Aristotélés y la *Summa Theologica* de Santo Tomás”, see De Castro y Bravo, F., *op cit.*, p.155.

²⁸ A ‘just’ contract required that both parties were familiar with all relevant terms and conditions, that the parties established a fair price, which created a warranty on the quality of the object of the contract.

²⁹ Grundmann has highlighted the teleological approach of the European legislator over the last decade in introducing contract law rules which focus upon a specific type of transaction and adopt a particular regulatory approach. EC contract law concentrates upon transactions which typically concern large volumes and that are not purely domestic. It is primarily obstacles to these transactions and resultant risks which are eliminated, see Grundmann, S., *The Structure of European Contract Law*, *ibid.* The late scholastics similarly adopted a teleological vision of contract arguing that an agreed transaction ought to be upheld, not because it was the expressed will of the parties - though this was evidently an equally important factor - but because of the validity, legal and moral, of the ultimate goal or object of the parties in entering into contractual relations, see Gordley, J., *The Philosophical Origins of Modern Contract Doctrine*, *ibid.*, at pp.240-1.

³⁰ See also, in particular, *Part I: Some Perennial Problems* in Gordley, J. (ed.), *The Enforceability of Promises in European Contract Law*, Cambridge Studies in

The theories developed³¹ by these pioneering European law and economics scholars were further analyzed by leading advocates of natural law in northern Europe, such as Grotius and Pufendorf³², who continued the late scholastic tradition but simplified much of the early humanist concepts. In so doing Grotius and Pufendorf popularised the legal doctrines but in the process much of the detail and theoretical precision was lost.³³ Gordley and Weiacker suggest that Pufendorf and Barbeyrac were greatly influenced by contemporary scientific and mathematic thought, particularly that of Descartes and as such "allowed philosophical principles and legal doctrine to drift apart,"³⁴ and with Christian Wolff, who developed contract theory scientifically and deductively on a pragmatic basis,³⁵ the late scholastic debate

International and Comparative Law & The Common Core of European Private Law, 2001.

³¹ Though not completely 'de novo'. The late scholastic thinkers were evidently building upon the scaffold erected by the Romano-canon lawyers of the fourteenth and fifteenth centuries. The Spanish civilian jurists of the preceding generations had advanced highly innovative and progressive contractual theories. In particular, they had expressly advocated the principle of freedom of contract in *Título XVI* of the Ordinance of Alcalá, of 1345. Whilst the canonists had concluded in principle that contracts were binding because of the consent of the contracting parties, the late scholastics reached the same conclusion by arguing from the standpoint of neo-Thomist and Aristotelian philosophy.

³² See Watson, A., *The Making of the Civil Law*, Harvard University Press, 1981, pp.83 et seq. Both humanists were undoubtedly familiar with the writings of the Spanish humanists, and Gordley suggests that Grotius in particular was a "late scholastic at heart". Wieacker adds that, Grotius "... frequently invokes Vitoria, Covarruvias, Ayala and Fernando Vázquez: their influence was all the greater because despite the War of Independence the cultural links between Spain and the Netherlands were still strong", *ibid*, at p.229. For an alternative analysis see Welzel - who posits the theories of Grotius in the earlier philosophies of stoicism: Welzel, H., *Introducción a la Filosofía del Derecho*, Aguilar, Madrid, 1971, pp.128-129. See also Marín López, A., *La Doctrina del Derecho Natural en H. Grocio*, *Anales de la Cátedra Francisco Suárez*, Universidad de Granada, núm.2, Granada, 1962, pp.205-211.

³³ Whether through an inability to completely comprehend the 'late scholastic' doctrines or indeed as a consequence of their rejection by the German natural lawyers, the end result was the loss of philosophical and moral justifications underpinning contract law.

³⁴ See Gordley, J., *ibid*, pp.133 et seq. See also Van Caenegem, R.C., *An Historical Introduction to Private Law*, Cambridge University Press, 1994, at p.116.

³⁵ See Van Caenegem, R.C., *ibid*, at p.119.

finally dropped out of sight, as he failed to comprehend the Aristotelian tradition that he was attempting to modernize and revive.³⁶

It is important, however, to stress what most commentators fail to recognize: the existence of two very different though not distinct ‘Schools’ of Salamanca, which in the gloss of history have largely been fused as one. As Brett observes, the terms “School of Salamanca” and “second scholastic” usually apply to the entire period of sixteenth-century Spanish scholasticism, from Vitoria to Suárez.³⁷ They therefore span both the early Dominican period and the later, Jesuit-dominated stage, when the movement had ceased to be centered on the University of Salamanca. However, “the Jesuit continuation of work of the School is a study in its own right.”

A decisive change occurred, however, in the intellectual climate of western Europe in the late seventeenth and early eighteenth centuries with the dawn of the Enlightenment; a philosophical movement which sought to liberate the individual from the medieval bondage of traditional authorities in religion, politics, law and culture, and to subject these powerful bastions to ‘rational’ criticism.³⁸ It was with the advent of ‘natural reason’ that the

³⁶ “... los humanistas ... liquidaron en el plano histórico-crítico la pretensión de identificar a Aristóteles con la Verdad”, por Garin, E., *La Revolución cultural del Renacimiento*, 2nd edn, Barcelona, 1984, at p.256. See also Gordley, J., *op cit.*, at p.133.

³⁷ Francisco de Vitoria, (1480-1546). Thomas Glyn Watkin views Vitoria as the modern founding father of the European law of obligations, whilst Francisco Suárez (1548-1670) has been singled out by one historian of legal interpretation as one of the most vigorous and sophisticated thinker on issues of legal textual interpretation and meaning of his time, see Lefebvre, C. *Les Pouvoirs du Juge en Droit Canonique*, Paris, 1938. Lefebvre's study points to the qualities of Suárez's work in comparison with that of his contemporaries, even though it did not form part of the “common stock of ideas and theories in the first third of the seventeenth century, even if it necessarily falls within the conceptual paradigms of that time”. Suárez's *Tractibus de Legibus ac deo legislatore* was published apparently for international consumption in Coimbra, 1612, Antwerp 1613, Lyons 1613 and Mainz in 1619. Yet, Watkin provides illuminating evidence as to why the theories of the scholastic thinkers failed to gain a dominant position within mainstream European legal thought: Suárez was published expensively in folio, whereas many monographs appeared in smaller, cheaper formats; and his work was not included under the rubric *libri juridici* in the book fair catalogues. Instead his volume, financed initially by the Bishop of Egitania and not, apparently, by a speculative publisher, was produced with the needs of Jesuit colleges in mind, and was addressed to canon, not civil, lawyers”, *ibid*, at p.48.

³⁸ Friedmann, W., *Legal Theory*, pp.114 & 115, Steven & Sons, 5th Ed., London 1967. See also Van Caenegem, R.C., *An Historical Introduction to Private Law*,

authority of Aristotelian and Thomistic philosophy collapsed, the dominance of the Roman Catholic church declined and the validity of the scholastic natural law theories of contract was finally rejected.³⁹ The historic precepts of the law of contracts predicated upon ancient doctrines emanating from a vague confluence of Roman legal thought and the moral authority of Aristotle and St. Thomas Aquinas were hollowed out and replaced by a new ideology, which stressed the sovereignty of the individual. The novel project of the natural lawyers was the intellectual enlightenment of society, thus legal doctrine and moral philosophy under the influence of the northern natural law school began to drift apart.⁴⁰

As Simmonds observes, “the shift away from Aristotelian jurisprudence had a number of consequences. It gave rise to a vision of political order spanning two contrasting traditions of juridical thought - exemplified by Grotius and Hobbes - that continue to exercise their influence.”⁴¹ The desire to achieve conceptual clarity and to present a general law of contractual obligations which could be defended with recourse to “natural reason,” prompted the later “pioneers of abstraction,” the French

pp.117 et seq., Cambridge University Press, 1994. This analysis is not shared by Watson however, who discounts any hostility toward the established order on the part of the German natural lawyers, see Watson, A., *The Making of the Civil Law*, *ibid*, pp.88 et seq., Harvard University Press, 1981.

³⁹ “It was at this point that the authority of Aristotle collapsed in the seventeenth and eighteenth centuries and the philosophical foundations of the law of contract were lost”, see Gordley, *ibid*, p.161.

⁴⁰ See Gordley, *ibid*, at p.133.

⁴¹ “In particular, the tradition of positivism was ultimately to yield a conception of legal scholarship quite different from that of Grotius and his successors”, Simmonds, N.E., *Protestant Jurisprudence and Modern Doctrinal Scholarship*, 60(2) Cambridge Law Journal 271, 2001, at p.300. Brett’s discussion of the impact of late scholastic thinking on both Grotius and Hobbes legal and political theories is further illuminating. She discusses the divisions among contemporary theorists as to whether the late scholastics sought a return to an authentic Thomist-Aristotelian theory, founded on such notions as pure natural law and of right as the object of justice (objective right), or whether, although on the surface these Spanish neo-Thomists appeared faithful to Aristotle and Thomas Aquinas, in reality they thought of right as a faculty or liberty of the individual (subjective right) and that as such their political theory, as premised upon such legal rights, ought to be viewed therefore as a forerunner to Hobbes legal philosophy. For an analysis of late scholastic doctrine in the development of European philosophy, see also Skinner, Q.R.D., *The Foundations of Modern Political Thought*, Volume II, Cambridge, 1978.

theorists⁴² to systematize the prevailing natural law theories, which were of late scholastic origin, into a rational and popular legal doctrine. Van der Walt notes that

many theorists wanted to ensure that choices among competing rights were constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that the legal story ... would have to be transformed from a religious fable into a scientific dissertation.⁴³

The eighteenth century ferment of ideas was itself a reflection of the needs and tensions of a changing society based on the new scientific knowledge of the seventeenth century, which bred a new faith in reason and progress. The philosophers whose intellectual radicalism fuelled the Enlightenment rejected traditional authority and asserted the 'Rights of Man' expressed in Rousseau's statement that 'man is born free but is everywhere in chains.' The concepts of reason, freedom and tolerance were a dominant force in a society undergoing rapid industrialization. The new economic wisdom was *laissez-faire* capitalism which combined with the philosophical drive of the Enlightenment theorists who proclaimed man to be a free, rational

⁴² See, *inter alia*, Gómez Arboleya, E., *El Racionalismo Jurídico y los Códigos Europeos*, Estudios de Teoría de la Sociedad y del Estado, Centro de Estudios Constitucionales, Madrid, 1962, pp.476-477. The German systematisers, Wolff and Savigny, were undoubtedly influential, yet in the ambit of contract law, it was the French legal theorists Domat y Pothier, who were instrumental in the birth of a generalised, abstract theory of contract, premised upon the principles of autonomy and freedom, which were justified with recourse to 'natural reason'. Domat's general law of contract is often reduced to the basic principle that, 'all contracts, whether they have a particular name or not, always have their effect, and oblige the parties to do what is agreed on' Domat, J, *Les loix civiles dans leur ordre naturel*, Book 1, Title 1. See Remy, J., *Les Oeuvres Complets de Jean Domat*, 1830. This subjective 'internalization' of contractual obligations - the meeting of minds or concurrence of two or more independent wills - though evidently supported by external, objective elements became the cornerstone of the French natural law theory of contract.

⁴³ See Van der Walt, A., *Marginal Notes on Powerful Legends: Critical Perspectives on Property Theory*, 58 *THRHR*, (1995) 402. Indeed, in of the late scholastics role in the formation of the modern law of contract one is minded of John Henry Newman's fable of the Man and the Lion, Lions would have fared better, had lions been the artists, cited by Keneally in *How the Irish Saved Civilisation*

individual whose right it was to order his own affairs freed from the formulaic exigencies of the past.

The new economic and political order that evolved from rapid industrialization and the post Enlightenment democratic rationalism saw a swift expansion in the area of contractual litigation with the concomitant necessity to find an effective law of contract based on the new doctrines of reason and free market liberalism, freed from historical and moral anachronisms. To such a mind-set the ceding of any moral authority to the theologically inspired philosophers of the past would have appeared as a betrayal of the new age of realism. Furthermore the philosophical discourse of the “late scholastics” belonged to an age of scholastic theorizing often freed from the practicalities of legal interpretation.⁴⁴ The new age theorists faced a different dynamic; to produce a practical blueprint for a society with a rapidly expanding need for a workable law of contract. As Zimmermann stresses, a desire to promote “greater publicity of the law” was an equally “admirable philosophical and educational idea espoused and energetically promoted by eighteenth century enlightened authoritarianism: the comprehensive and systematic re-organization of law and society along the lines of natural reason and in the form of codification aimed at making the law accessible, at instructing all subjects.”⁴⁵

However, perhaps more important in the evolution of classical contract theory than the writings of the legal theorists was the period of the Enlightenment itself; like any social revolution it was greater than any individual. Much more than any pure theory it was the general thrust of an era.⁴⁶ Northern natural law claimed that men had an inalienable right to own property and contract as they saw fit. To the principles of *laissez faire* and *laissez passer* was added *laissez contracter*. As such, whether as a result of legal practicalities and the prevailing economic and political realities of the age, or as a consequence of latent hostility to the earlier more theologically

⁴⁴ It is important to note, however, that the doctrines of the Spanish natural lawyers, premised upon an ideal of justice which formed part of a universal or divine law- Van Caenegem, R.C., *An Historical Introduction to the Private Law*, p.117, Cambridge University Press, 1994 - failed to find legal expression in practice, either in the courts or in legislative enactments, and are thus largely consigned to history.

⁴⁵ Zimmermann, R., *Codification: History and Present Significance of an Idea*, 3 European Review of Private Law 95, 1995.

⁴⁶ It was a general thought and a particular perception of society, of morality, of order. The “ethereal intellectual constructions” of the advocates of the law of reason, provided an alternative approach to the analysis of conceptual problems, per Zweigert & Kötz, *ibid*, at p.142.

based philosophies, or perhaps even due to an inability to properly comprehend them, when the body of learning developed by the late scholastics was taken up by the northern natural law school the most important elements of promise keeping, virtue and substantive justice were lost. The moral arguments from which obligations emerged and on which they were premised were abandoned, and only the part of the theory concerned with the will of the parties, together with its structure of concepts based on offer and acceptance as the expression of the parties' agreement, was retained.⁴⁷

THE ASSIMILATION OF FRENCH NATURAL LAW THEORY AND THE DEVELOPMENT OF ENGLISH COMMERCIAL CONTRACT LAW

The process of assimilation into English law of a generalised law of contract founded upon the classical theory of private contractual autonomy, which was dubbed 'the will theory,' and the mantra of 'freedom of contract' evolved during the late eighteenth⁴⁸ and early nineteenth century, beginning in earnest with the publication of Robert Pothier's, *Traité des Obligations* in 1806. The 'novel' theory that the mere consent or willingness of both parties to form contractual relations should prove sufficient for the legal system to afford legal protection to contractual agreements had a profound effect on the English treatise writers and judiciary. The French theorists' abstract analysis of contract as an *accords de volontés* or meeting of minds, premised upon a

⁴⁷ Indeed Gordley suggests that when the authority of Aristotle collapsed in northern Europe what remained of the 'late scholastics' theory to the untrained mind was the concept of the will of the parties. See also, Gordley, J. *Myths of the French Civil Code*, 47(3) *The American Journal of Comparative Law*, 1994.

⁴⁸ *Hawkes v Saunders*, 1 Cowper 289, 98 Eng. Rep. 1091 (K.B. 1782). In the late eighteenth century Lord Mansfield suggested that in English law, as in the civil law, all promises seriously made should be considered as legally binding, subject to a broad theory of what may be called 'invalidating cause', which was remarkably similar to the civilian concept of the 'justa causa'; see also *Payne v Cave*, 3 Term R. 148, 100 Eng. Rep. 502 (1789) and *Cooke v Oxley*, 3 Term R. 653, 100 Eng. Rep. 785 (1790) in which distinctly civilian terminology was employed by the courts; yet, as Horwitz notes, "only in the nineteenth century did judges and jurists reject the belief that the justification [for enforcing] a contractual obligation is derived from the inherent justice or fairness of an exchange. In its place they asserted for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties", see Horwitz, M.J., *The Historical Foundations of Modern Contract Law*, 87 *Harvard Law Review* 917.

reciprocal offer and acceptance, provided a generalised system that fitted the spirit of the age and was readily welcomed into English law.⁴⁹

Indeed, it seems irrefutable that, before the writings of Blackstone, in England “the science of law in all that relates to contracts was left almost without cultivation.”⁵⁰ Similar to the proliferation of legal schools throughout continental Europe from the twelfth century onwards, the adoption of continental contract theories arose via the promotion in England of the legal treatise,⁵¹ which heralded a new common law approach to the analysis of the law, provoking theorists and students to engage in debate and conceptualise

⁴⁹ “The authority of Pothier ... is as high as can be had, next to the decision of a Court of Justice in this country”, *per* Best J, *Cox v Troy* (1822) B & Ald 474, at 480. Without doubt the generality and abstraction offered by Pothier's analysis was warmly received into an English legal system that had endured since the sixteenth century the uncompromising system of Assumpsit.

⁵⁰ Carey, “A Course of Lectures on the Law of Contract: Lecture 1”, *The Law Times* (1845) at 463. As Horwitz notes, “Modern contract law is fundamentally a creature of the nineteenth century”, see Horwitz, M.J., *ibid*; See also Atiyah, P.S., *An Introduction to Contract Law*, at p.7. The main corpus of the general principles and theory of the modern English law of contract, including the concepts of offer and acceptance, the intention to create legal relations, the various forms of vitiation of consent etc, were developed and elaborated in the late eighteenth and early nineteenth century via treatise.

⁵¹ J.J. Powell's *Essay upon the Law of Contracts* (1790) developed upon Blackstones' *Commentaries* (1765-69) which devoted a mere forty pages to 'contracts' and focused primarily upon contracts for land; however it was Pothier's *Traite des obligations* of 1761 which proved most influential both in the courts and among legal academics, prompting the works of the later treatise writers such as Chitty (1818), Pollock (1875), Anson (1879), etc. In this regard, it is important to highlight the important role of Ibbetson in unearthing Sir Jeffrey Gilbert's unprinted treatise on contract: “which has a good claim to be the first serious work on the subject in England” and which bears a strong imprint of the thinking of Thomas Hobbes social contract theories. Moreover, “Pufendorf's influence is abundantly clear in the first published English work on contract with any pretension to treat the subject on an abstract basis, a *Treatise on Equity* published anonymously in 1737, but probably the work of Henry Ballou or Bellewe of Lincoln's Inn. For the most part his discussion of contract consists of brief paraphrases of or unattributed quotations from the English translation of Pufendorf's *De iure nature et gentium*, followed by illustrative material from English case law,” see Ibbetson, *ibid*, at p.73. In similar fashion to the continental legal schools of the Middle Ages, the use of the legal treatise in England and later in the U.S., can be viewed as both the forum and the emerging vehicle for the debate and promotion of contract theories.

legal problems in a traditionally civilian manner.⁵² Identical motivations to those that drove the Enlightenment theorists in a previous age demanded that the general principles and legal theory behind many of the developments in the courts be enunciated. The attempts to systematise the law of contract, however, marked a significant break with common law tradition.⁵³

As Cornish and Clark affirm, the judges wanted rules and were searching for principle in a rapidly expanding area of their business, and their small number constrained their ability to make precedent.⁵⁴ The English judiciary, similar to the Enlightenment theorists before them, was faced with a new legal challenge; their immediate priority was to produce a practical legal framework for an industrialized society with a rapidly expanding need for a coherent law of contract. Formal recognition of the adoption of natural law theories in the English courts was forthcoming as evidenced in the leading case of *Adams v Lindsell*⁵⁵ and by the mid nineteenth century, “will theory” had taken root in English law.⁵⁶

Indeed it has been suggested that the northern natural law theories were so popular among the legal fraternity that the case law ought to be viewed as a mere reinforcement of the doctrine or as ‘fruits on the conceptual

⁵² An importation of a civilian outlook into the common law was the logical result of an acceptance of civilian theories; see Simpson, AWB, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, (1981) 48 University of Chicago Law Review 632.

⁵³ The common lawyers “engaged upon an enterprise that was new to the common law ... but old to the civilian tradition; they were trying to do what the civilians, the canonists and the natural lawyers had been doing for centuries”, Simpson, AWB, *Innovation in Nineteenth Century Contract Law* (1975) 91 *LQR* 254.

⁵⁴ See, Cornish, W.R. & Clark, G.N., *Law and Society in England 1750–1950*, pp.200 et seq., London, 1989. See also Rubin, G.R., *Law, Economy and Society, 1750–1914: Essays in the History of English Law*, London, 1984.

⁵⁵ (1818) 1 B & Ald 681 - This case is widely regarded in English contract law as constituting the birth of the concept of “offer and acceptance”. Simpson *supra* suggests that the court relied heavily upon Pothier’s *Treatise on the Contract of Sale* which provides that “a contract is affirmed by the coincidence of the will of [the two contracting parties], where one promises something to the other, and the other accepts the promise that he was made” - *‘le contrat renferme le concours des volontés de deux personnes, dont l’une promet quelque chose a l’autre, et l’autre accepte la promesse qui lui est faite’*.

⁵⁶ Atiyah, P.S., *The Rise and Fall of Freedom of Contract*, *ibid*, at p.407. See also wealth of caselaw; e.g. *Pole v Leask* (1863) 33 L.J. Ch. 155; *Dickinson v Dodds* (1876) 2 Ch.D 463, at 472; *Cundy v Lindsay* (1878) 3 App. Cas. 459, at 465.

tree.⁵⁷ The universality of this abstract construct was similarly attractive to academic and judicial opinion, which was endeavoring to discern the general basic principles of contract law.⁵⁸

Gordley stresses that, “the courts were evidently highly influenced by the treatise writers who had merely translated natural law theories into English.”⁵⁹ In turn the natural lawyers had developed their contractual theories from the writings of the late scholastics, which were defended with recourse to the philosophy of Aristotle and Thomas Aquinas. And yet, “this philosophy was almost unintelligible to the nineteenth century jurists. Consequently, the treatise writers often borrowed superficially, repeating the phrases of the natural lawyers with little understanding of their original meaning. They often borrowed selectively, neglecting doctrines that seemed alien and repugnant. The nineteenth century jurists arrived at their will theories by starting with the doctrines of the natural lawyers and purging them of older Aristotelian concepts they did not understand. Will was the single most important concept that remained.”⁶⁰

The expressed will of the parties thus became the impetus to the formation of contracts and constituted the justification for their enforcement,⁶¹ as such the intention of the contracting parties became the kernel of early nineteenth century contract law. With increasing regularity English judges were referring to Roman law concepts such as the requirement that the courts find a “consensus ad idem”⁶² between the parties who were at liberty to “realize their wills” and to the late scholastic theory of the binding force of promises. Unless the two minds were *ad idem* there could be no contract. Dicta in *Cundy v Lindsay*⁶³ further reveal that judicial support for the will

⁵⁷ See Danzig, R., *A Study in the Industrialisation of Law- Hadley V Baxendale*, (1975) 4 Journal of Legal Studies 249.

⁵⁸ “When Pothier’s works began to be read in England they must have appeared a revelation of clarity of exposition”, per Adams, J.N. & Brownsword, R., *Understanding Contract Law*, at p.32., 2nd Edition, London, 1996,

⁵⁹ Gordley, J., *op cit.*, p.161 et seq.

⁶⁰ Gordley, J., *op cit.*, at p.162.

⁶¹ The justification for enforcing contracts was to be found in the convergence of the parties wills.

⁶² *Haynes v Haynes* (1861) 1 Dr & Sm 426, 433 – “when both parties will the same thing, and each communicates his will to the other, with a mutual agreement to carry it into effect, then an engagement or contract between the two is constituted”, per Kindersley VC.

⁶³ (1878) 3 App Cas 459, at 467. Agreement is necessarily the outcome of consenting minds.

theory was still enduring in the late nineteenth century and that contracts were consistently being interpreted as the product of a ‘consensus of minds.’

However, having assimilated and promoted the subjective concept of autonomy, the English courts were further required to interpret the sense of the reciprocal declarations and determine whether, in fact, the parties had agreed to contract. In the event, the test imposed by the courts was evidently an objective test. Objectivity prevailed since the courts, having regard to the external manifestations of agreement, were obliged to rule on whether or not an agreement had in fact been made⁶⁴; and ensure that commercial common sense was not adversely affected by the operation of a subjective ‘will theory’. In the period prior to the assimilation of Continental legal theories English law had labored under the cumbersome doctrine of *assumpsit*; as the legal remedy for situations in which one party was in breach of an undertaking made to another. In such cases it was necessary to examine the external acts of both parties. It was thus logical for the courts in considering whether there had in fact been an intention on the part of the contracting parties to create legal relations to apply an objective test as a means of rationalizing the subjective will theory. The majority of Anglo-American legal academics have reasoned from the perspective that classical contract doctrine was elaborated in the courts and fitted into the spirit of the age. Yet only those such as Watkin, Ibbetson and perhaps more emphatically, Gordley have begun to recognize that the traditional doctrine as introduced into Britain was incomplete, thus provoking the courts to ‘bend and stretch the doctrines they had borrowed to do the work of those they had not.’⁶⁵

Importantly, O'Malley asks the question why the complex doctrines of the late scholastics were ‘sloughed off’ in favor of a “stripped down will theory.” He suggests that most of the commentaries are “strangely silent on the question, perhaps because a principal item on their agenda is the denial of propositions concerning the impact on common law of capitalistic economic interests and liberal political theory.” However, the influence of classical

⁶⁴ *Smith v Hughes* (1871) LR 6 QB 597 – “If, whatever a man’s real intention be, he so conducts himself that a reasonable man would believe that he is assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to other party’s terms, *per* Blackburn J. Similar observations were made in *Bardell v Pickwick* and in the later US case of *Hotchkiss v National City Bank*, 200 F. 287, 293 (S.D.N.Y.) 1911. It is evident however, from this historical analysis, that this conclusion had been reached by the civilian framers of *Las Siete Partidas* in fourteenth century Spain.

⁶⁵ Gordley, J., *ibid*, p.135.

liberalism in the shaping of English classical contract theory, with its emphasis on the sovereignty of the individual, and the economic theories of those such as Adam Smith, has largely been accepted without engendering much controversy. In particular, Anglo-American analyses of the historical development of the pillars of classical contract theory have been presented by those such as Horwitz,⁶⁶ who suggests that the emergence of classical contract theory was due primarily to the demise of the “moral obligation” doctrine in the law of consideration,⁶⁷ a formal recognition of the executory contract, the awarding of expectation damages; and in particular due to deliberate judicial activism in order to promote the capitalist system and commercial interests.

In support of the Horwitz thesis it is widely accepted that the role of equity in the area of contract law declined, as the ‘moral obligation’ doctrine in the law of consideration was expunged by the courts.⁶⁸ This radical and intentional doctrinal shift in contract theory in the early nineteenth century away from the old system of equity, which was viewed as being antagonistic to the interests of commerce, and the embracing of novel concepts to support the capitalist system was undoubtedly due to the influence of economic liberalism on the English judiciary. As Cornish & Clark observe, “the generalizations evolved by the text-writers and judges undoubtedly buttressed freedom of dealing and sanctity of bargaining, the economic security of market place pricing over government regulation and the moral righteousness of self sufficiency and self improvement.” There was without doubt a common belief among those judges sympathetic to the *laissez faire* economics of the era that just as Adam Smith’s ‘hidden hand’ analysis of the market would ensure the proper functioning of the economy, so the hidden subjective “meeting of minds” would ensure the smooth operation of contract law. As Pollock affirms: The sort of men who became judges towards the middle of the century were imbued with the creed of the philosophical radicals for whom the authority of the orthodox economists came second only to Bentham’s and whose patron saint was Ricardo.⁶⁹ The judge most commonly cited as reflective of the general attitude as George William Bramwell, a leading advocate of *laissez faire* economics and a persistent champion of

⁶⁶ Though his thesis has been rejected by Simpson as being ‘oversimplified’ in Simpson, A.W.B., *The Horwitz Thesis and the History of Contracts*, 46 University of Chicago Law Review 533, at p.600.

⁶⁷ See *Eastwood v Kenyon* (1840) 11 A&E 438, 113 ER 482.

⁶⁸ See Atiyah, P.S., *The Rise and Fall of Freedom of Contract*, *ibid*, pp.388 *et seq.*

⁶⁹ 39 *LQR* 163, at 165, *per* Frederick Pollock.

“real” consent.⁷⁰ The liberal judiciary prided itself on its rejection of moral paternalism. The prevailing view, consistent with liberal ideology, remained that individuals should be permitted the maximum liberty to contract⁷¹. Moreover, the small number of practicing judges⁷² reveals that it would have been possible for the ideology of freedom of contract and *laissez-faire* to be promoted through the courts.⁷³ For this reason it is possible to view the absolutist dogma of ‘freedom of contract’ as operated in classical English contract law as essentially a judicial construct and as a ‘larger ideological orientation which accompanied the growth of industrial capitalism’, though the philosophies used to support this novel theory were in reality something of a continental European pastiche.⁷⁴ Importantly, the adherence of the English common law judiciary to classical liberalism and the capitalist system meant that the inherent injustices of that system were merely transplanted into nineteenth century contract law since “the contractarians ideology above all expressed a market conception of legal relations. As the only measure of justice was the parties’ own agreement, all pre-existing legal duties were inevitably subordinated to the contract relation. The law had come simply to ratify those forms of inequality that the market system produced.”⁷⁵

⁷⁰ See Atiyah, P.S., *The Rise and Fall of Freedom of Contract*, pp.375 *et seq.* and Tillotson, J., *Contract Law In Perspective*, 2nd ed., p.42, London, 1995., who notes that ‘enthusiasm for freedom of contract went hand in hand with support for the operation of a free market’. See also Freil, R.J., *The Law of Contract*, 1995.

⁷¹ See Collins, H., *Legal Theory and Common Law*, OUP, 1996, at p.144. As Atiyah stresses, the common belief was that “people could be trusted to look after themselves, to see to their own interests, and this led to a rejection of paternalism” and the adoption of an umpirical or abstentionist position by the courts. See Atiyah, P.S., ‘Freedom of Contract and the New Right’, in *Essays on Contract*, Oxford Clarendon Press, 1996 and Rubin, G.R., *Law, Economy and Society*, 1980 at pp.12-13 and pp.70-71.

⁷² Cornish, W.R. and Clark, G de N, *Law and Society in England, 1750-1950*, p.206, Professional Books, London, 1989.

⁷³ In addition, the introduction of the Common Law Procedure Act 1852 further assisted the development of the concept of freedom of contract by abolishing the various procedural forms of action in the courts.

⁷⁴ See Cornish and Clark, *ibid*, at p.202. Moreover, as Gilmore notes, ‘the classical theory of contract did not come as the natural result of case-law development ... it represented a sharp break with the past’, Gilmore, G., *The Death of Contract*, Ohio State University Press, 1974, at pp.17-18. Importantly, the population of London more than doubled in the period between 1800 and 1850 and the social conditions in Britain during the age of classical contract are perhaps best illustrated by Blakes’ poem ‘London’.

⁷⁵ Rubin, G.R., *Law, Economy and Society*, London, 1984, p.70. Curiously, Gordley rejects any grander ideological motives on the part of the common law

The English common law judiciary adopted these novel civilian contractual theories and concepts, which were considered most suitable for an emerging industrialized society, and thereafter embarked upon a process of commercialization of the law, characterized by a pragmatic attitude and a close tracking of commercial interests. Indeed, even those with the most rudimentary legal schooling in the historical development of contract law in European legal systems would have quickly grasped that the English law of contract, having borrowed so liberally from the civilian traditions, thereafter chose to bend and mould these new “legal transplants” to best suit the will of the business elite. The moral dimension or concept of *good faith*, was largely viewed as an impediment to trade.

It may be argued that this was due to a degree of legal naivety on the part of the English judiciary, prompted by a lack of familiarity with the fundamental structures of continental contract theory, which resulted in the erroneous interpretation of the principle of freedom of contract and contributed in part to its irrational interpretation.⁷⁶ The principle of freedom of contract, which had been advocated by the canonists in fourteenth century Spain and which was impliedly enshrined in the French Code civil was merely that; a principle. Yet the English courts elevated the principle of freedom of contract into a fixed rule or end in itself⁷⁷ and thus embarked on a

judiciary. He suggests that in practice, ‘we find little direct borrowing from philosophers, economists or political theorists. Only rarely do we find any sign of commitment to liberal values of freedom or individualism. We find almost the opposite: an insistence that the jurist can do his job without taking account of economics, philosophy, politics or values such as freedom ... They said almost nothing about any larger principles on which they were building’, *ibid* (1994) at p.215-216.

⁷⁶ León González, M.A., *La evolución histórica del concepto del contrato, Lecciones sobre las obligaciones y contratos*, Salamanca, May 12-14, 1998. This analysis of the development of freedom of contract in English law is a minority opinion which evidently questions much of the traditional thinking, though this author finds it highly persuasive.

⁷⁷ In the nineteenth century, freedom of contract was regarded by many philosophers, economists and judges as an end in itself, finding its philosophical justification in the ‘will theory’ of contract and its economic justification in *laissez-faire* liberalism. *Chitty on Contracts*, pp.5 et seq., 27th ed., Vol. I, General Principles, London, 1994. Caselaw in modern times reveals judicial recognition that the operation of an absolutist analysis of freedom of contract cannot be justified and that the doctrine has been reduced to a ‘general principle’, see for example *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale*

somewhat illogical process of upholding contractual agreements even where parties were operating from an unequal bargaining position.⁷⁸ By the late nineteenth century, however, there was a general realization that this absolutist dogma of freedom of contract, operating without regard to social, equitable or moral considerations, was at best a utopian ideal and at worst a pernicious concept open to corruption by the wealthiest and most powerful sections of society. In this I find myself agreeing with Atiyah and Friedman that the dogma of freedom of contract as it operated in Britain applied to an age of *laissez faire* liberalism and as a "mere theoretical construct, which [had] little or nothing to do with the real world, would not - or could not - change as the real world changed."⁷⁹ It emerged as an absolutist doctrine at odds with a rapidly changing political and economic climate, for as Gilmore attests, 'its natural habitat was the law schools, not the law courts. On the whole, however, the theory was in its origins, and continued to be during its life, an ivory tower of abstraction.'⁸⁰ Whilst the late scholastics had discussed not only the will of the parties, but the virtues of promise-keeping, liberality, and commutative justice, the final cause and essence of a contract, natural terms and equality in exchange, the jurists of the nineteenth-century rejected them.⁸¹

[1967] 1 AC 361, 399 and *Photo Production Limited v Securicor Transport* [1980] AC 827, 848.

⁷⁸ As Cornish and Clark note, the common law courts renounced their 'earlier willingness to rectify elements of unfairness in bargains and instead insisted upon enforcing whatever terms had been agreed'. The common law support for a severely individualistic conception of freedom of contract contrasted with the courts of equity, which constituted 'a protective jurisdiction of conscience', *ibid*, at p.203. Evidently, as Horwitz notes, the role of the courts of equity had greatly diminished.

⁷⁹ Per Friedman in Gilmore, G., *ibid*, at p.7. Cornish and Clark, *ibid*, suggest that the decline of the classical vision of contract ought to be traced from the year 1876 onwards; as, following the Judicature Acts of 1873, in 1876, "the liberal hegemony of the mid-Victorian years was threatened by a novel, democratic "collectivism" and in that year a directive was issued giving preference to the rules of equity over the common law rules, at p.203.

⁸⁰ Gilmore, G., *The Death of Contract*, p.18., Ohio State University Press, Columbia, Ohio, 1974.

⁸¹ "All these specific, substantive, moral considerations were omitted when this civilian law of contract was received into common law. What was taken on board was only that part of the theory concerned with the parties will, and the categories based on offer and acceptance that were held to be the expression of their agreement. This, as Gordley stresses, was to create problems for the later development of contract law. As a result of stripping away requirements for full understanding the common law had no way of dealing with the implied lack of consent. Contract law in the first half of the century was far from the logical and complete doctrine that is imagined in

"They were left with few other concepts than the will of the parties. Almost every important doctrine raised problems the will theorists tried in vain to resolve.⁸² Thus, whilst the will theory provided the law with the source, the content and the justification for the enforceability of contractual agreements, it failed to explain the reasons for the courts necessary intrusion into the realm of private agreements and provided no rational manner of resolving disputes raised by the operation of the theory in practice.⁸³

CONCLUSION - INFORMATION EXCHANGE AND THE DESIGN OF MODERN EC CONTRACT LAWS

The leading US contract law professor, Melvin Eisenberg has consistently argued that a uniform American national law evolved under the influence of economics, common history, legal education and above all a desire among lawyers to be part of a common legal culture. If a European system of contract laws is to emerge and compete successfully with rival jurisdictions, it is not only imperative to ascertain the reasons for users current preference for English domestic law and US state laws but for a consensus to emerge among practitioners, judges and other users that such a uniform EC law is in the common interest. On a deeper level, the distinct lack of any sole institution with sufficient legitimacy and authority to impose a uniform template of agreed private law instead gives rise to the need for a coherent governance strategy to guide, monitor and validate the ongoing process of Europeanization - a strategy capable of ensuring a more satisfactory entrenchment of Community regulatory law into national legal systems.

Though a similar proposal has been overlooked in the framing of both the 2003 Action Plan and 2004 Follow-up Communication, a new European Private Law Association (EPLA) should be reconsidered. Professor Walter Van Gerven, a former Advocate General at the ECJ in Luxembourg and consistent promoter of comparative case-law research has previously made the case for a 'European Law Institute' and a 'Curriculum Commission' which would seek to "educate practitioners in the use of any emerging

discourses on liberalism. It also exhibited major lacunae that would later need to be filled", O'Malley, P., *Uncertain Subjects: Risks, Liberalism and Contract*, Journal of Economy and Society, pp.460-484, at p. 483. Vol. 29, Number 4, November, 2000.

⁸² Gordley, J., *op cit.*, p.160-1, who suggests that having failed to retain these earlier concepts they were unable to make their 'will theory' work.

⁸³ As Gilmore notes, classical contract was 'an ivory tower of abstraction' whose 'natural habitat was the law schools, not the law courts', Gilmore, G., *The Death of Contract*, p.18., Ohio State University Press, 1974.

codified law and to determine law curricula for universities thus promoting a common European legal culture.”⁸⁴ An EPLA may find inspiration from the models of co-operation that currently exist between Nordic jurisdictions and the joint research activities of the Scottish Law Commission and the Law Commission of England & Wales.⁸⁵

Importantly, however, beyond substantive and procedural law harmonization, US and Canadian lawyers are similarly presented with much less practical hindrance in crossing jurisdictions than European lawyers who aim to practice law in other Member States. Providers of legal practice courses, for example, are notoriously conservative and users cite excessive cost, delay and confusion for qualified lawyers who aim to have their national qualifications afforded equal weight and standing in other EU jurisdictions.⁸⁶ The European University Institute and similar academic institutions are pioneering change in this regard by offering academic degrees that are fully recognized and accredited across all Member States.

Notwithstanding these improvements, a formally established, public organization could play a crucial role in Member State surveillance and in disseminating information on existing diversity in national private laws whilst the CFR evolves. Equally important in the short-to-medium term is the need to scrutinize the transposition of EC Directives in the Member States in order to construct a database of the particular problems that a CFR may help to resolve.

⁸⁴ Van Gerven, W., *Codifying European Private Law? Yes, if ...!* 156 *European Private Law Review* 2001. See also, Schmid, C.U., *The Emergence of a Transnational Legal Science in European Private Law*, *Oxford Journal of Legal Studies*, Vol.19, 1999 and Hesselink, M.W., *The New European Legal Culture*, Kluwer, 2001. Hesselink detects the emergence of a new European legal culture, characterized by a rejection of the formalism of the past and the promotion of a “more substance-orientated and pragmatic approach”. See, in particular, Chapter IV on ‘*European private law: Shift from Form to Substance*’, pp.37 et seq.

⁸⁵ Indeed, the working methods employed by the Scottish Law Commission and the Law Commission of England & Wales, in bringing forward joint initiatives, deserve further academic scrutiny and may serve as an adequate template for future co-operation at EU level. Both Commissions have produced consistently high grade research and a recent study on the impact of Unfair Terms legislation has received much positive comment from business and consumer associations beyond both jurisdictions.

⁸⁶ For a suitable example of this problematic conservatism, see Report to the Irish Competition Authority on the Provision of Legal Practice Services in Ireland criticizing the current practices of King’s College, Dublin as the sole provider of formal legal practice examinations in Ireland.

An EPLA could equally assist in ‘road-testing’ the emerging CFR and any later Optional Instrument(s) thus triggering ‘trial and error’ processes; and in devising means to negative the irritating effects of these new legal constructs. Perhaps the most crucial role would be that of widely publicizing any emerging rules and principles. This would encourage an open, mutual learning process and would help to embed the CFR progressively. An EU Private Law Association could further assist the Commission's work by documenting “best practice” across the Union thus instilling indirect peer pressure on those national legal systems or economic actors that fail to comply with accepted EU-wide standards.

Experience from previous uniform private law-making initiatives suggests that the approximation of national systems and the move towards a territorially delimited contract law for Europe will remain a consistently imperfect project, requiring continual revision and supervision. It will also require a keen sense of our shared history, the search for commonalities and above all a satisfactory supporting ethic.⁸⁷ Yet, access to legal information and the free flow of modern theories are equally critical to the success of this endeavor.

The lack of adequate legal research tools and/or the prohibitive cost of accessing available resources in a number of EU jurisdictions evidently complicates the current harmonisation effort. Notably, the absence of sophisticated nation-wide databases of case law and legislation in a number of jurisdictions has allowed French, British, Dutch and German scholars a unique advantage in steering the pace and direction of law reform. The publicly accessible website of the *British and Irish Legal Information Institute* is a notable example of what can be achieved.⁸⁸ It further reveals how far a number of jurisdictions must travel in order to allow for adequate comparative analysis of contract law decisions. In the absence of such resources, our understanding of the extent of legal divergences, the practical implementation of current Community legislation and the types of disputes most commonly litigated in each jurisdiction will remain at best incomplete.

⁸⁷ Brownsword, R., *Individualism, Cooperativism and an Ethic for European Contract Law*, 64(4) *Modern Law Review* 628 (2001). See also Truilhe-Marengo, E., *Towards a European Law of Contracts*, 10(4) *European Law Journal* 463 (2004).

⁸⁸ See www.baili.org. Whilst by no means perfect, the BAILI website compiles updated legislation, caselaw and legal commentary from Britain, Ireland and the Commonwealth and provides access to a range of other ‘World resources’.