A GUIDE TO EUROPEAN PRIVATE LAW*

IVÁN SIKLÓSI

Department of Roman Law
Telephone number: (36-1) 411-6506
e-mail: ivan.siklosi@ajk.elte.hu

1. An excellent and detailed handbook, treating the private law of the European Community, was published in 2005 by the Central European University Press in English. As for antecedents of this work we can refer to an original book in Italian language, which was published in three editions by Giannantonio Benacchio, Professor of Private Comparative Law, Faculty of Law at the University of Trento between 1998 and 2004[1]. The recently published volumes were written in cooperation with Barbara Pasa, Lecturer and Research Fellow, Faculty of Law at the University of Trento and translated by Lesley Orme. Benacchio's book originally described the most important institutions of the European Community's private law in one volume, which consisted of two parts: a general and a special one. The new work entitled *A Guide to European Private Law* analyses the most significant questions related to the European Community's private law[2] and the process of harmonization in two volumes. Thereby, this work can be regarded as a completely new one in respect of its structure and content.

---

* Giannantonio Benacchio-Barbara Pasa, *A Common Law for Europe* (translated by Lesley Orme), Central European University Press, Budapest-New York 2005, VIII+320 p. — Barbara Pasa-Giannantonio Benacchio, *The Harmonization of Civil and Commercial Law in Europe* (translated by Lesley Orme), Central European University Press, Budapest-New York 2005, X+567 p.

1 The first edition of the book in Italian language was published in 1998, the second edition in 2001. The third edition of Benacchio's work was published in 2004 (G. Benacchio, *Diritto privato della Comunità Europea. Fonti, modelli, regole*, Padova 2004[3]). The second edition was published in an excellent Hungarian translation by András Földi and Norbert Csizmazia in 2003 (G. Benacchio, *Az Európai Közösség magánjoga* [The private law of the European Community], Budapest 2003).

2 The expression 'European private law' does not mean the same as 'European Community's private law'. See to the different meanings of these terms Benacchio-Pasa, *A Common Law*, p. 277.

This handbook not only gives a great and detailed synopsis of civil and commercial law in Europe but it also utilizes the results of comparative law[3] and analyses various internal rules of the Member States regarding the process of harmonization. Furthermore, it represents a serious value describing the development of the European Community's private law until recent times, citing the original texts of the most important treaty provisions, directives, cases and Member States' legal rules as well.

The first volume describes the general part of the European Community's private law while the second one contains a special part of it regarding the European private law-making process and the harmonization of private and commercial law's institutions in Europe.

2. Following the *Introduction*, the first chapter *(Private Law of the European Community: the Process of Harmonization, Uniformization, and Unification)* of the first volume clarifies the premisses for further analysis giving a description of the background and the purpose of the European Community's and the European Union's regulation. The authors deal with some fundamental issues in this chapter, for instance with the question of European Federalism, the Economic and Monetary Integration, the difference between European Union and European Community and the general problems related to the harmonization of law.

The authors treat separately the concept of *acquis communautaire*, which means the collection of decisions from the European Union (it is declared „the legal heritage of the European Community" by the authors[4]). It is well-known that the difference between the term *acquis communautaire* and Community Law (in French *droit communautaire*) is due to the fact that the French expression involves all principles, provisions and decisions, which are not only of merely legal but also of political nature. In addition, it relates to all rules characterized both by binding and not-binding nature. *Acquis communautaire* is one of the most important concepts in the terminology of the European Community's and Union's law, since achieving a Member State status implies the acceptance of *acquis communautaire*. Therefore we could affirm – on the ground of Article 3 of the Treaty of the European Union – that the Union is based on the conception of *acquis communautaire*.

---

[3] The English legal terminology uses the term 'comparative law' (see in French *droit comparé*, in Italian *diritto comparato*, in Spanish *derecho comparado* etc.). However, in my opinion the term 'comparison of laws' (this expression — not used in English legal terminology — is the metaphrase of the German *Rechtsvergleichung*) would be more suitable, because it is able to describe more adequately the essence of this concept. See especially K. Zweigert-H. Kötz, *Einführung in die Rechtsvergleichung*, Tübingen 1996[3] (in English: *An Introduction to Comparative Law*, Oxford 1998[3]).

[4] Benacchio-Pasa, *A Common Law*, p. 20.

Some important questions are analyzed in the second chapter *(The Diffusion of Legal Rules and Models, and the transposition of Concepts),* which not only relate to the area of Community law *stricto sensu,* but also to the area of comparative law and legal theory as, for instance, the diffusion of intra-Community models or the incorporation of extra-Community models. Relating to the last problem, the authors refer to the American origin of the so-called 'antitrust law' and of the legal instruments for consumer protection as well. The *Sherman Act* – created in 1890 – meant the genesis of regulation concerning the competition law.

Essential terminological and language problems are described in this chapter. The authors point out the well-known circumstance that some concepts might have various meanings in the different legal systems. For instance, the British term 'obligation' is wider and less rigorous than the Italian *obbligazione*, but the French word *obligation* means the same as the Italian *obbligazione*.[5] The authors examine the process of Community law applying old terms for new concepts. There are, however, situations when the Community law-making needs to create completely new concepts. From this point of view, it is referred to the exhaustion of the right (in French *épuisement du droit*, in Italian *esaurimento del diritto*) – which had been developed as a response to purely Community requirements – and the principle of preventive action and „who pollutes pays", firstly sanctioned by the *Single European Act*.

Among the conceptual problems, the authors pay attention to the various meanings of the term *causa* in the different legal systems. The expression *Kausa* has another meaning in German law as the term *causa* in Italian law (and *cause* in French law, *causa* in Spanish law as well).[6] The Article 1325 of Italian *Codice civile* – inspired by the Article 1108 of the French *Code civil* – declares *causa* as one of the essential conceptual elements of the contract.[7]

---

[5] Benacchio-Pasa, *A Common Law*, p. 83. It is also shown here that the British word 'contract' does not correspond to the Italian *contratto* or the French *contrat*.

[6] „Tout engagement doit avoir une cause honnête" — said Robert-Joseph Pothier (*Traité des obligations*, Paris 1835, 42), the excellent French romanist (With Schlosser's words, Pothier is „père du *Code civil*" [H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte*, Heidelberg 2005[10], p. 128.]). — The concept of *causa* cannot be easily defined (see for example J. Gaudemet, *Droit privé romain*, Paris 2000[2], p. 263.). The cited civil codes do not aim to define the term *causa*, but the French *Code civil* and the Italian *Codice civile* as well define *cause illicite* and *causa illecita*. With Gaudemet's words, the cause „désigne parfois le motif qui a incité une partie à contracter" (Gaudemet, op. cit., p. 263.).

[7] Contrary to the German *Bürgerliches Gesetzbuch* that does not declare *Kausa* as the conceptual element of the contract on the ground of the doctrine of legal transactions. Zimmermann remarks that the term and idea of *causa* disappeared from the definition of contract in the works of the German authors of the 17th and 18th century in contrary to France and Italy, where *causa* continued to be required as an essential element for the validity of contracts (R.

The meaning of the term *causa* became an important question in the *Marleasing* case in 1990[8], which is also considered as illustrative by the authors.[9] The Marleasing SA company had objected the foundation of the Comercial Internacional de Alimentación referring to the nullity of the contract, because – according to Article 1261 of the Spanish *Código civil*[10] – the contract lacked cause. Contrary, the Spanish company remarked that Article 11 of the Council Directive 68/151 did not feature lack of cause among the established reasons for declaring the incorporation of a public limited company null and void, but the directive has not yet been implemented in the Spanish legal system. According to the authors' affirmation the directive is very strict[11], since Article 11 gives a definitive list of the cases in which a company may be declared null and void. Although the directive was not implemented in the domestic law, the Spanish judge was bound to disregard the cited provision of the *Código civil*. The European Court of Justice (in the following: ECJ) emphasized the duty of the national judge to interpret domestic law in conformity with Community law.

In the third chapter the authors deal with harmonization from a special aspect: as an instrument for the pre-accession strategy. The authors examine highly significant documents in this chapter, for instance, the *Agenda 2000: 'For a stronger and wider Union'*, the pre-accession programs (PHARE, ISPA, SAPARD) and the *Accession Treaty,* which resulted in the most considerable enlargement in the history of the European Union. The central role of the European Council in the enlargement process is pointed out, as well as the importance of the activity of the European Bank for Reconstruction and Development.

Some significant questions *(Institutions and Sources of Community Law)* which were elaborated in the literature of the European Community law many times are analyzed in the fourth chapter. For instance, the authors study the system of the sources of the European Community's law, the principle of subsidiarity which is implied in Article 5 of the European Community Treaty, the widely discussed problem of Community and national competences, the direct effect of the treaty provisions and the regulations and the supremacy of sources of the Community law over domestic laws. The writers also analyze the article con-

Zimmermann, *The law of obligations. Roman foundations of the civilian tradition*, Oxford 1996[3], 553 – with summary of the relevant literature). Therefore *causa* cannot be found among the essential elements of contracts in those civil codes, which were not inspired by the French *Code civil*.

8 *Marleasing S.A. v. Comercial Internacional de Alimentación*, C-106/89 (1990), ECR I-4135.

9 „The *Marleasing* case of 1990 is illustrative." Benacchio-Pasa, *A Common Law*, p. 235.

10 The title of the relevant article is the following: *De los requisitos esenciales para la validez de los contratos*. Compare to the title and the content of the famous Article 1108 of the French *Code civil (Des conditions essentielles pour la validité des conventions)*.

11 Pasa-Benacchio, *The Harmonization*, p. 305.

cerning the principle of subsidiarity with full particulars. We could lay down – with the authors' words – that „it is a strongly political principle, rather than a judicial or technical one".[12] The principle leaves room for various interpretations. According to the authors' remark, the principle is so ambiguous that it could be invoked both by supporters of more decided intervention by the Community as well as the defenders of greater national autonomy.[13] It could provide legitimacy for Community intervention and for the protection of the Member States' autonomy as well.

It is well-known that the ruling of the ECJ in the *Van Gend & Loos* case in 1963[14] meant the first step towards the autonomous effects of the treaty provisions. Regarding its importance, the authors examine the famous decision carefully. The ECJ affirmed that Article 12 of the European Community Treaty concerning the new customs duties and charges of equivalent effect on importation and exportation as well contains a clear and unconditional prohibition which does not mean a positive but a negative obligation. The Court pointed out the special nature of the provisions of the European Community law compared to the provisions of the traditional international law. Community law not only imposes obligations on individuals, but it is also intended to confer rights upon them which – according to the opinion of the ECJ – „become part of their legal heritage".[15] Therefore individual citizens as subjects of Community law may directly refer to the cited article having direct effect.

The authors remark that the affirmation of the principle of direct effect, on the basis of which every national judge can and must apply treaty provisions did not, however, provide the supremacy of the Community law over domestic law that is incompatible with it. The supremacy of the treaty provisions over national law was forcefully emphasized by the ECJ in *Costa v. Enel* ruling in 1964[16], which meant a real break-through in this regard. On the basis of the excellent and clear argumentation of the Court we could lay down that the European Community created its own legal system that must be protected by national courts.

Some cardinal questions are analysed in the fifth chapter *(The Adaptation of National Laws to Community Law),* such as the transposition of directives, the difficult development of the vertical and horizontal direct effect of the non-implemented directives, the interpretation of domestic law in conformity with

[12] Benacchio-Pasa, *A Common Law*, p. 167.
[13] Benacchio-Pasa, *A Common Law*, p. 167.
[14] *Van Gend & Loos v. Netherlands Inland Revenue Administration*, C-26/62 (1963), ECR I-3. See to the ruling Benacchio-Pasa, *A Common Law*, pp. 190—193.
[15] Cited by Benacchio-Pasa, *A Common Law*, p. 192.
[16] *Costa v. Enel*, C-6/64 (1964), ECR I-1129.

Community law or the Member States' liability in damages for breach of Community law. Various famous and important cases are presented in this chapter based on these questions as, for example, the *Marleasing* case related to the interpretation of national law in conformity with Community law or the *Francovich* case[17] which emphasized Member States' responsibility for breach of Community law when a directive was not implemented in domestic law.

The sixth and last chapter of the first volume – involving an important question in its title *(A Common Law for Europe)* – gives an interesting summary of the different tendencies concerning the unification of private law in Europe. The authors refer to the roots of 'European common law'.[18] The Roman-Justinian law – reworked by Glossators and Commentators – formed the only system which was able to give uniform and rational solutions to various problems in medieval times, contrary to customary laws. However, it would be – according to the authors' affirmation – „backword-looking and unsustainable"[19] to simply re-propose the model of the *ius commune* in a time such as our own.

Finally, the authors deal with – among the most important tendencies of European private law's unification – the initiative of the *Pavia Group* as one of the best known initiatives, the *McGregor Contract Code*, the *Principles of European Contract Law* made by the Lando-commission which enjoys a wide consensus, the *Trento Common Core Project* and recently the activity of the *Acquis Group*.

3. In the detailed second volume of the work *(The Harmonization of Civil and Commercial Law in Europe)* the authors study the different institutions as a special part of the Community's private law. They focus on the effect of the Community's law-making on the legal system of the European states regarding especially the implementation of the directives. This volume – likewise the first part of the work – follows another structure compared to the Italian book.

In the first chapter of the second volume the authors analyse the most important institutions of Community's consumer law and the effect of the Community's regulation on consumer protection on the law of contracts of the European states. The authors examine the historical development of law-making on con-

---

[17] *Francovich and Bonifaci v. Repubblica italiana*, C-6/60 & 9/90 (1991), ECR I-5357.

[18] See to this question in Hungarian literature A. Földi, *A közös európai jog történeti gyökerei I* (Historical roots of European common law), Acta Facultatis Politico-iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae 35 (1995/96), pp. 101—117. Földi (op. cit., p. 101.) lays down expressly that European common law is – *volente nolente* – Roman law. The author's opinion is perhaps excessive, but we have to affirm that the Roman legal tradition means really a key to understanding modern law and it is able to provide a basis for European common law.

[19] Benacchio-Pasa, *A Common Law*, p. 280. See likewise M. Cappelletti (ed.), *New perspectives for a common law in Europe*, Firenze 1978, p. 4.

sumer protection since the first multi-year action program for consumer protection in 1975 with full particulars. According to the authors, the term 'consumer' is not unambiguous due to the fact that it is used in different meanings by the sources of European Community law. The authors investigate, for example, the purpose of the Community's regulation concerning consumer protection, the effect of the Community's intervention on the Member States' law of contracts and the limits of the protection. Following the general questions, the authors analyse the directives concerning consumer protection as, for instance, the Directive 93/13 on unfair contract terms (in French law *clauses abusives*, in Italian law *clausole vessatorie*) in consumer contracts, which is declared by the authors as one of the most interesting Community interventions, since it contains not a procedural but a substantive regulation. Therefore it had a very important effect for the commercial practice of the European legal systems. Article 3 of the directive introduces the concept of 'unfair contract term' which is contrary to the requirement of good faith.[20] Regarding the possibility of the different interpretations, the use of this expression could be considered to be unlucky. The authors analyse in this chapter, inter alia, the provisions of the Directive 94/47 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis,[21] the Directive 97/7 on the protection of consumers in respect of distance contracts and the Directive 2000/31 on electronic commerce as well.

[20] The 209/B § of the Hungarian Civil Code implements the term of the English text of the directive, because it refers expressly to the breach of the requirement of good faith. There is no term as 'good faith and fairness' in English legal terminology to express good faith in objective sense as, for example, in German the term *Treu und Glauben* or in Italian the term *corretezza e buona fede* (the French term *bonne foi* is able to refer to the good faith in objective and subjective sense as well. In the French version of the directive the following phrase is used: „en dépit de l'exigence de bonne foi".). Lajos Vékás referred firstly to the translation error which has happened when the directive was implemented into Hungarian civil law (L. Vékás [ed.], *Európai közösségi jogi elemek a magyar magán- és kereskedelmi jogban* [Elements of European Community's law in Hungarian private and commercial law], Budapest 2001, p. 45.). The authors refer expressly to the Hungarian translation errors, too (Pasa-Benacchio, *The Harmonization*, p. 60.). See generally to the problem of good faith and especially to this question — with summary of the literature — A. Földi (*A jóhiszeműség és tisztesség elve* [The principle of good faith and fair dealing], Budapest 2001, pp. 105-106.), who remarks that the German text of the directive is not problematic — contrary to the English text — because it refers to the term *Treu und Glauben*.

[21] The concept of 'timesharing' has very different interpretations and manifestations in the different legal systems. Timesharing is organized on a different basis in common law countries compared to, for example, *jouissance à temps partagé* in French law. In Portugal, on the other hand, „the multiple-owner is considered to have a title to real property *sui generis*" (*direito de habitação periódica*, see Pasa-Benacchio, *The Harmonization*, p. 66.). See to this question also G. Benacchio, *Dal condominio alla multiproprietà*, Rivista notarile, 1982.

The second chapter takes a view on the Community's regulation related to product liability (in Italian *responsabilità del produttore*). Firstly, the authors scrutinize the Member States' law-making before the Directive 85/374 on product liability with special regard to the development of the French regulation concerning product liability, asserting that France had probably the most efficient model of product liability in Europe. The French case law decided most of the questions on contractual basis regarding the prohibition on accumulating contractual and extra-contractual (tortious) liability *(non-cumul des deux ordres de responsabilité)*. The legal basis was provided by Article 1641 of the *Code civil*, which makes the seller liable for the unknown defects *(défauts cachés)* of the product.[22] However, the *action directe* against the manufacturer has been introduced later. According to the authors' affirmation, all Member States had constructed their own legal model of product liability wherefore the directive in 1985 did not introduce a totally unknown concept.[23] The authors also mention the two important directives on general product safety (in French *securité générale des produits*, Directive 92/59 and 2001/95), the Draft Directive on the liability of service providers and finally the Directive 2004/35 on liability for environmental damage in the area of product liability.

In the following chapter, the authors discuss the questions considering the Community's regulation on insurance, credit, financial industries, investment, saving and consumer protection related to it. The authors analyse different legal institutions, which are relatively few treated in the Community's and especially in the Hungarian literature. This chapter yields, amongst others, the analysis of the directives concerning insurance services, the Community legislation relevant to the banking and financial sector as well, the law-making related to consumer credit contracts and financial services and the directives providing indirectly the protection of the interests of investors and savers.

The fourth part of the work, which is the longest, takes a view to the Community's company law. The internal market is achievable by the protection of the well-known four freedoms (movement of persons, services, goods and capital) but this protection is not enough for the single market. It is evident that the harmonization of the legal rules on undertakings is essential to create an effective single market. The instruments which can be used to create a single market are essentially two: the harmonization of private international law and of substantial private law. There are also important results in the area of harmonization of private international law, but it is more successful to approximate the

[22] The text of Article 1641 of the *Code civil* is the following: „Le vendeur est tenu de la garantie à raison des défauts cachés de la chose vendue qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement cet usage que l'acheteur ne l'aurait pas acquise ou n'en aurait donné qu'un moindre prix s'il les avait connus."

[23] Pasa-Benacchio, *The Harmonization*, p. 111.

Member States' institutions related to the substantive private law. Following the analysis of the general questions concerning the Community's company law and the introduction to the system of legal sources, the authors deeply analyse the important directives which have changed the Member States' own regulation on company law. For example, the authors analyse particularly the first directive, which involves a strict regulation giving a definitive list of the cases in which a company may be declared null and void. The Regulation 2157/2001 on the statute for a European Company is particularly examined in this chapter, too. The *Societas Europea* – which is only able to be created as a public limited company – may not be constituted by natural persons, but only legal ones.

In the fifth chapter, the authors deal with the Community law-making related to industrial and commercial property rights. There are some interesting affirmations considering the expression 'industrial and commercial property rights' in the introduction of this chapter. The term 'industrial property' was featured in the *Paris Convention* for the protection of industrial property, signed in 1883. The meaning of the adjective 'commercial' is attributed to the need to suppress unfair competition.[24] The expression 'industrial and commercial property rights' can be found in Article 30 of the European Community Treaty. Following the specification of the causes of Community's regulation related to the intellectual property rights, the authors deal particularly, for instance, with the doctrine of exhaustion of rights which was elaborated by the ECJ, the institution of European patent, the Community patent, the Community trademark and the regulation concerning the copyright and neighboring rights as well.

Last but not least, the sixth chapter of the second volume holds the analysis of the most essential and well-known rules related to the Community's competition law, with special regard to the Community's regulation on concentrations, the prohibition of abuse of a dominant position and the legal rules considering the state aid. The authors deal with the history of the regulation and the special reasons for competition law, too. The authors lay down that the fundamental concepts, principles and provisions of competition law (for example, the concentration of undertakings or the abuse of a dominant position) were composed in the United States in the 19th century.

* * *

Finally we can emphasize that an imposing work was composed which – regarding the content and the form as well – surpasses the earlier books. This elegantly produced work is an important contribution to the scholarship of Community law and comparative law as well. We could say that the authors'

[24] Pasa-Benacchio, *The Harmonization*, p. 410.

work is a real treasure-house as it contains a lot of internal legal rules concerning the harmonization of private law, which are not only simply cited, but accurately analysed from a critical aspect and can be obtained by the English reader audience.

The bibliographies related to each chapter provide a serious innovation compared to the Italian work and its Hungarian translation as well, including well relevant, selected books, commentaries and essays in English, German, French, Italian and Spanish. Regarding this circumstance, the work can be used excellently by specialists of Community law and of comparative law as well.