Original Project Proposal

1. The hypothesis: ERPL a self sufficient private legal order enshrining a new order of values

There is a strong coincidence between ideological preconceptions of European constitution building and European private legal order building through the DCFR. The dictate at the moment seems to convey, more than ever, a quest to embark on constitutional pluralism and private law pluralism, bearing different headings in the private law discourse: "Private Law and the Many Cultures of Europe" (*Wilhelmsson/E. Paunio/A. Phjolainen*), "Private Law Beyond the State" (*Michaels/Jansen*), or "Open Method of Co-Ordination" (*van Gerven*). However, outside political and academic debates, European constitution building and European private law construction steadily continues via secondary law making with the support of the Member States and via by the EUJ and national courts. My project focuses on ERPL beyond the boundaries of autonomy and freedom of contract guided national private legal orders (*L. Raiser, H. Collins*). I start from the following hypotheses:

- ERPL is developing through regulation and new modes of governance in subject matters usually regarded as being beyond traditional private law, for example consumer and anti-discrimination law, regulated markets, private competition law, state aids, public procurement, property rights and unfair commercial practices, risk regulation and standardisation of services,
- ERPL is striving for self-sufficiency, it is EU made and EU enforced, via old and new modes of governance,
- ERPL yields its own order of values, enshrined in the concept of access justice (Zugangsgerechtigkeit).

The focus of this socio-legal project lies in the search for a normative model which could shape a self sufficient European private legal order in its interaction with national private law systems.

- It aims at a new–orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation.

- It suggests the emergence of a self sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law.

- It elaborates on the interaction between ERPL and national private law systems around four normative models: intrusion and substitution, conflict and resistance, hybridisation and convergence.

2. Creative destruction

The ERPL challenges the basis of our understanding of private law. Is the European Union – with the support of the majority of the Member States - 'destroying' 'our' national private law systems? What kind of private law is the European Union creating? Recalling de-juridification, de-politicisation and de-judicialisation (*Joerges*), can it continue to be regarded as law? (*Walker*) Is it a private legal order of big companies and informed customers/consumers who behave like small businessmen? Where do the truly weak groups stand and what role should be granted to small and medium sized companies?

I propose the use of *Schumpeter's* formula of creative destruction as the starting point of analysis. Taken literally this formula would mean that private law, and its conception over centuries as an order inherently linked to the idea of a nation state, is drawing to an end. The European legislator would then be the 'terminator', who is undermining the ideological basis of the different national private legal orders, the overall assumption that *Privatautonomie*, *freedom of contract* and *autonomie de la volonté* are the sole and decisive denominators. The standard justification for the opposite position is that ERPL does not develop in a legal vacuum. It is said to be based on and dependent of the national private law systems.

Much depends on the understanding, the role and the function of the state in a market economy. The European Union is not a fully-fledged state, but it is a strong regulator of private law relationships. In this sense, the European Union has much in common with the idea of the 'market state' (*Patterson/Afilao*). If we assume that the European regulator is disconnecting national private legal orders from their ideological basis, the question remains then as to what is '*constructive'* in the destruction process? I begin from the premise that the EU is yielding a new concept of private law, one which is distinct from national preconceptions and one genuinely anchored in the European legal order.

3. The Driving Forces behind ERPL: Economisation (Internal Market) and Politicisation (Governance)

The driving force behind the changing patterns of private law result from the economisation of private law via the Internal Market Programme and from its politicisation as enshrined in EU governance (*Weiler*). Governance builds on networks rather than hierarchy, participation and mutual learning rather than command and control, iterative rather than discrete processes. "Ökonomisierung" and "Politisierung" set the frame within this project for a deeper understanding of what actually occurs in the field of visible private law.

(1) Economisation and private law: The strong market–approach has somewhat superseded "les grandes idées politiques", which has guided the project of the "United States of Europe", at least

until the early nineties. The Internal Market Programme has become the (most stable and consistent) driving force behind the European integration process. This has been even more so since the 2004 enlargement – the joining of ten (now 12) new Member States from Middle and Eastern Europe– and the failure of the European Constitution project. The Lisbon Agenda 2000, the backbone of the "new economic approach", could be understood as a revival and reinvigoration of the Internal Market Programme, albeit in light of the 21st century with emphasis on industrial policies. More forcefully than ever before, the European Commission is using the different sectors of economic law to render Europe 'the most competitive economy of the world'.

Private law was and still is needed to give shape to the Internal Market - what I have termed the economisation process. However, the private law referred to is not that which exists in national legal orders, that guided by private autonomy and freedom of contract. Rather it has two faces: it is regulatory in the sense that it is required in order to constitute the Internal Market, and it is competitive since the philosophy behind the regulatory measures relies heavily on market freedoms and competition. The strengthened market bias is paving the way for the infiltration of the Anglo–American understanding of the role and function of law (*Stürner*), which has normative implications: in the changing paradigm of justice, in the increasing importance of economic efficiency (via economic analysis of law in Europe), in economic impact assessments which forestall European law making; and once might even go so far as to imagine a gradual resemblance of European law to common law systems as opposed to continental codification.

(2) Politicisation of private law: The Internal Market Programme and "European Governance" emerged at the same time. Governance should close gaps between the capacity of the EU to promulgate rules and its ability to enforce them (*Héritier*). The so-called New Approach on Technical Standards and Regulations of 1985 eventually led to the adoption of the so–called "comitology"; the regulation of administrative co-operation via committees. There is a direct link from "comitology" via "governance" to "European Constitution building", as reflected in legal theory (*Joerges*), and European Governance mainly as a process of politicisation. This means, with regard to law and the role of the legal system in the European integration process, that the importance of law in the European integration process is decreasing whilst the impact of politics is increasing. There is no document of the European Commission establishing a link between governance and private law. However, one might argue that governance in private law compensates for the lack of traditional regulatory approaches in various boundary fields of private law as well as with regard to its main terrain, i.e. the right of obligations (DCFR).

Governance has a twofold impact on private law: it is fostering constitutionalisation of private law through constitutional and human rights (*Grundmann*) and it is establishing new modes of law making and law enforcement (*Cafaggi*). The question remains to be answered whether governance may only be democratically legitimated if basic procedural requirements such as transparency, participation and accountability are safeguarded and if the enforceability of these parameters via individual and/or collective rights is secured.

4. The Subject Matter: the "Visible" European Private Law

The fields of analysis are united by a predominant Internal Market perspective combining the four freedoms with competition.

(1) A new order of values: ERPL is not bound to a model of social justice in the sense of distributive justice as it is known in the national legal orders in the form of the materialisation of contract law. ERPL is dancing to a different theoretical tune. Its scope is to ensure access to the Internal Market for those who cannot manage to pass the threshold by themselves. ERPL formulates a normative programme for setting access barriers aside. I have chosen the term *'access justice (Zugangsgerechtigkeit)'*, which goes beyond a libertarian concept of freedom, placing the realisation of access and the surmounting of possible impediments in the hands of individuals. Access justice requires activity on the part of the EU in order to deconstruct possible barriers to the internal market. Private autonomy in ERPL is always only ever regulated private autonomy. It is not, unlike national orders, a given. Regulated autonomy serves the paradigm of access justice.

(2) The scope of regulatory private law: Elsewhere (*Yearbook of European Law*), I have set out the fields inclined to ERPL: 1) consumer law; 2) non-discrimination law; 3) regulated markets: telecommunication, energy, transport; insurance, capital markets and company law; 4) property rights and unfair commercial practices law, 5) private competition law, state aids and public procurement; 6) regulation of health and safety; and 7) standardisation of services outside regulated markets. Each of these areas specifically contributes to ERPL, via mandatory rules, via co- and self-regulation.

5. The Construction of 'General Principles of ERPL'

These general principles (*Tridimas*) reflect the functional approach of the ERPL. ERPL constantly blurs the lines of demarcation between legal fields, public and private law, statutory regulatory law and private regulation (the instrumental use of private law via private actors), regulatory law and private-autonomous law, between legal effects and interdependencies of apparently adjacent legal fields, between individual and collective legal constructs, and even between bilateral and a multisided contractual model.

(1) The instrumental protective control approach: The addressees of European private law regulation are vulnerable people, in particular part-timer employees, pregnant women, young people and children, but also business people. The protective approach is to be understood as instrumental. The addressees are the duty-bearing beneficiaries of regulatory private law. They ought to be reintegrated into the labour market. Consumers should assist the breakthrough of cross-border exchange of goods and services. Business people should gain access to new markets, which have thus far remained closed. Protection is always functional, it pertains to the tasks of the particular addressees in their own sectors of the economy.

(2) The interlocking of advertisement, pre-contractual information and contract conclusion: The legal medium through which this aim is achieved is information regulation. Contract related directives and regulations aim to improve the legal position of the weaker assisted by a network of informational duties. The closer to the point of conclusion, the greater the duty to provide information. Duties of transparency, pre-contractual information duties and actual conclusion of contract rules converge. The scope of this paradigm change, initiated by regulatory private law, can be seen in the necessity to rethink the need to fence off the legal effects of unfair commercial practices from its impact on contract law. Actions for injunction, setting an end to unfair commercial practices, might gain importance in private law follow on disputes.

(3) Competitive and contractual transparency: Competitive transparency ought, like the framework rules on competition, state aids, and public procurement law, guarantee pre-contractual competition. Competitive transparency ought to put a contracting party in a position so as to be capable, prior to concluding the contract, of recognising and weighing up the pros and cons of a potential contract with various contractual partners on the basis of the information provided. Contractual transparency, on the other hand, ought to place parties in a position of understanding the reciprocal rights and duties that flow from a contract once it is concluded. Competitive and contractual transparency are not only intertwined on account of their content, they are interlocking because of the formation of legal remedies. A breach of the principle of competitive transparency in the prelude to a contract can have effects in the context of contractual transparency and therefore on the validity of the contract itself.

(4) Standardisation of contracts via information duties: Since the 1980s, ERPL has tried and tested informational duties as a means of rectifying the instrumentally protection-orientated approach, in particular in the field of services. The informational duties are so narrowly drafted, that they actually come close to providing a contractual template. ERPL subjugates ‚the contract' to various purposes. Only a closed and relatively consistent contractual model, identical throughout the EU, can guarantee that such contracts are concluded and that the corresponding sectors achieve the sought after aims. The standardisation meets the interests of the trade. Rather than autonomy and free negotiation of contractual rights and duties being decisive here, the ensuring of functionally calibrated contract for the relevant purpose is key.

(5) Elimination of market distortions: Black and grey lists with incriminating contractual stipulations have had a rather more invalidating effect. Here, we are concerned with the elimination of contractual features which have been earmarked as undesirable from the perspective of the Union legal order. Traditionally, the instruments of legal control are analysed under the perspective of social calibration of contract law. ERPL is equipped with three types of rules, which should be weeded out with the help of their particular contractual techniques, a) horizontally, just as they come to be expressed in the unfair terms and the unfair commercial practice directives, b) thusly related to certain branches, such as in insurance law, and c) contract type-related prohibitions, which are distributed over all of European private law.

(6) Post-contractual cost-free or cost-reduced withdrawal and cancellation rights: The free or economical reasonable escape from a contract is one of the key instruments of competitive contract law. Reduced risk in contract conclusion and reduced risk in contract escaping correlate. ERPL tends to make the entry into a contract as easy as possible, in that the addressee no longer bears or bears only a very easily discharged duty to research the information relevant to the contract; rather, the information is available to him/her by law. By means of the cordoning off of unfair commercial practices and contract law, which can occur as a result of the interpenetration of the legal effects of individual and collective legal protection, pre-contractual protection against dis- or misinformation takes on a new quality. If this mechanism for whatever reason fails, the needy addressee has the option of quickly and easily stepping back from the contract, free of costs or at low costs. The EUJ *(Quelle, Messner)* has confirmed such an interpretation.

(7) Legal protection through ADR, judicial and administrative enforcement: As the European Union has no explicit competences for regulating enforcement, perhaps, with the exception of transborder

issues, enforcement is integrated into the subject matter of regulation. Outside continental private legal orders, substantive and procedural law are not really separated. Slowly, the institutional framework is taking shape, in which collective legal protection can be situated. Emphasis is shifting from judicial to administrative enforcement via regulators, maybe even in the upcoming domain of collective compensation. In relation to the calibration of individual legal protection, ERPL rules provide for subject related individual rights and remedies. These individual rights and remedies are never meant to be exhaustive. The respective directives and regulations repeat in mildly varying terms, the EUJ-coined formula that legal protection must be effective, deterrent and proportionate. Far more concrete are the attempts of the EU to oblige the Member States to develop suitable non-coercive conflict resolution mechanisms.

6. Towards the Gradual Substitution of National Private Legal Orders

My suggested perspective, one which looks at the national private legal orders from the perspective of ERPL, allows for the formulation of a set of hypotheses which suggest deeper, if not dramatic, changes in private law matters. What I am trying to formulate are *conceptual and normative assumptions* on the possible future development of the ERPL to displace national private legal orders thereby turning the different fields into self-sufficient legal orders widely disconnected from the national private law strand. This could be realised via the downgrading of international private law, via the substitution of minimum with maximum harmonisation, and last but not least via the transformation of directives into de facto regulations.

(1) Decreasing the role of international private law: From an orthodox view, Rome I and Rome II are milestones in the development of a bottom-up European private law via the balancing out of conflicts between 27 divergent legal orders and their values. There is room for international private law, as long as the application of the rules, whether private or public, does not stop at the border. Only where national rules are bound to their territorial scope is international private law out of play (*Muir Watt*). However, ERPL is intended to set common European standards which are bound, if at all, to the territory of the European Union (*Ingmar*). That is why Rome I and Rome II are only of limited significance coming into play only where EU law does not lay down the standards itself, either by minimum or maximum harmonisation, or by anchoring the country of origin principle. The EU legislature did not even allow for the acknowledgment in Rome I or in Rome II of the DCFR as a voluntarily 28th private legal order. For the perpetuation of varied value-orders there remains little scope.

(2) Better regulation through increased consistency and coherency: Since the promulgation of the Lisbon Agenda 2000, the EU has made it its task to legislate more coherently, and to avoid a fragmentation of results to similarly rooted problem cases. The European Commission even offers a particular website on 'better regulation'. The efforts toward rendering the various fields of ERPL more consistent and strengthening its efforts in view of establishing better implementation practices in the Member States are obvious. Implicitly the European Commission pushes for the verticalisation of the different areas, thereby making the horizontalisation at both the EU level i.e. between the various areas – and at the national level i.e. between the EU rules and the national private legal orders – more difficult. A tried and tested means to separate horizontal national and sectoral EU regulatory law, would be the conversion of EU directives into EU regulations. A general tendency in this direction cannot be detected, even if the Brussels Regulation, Rome I, Rome II, bits and pieces of

energy and telecommunication law, as well as the entirety of passenger law have been promulgated in the form of regulations. However, the European Commission (COM (2007) 502 final) is gradually shifting the focus from that of replacing directives with regulations.

(3) Expanding competences through regulatory techniques: The European Commission paid great attention to the principle of mutual recognition as well as the country of origin principle, but failed in the end. Currently, it is concentrating its efforts on the anchoring of the principle of full harmonisation in regulatory private law. The consequences of the about-turn from minimum to maximum harmonisation are serious. Regulatory competence passes to the EU, which oversees the implementation process and can engage the EUJ's controlling function. New juridical battle lines are drawn, partly triggered by the EUJ and ideologically (not argumentatively) in line with the Lisbon Agenda (*Gonzales Sanchez, Gysebrecht, VTB*), as the question becomes increasingly prominent, to what extent does full harmonisation or mutual recognition stretch? There is a close relationship between favouring or at least admitting full harmonisation and rejecting mutual recognition. The rejection of the principle of mutual recognition, which contains a conflict of law element in respect of differences, comes at a price. Paradoxically enough, it promotes the trend towards (full) harmonisation.

(4) Governance through EU induced private regulation: EU induced private regulation, i.e. the regulations and directives in the various fields setting incentives for private regulation, appear as just another means to prolong the instrumental use of regulatory law in completing the objectives of the Internal Market. Transplanted into the perspective of better regulation which strives for coherency and consistency, direct or indirect state induced private regulation though being part of the better regulation approach seems to point exactly into the opposite direction – incoherency and inconsistency. Whilst it seems true that sector related private regulation must fit the needs of the particular business in question or the particular purpose the EU rules are designed for, it seems equally necessary to underline that the principles of transparency, participation, accountability and judicial review should apply equally to all forms of private regulation, whatever the subject matter might be (*Cafaggi, Joerges*).

(5) Creeping competences through new modes of law making and law enforcement: Academic attention is focusing on new modes of law making, both inside state induced private regulation and outside (*Cafaggi/Muir Watt*). What is much less visible is that the European Commission is becoming more and more involved with law enforcement. Conflict resolution, be it individual or collective, shall be managed. This seems to be the European Commission's idea via regulatory agencies within the respective fields of competence. Where there are no European regulatory agencies, or where the European regulatory agencies have no formal regulatory competences, the European Commission steps in and formulates enforcement strategies and enforcement programmes outside its formal competences putting pressure on the Member States and their enforcement entities, be they administrative or not, to direct their attention to those issues which, according to the European Commission, deserve prior attention in securing compliance with the respective European rules. In this sense, the European Commission is developing entirely new modes of enforcement governance, it is out-sourcing enforcement to private companies, and establishing networks within which the lines between administrative and profit orientated private enforcement strategies are intermingled.

7. The Outlook of the New Order: Three Layers of European Regulatory Private Law

Neither the Member States nor the European Commission have grasped the nettle with regards to clarifying the relationship between the legal orders. This task has fallen to national and European courts, as well as to the academia. I will define the different layers of European regulatory private law and national private law which have been yielded out of the ongoing process of the Europeanisation of private law. This could easily be understood as an attempt to recognise a kind of new 'Ordnung' in the chaos (*Möslein*) which results from the ongoing destruction of national private legal orders.

(1) Self-sufficient sectoral European market orders: The European Union regulates central areas of economic life, without considering the interpenetration of public economic and private law, overstepping the boundaries between state made law and private made law through new forms of governance in the rule setting via co-regulation and enforcement via outsourcing and privatisation. My suggestion is that behind this lies the implicit normative and conceptual assumption that sectoral orders may, broadly speaking, stand for themselves. I would suggest the following trend towards self-sufficient sectoral legal orders: *horizontal orders*: a) consumer law together with unfair commercial practices and b) anti-discrimination law, these two areas are at the forefront of the current analysis; *vertical orders*: a) regulated markets – telecommunication, energy, transport and financial services, b) pre-market risk regulation for chemicals, pesticides, foodstuff, consumer goods, post market control and product liability, c) private competition law, state aids and public procurement and d) regulation of services via European standards bodies.

Self-sufficiency has two strains, law making and law enforcement. Law making no longer lies in the hands of the European Union alone. Through co-regulation and self regulation a variety of rule setting institutions join in. The law making process has become heteronomous. The combination of public law making and private law making via co-regulation paves the way for the internationalisation of standard setting. Secondly self-sufficiency refers to the phenomenon that each market order may – this again is my assumption – function without a direct link to national private legal orders. That is why it does not suffice to look at the substantive law. A full understanding of the closeness of the sectoral market orders requires the inclusion of enforcement in the analysis: via regulatory agencies or via self-regulatory bodies, via individual or collective actions, via conflict resolution through litigation in courts or before administrative authorities or via dispute settlement through agencies, through self-regulatory bodies or through collective actions.

(2) General principles in European regulatory private law: The suggested *general principles* (see point 5.) shall ideally reveal common denominators between the various fields of European regulatory private law. They shall operate like a thread sewing the still heterogeneous areas together and allowing for mutual transplants across the narrow boundaries of the dispersed areas of European regulatory private law. Inherent to such thinking is the idea that European regulatory law is guided by a philosophy that, methodologically speaking, justifies cross-border (between the different areas of European regulatory private law) fertilisation. Setting consumer law aside it seems as if the Member States have followed the European approach in separating regulatory private law from the body of the national civil codes – as far as they exist. This facilitates the development of a self-sufficient European regulatory private legal order considerably.

(3) General principles of civil law: At a time when the political future of the DCFR is unsecure, while simultaneously however, references from the national courts to Luxembourg in private law matters

are heavily increasing, the EUJ has taken a bold step forward, on proposal of Advocate General *Trstenjak*, in a move which has gone rather unnoticed within the discourse concerning the development of a genuine European private law. In *Hamilton*, the EUJ refers for the first time, to the '*general principles of civil law*'. In two further judgments decided in 2009, *Messner* and *Audiolux*, both on proposal of AG *Trstenjak*, the EUJ confirmed its preparedness to elaborate on the notion of 'general principles of civil law'.

The EUJ does not provide much guidance as to the origins of the 'general principles'. AG *Trstenjak* and, in relying on her opinions, the EUJ start from a comparative law approach via references to PECL, the DCFR and the Acquis Principles. There seems to be a certain preparedness to upgrade the DCFR to some sort of expert restatement of soft law standing. In such a perspective, the DCFR could serve as a constant source of 'inspiration' for developing principles, but not for seeking guidance to clear cut solutions. Outside and beyond the comparative analysis of European 'rules' the widely recognised constitutionalisation process of private law provides for an additional source, via the European Economic Constitution and the Charter of Fundamental Rights. The former opens the door to the case law on the four freedoms in all its ambiguities and in its impact on private law (*Steindorff*), the second to the increasing importance of the Charter in the interpretation of EU law. In *Kücükdeveci* the EUJ recognised the horizontal direct effect of the Charter, thereby overcoming reservations voiced in the Lisbon Treaty against the applicability of the Charter.

8. Literature

F. Cafaggi, (ed.) The Institutional framework of European private law, OUP, 2006; *F. Cafaggi/H. Muir Watt* (eds.), Making European Private Law, Governance Design, 2008; *F. Cafaggi/H. Muir Watt* (eds.), The Regulatory Function of European Private Law, 2009; *H. Collins*, Regulating Contracts, 1999; *C. Crouch/M. Schröder/H. Voelzkow*, Regional and sectoral varieties of capitalism, Economy and Society, 39 (2009), 654; *St. Grundmann* (ed.), Constitutional Values and Contract Law, 2008; *same author:* Europäisches Schuldvertragsrecht, 1999; *P.A. Hall/D. Soskice* (eds.): Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, 2001; *A. Héritier*, Explaining Institutional Change in Europe, Oxford University Press, 2007; *Ch. Joerges*, The Challenges of Europeanisation in the European Private Law, Duke Journal of Comparative and International Law 24 (2005), 149; *same author/F.* Rödl, (2009) Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation, in: Calliess/Fischer-Lescano/ Wielsch/Zumbansen (Hrsg.), Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag, 775**;** *P. Legrand*, European Legal Systems Are Not Converging (1996) 45 ICLQ 52; *R. Michaels/N. Jansen*, Private Law Beyond the State? Europeanization, Globalization, Privatization, (54) American Journal of Comparative Law 2006, 843; *Ch. Lane/G. Wood*, Capitalist diversity and diversity within capitalism, Economy and Society, 39 (2009) 531; *P. Maduro*, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', European Journal of Legal Studies, No. 1, Issue 2, 2007; *F. Möslein*, Contract Governance and Corporate Governance, JZ 2010, 72; *H. Muir Watt*, Integration and Diversity: The Conflict of Laws as a Regulatory Tool, in F. Cafaggi (ed.), The Institutional Framework of European Private Law, 2006, 107; *D. Patterson/A. Afilalo*, The New Global Trading Order, 2008; *L. Raiser*, Die Zukunft des Privatrechts, 1971; *N. Reich*, Horizontal liability in EC law: Hybridization of remedies for the compensation in case of breaches of EC rights, CMLRev. 2007, 705; *E. Steindorff*, EG-Vertrag und Privatrecht, 1996; *W. Streek/K. Thelen* (eds.), Beyond continuity: Institutional change in advanced political economies, 2005; *R. Stürner,* Markt und

Wettbewerb, 2007; *T. Tridimas*, The General Principles of EU Law, 2nd edition, 2006; *W. Van Gerven*, Needed: A Method of Convergence for Private Law, in A. Furrer (Hrsg.), Europäisches Privatrecht im wissenschaftlichen Diskurs, 2006, 437; *N. Walker*, Legal Theory and the European Union (2005) OJLS, 581; *J.H.H. Weiler*, The Transformation of Europe, Yale Law Journal (100) 1991, 2403; *Th. Wilhelmsson/E. Paunio/A. Phjolainen* (eds.), Private Law and the Many Cultures Europe, 2007