Revista JURÍDICA PORTUCALENSE

www.upt.pt

Nº 37 | Universidade Portucalense | Porto | 2025

https://doi.org/10.34625/issn.2183-2705(37)2025

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DOI: https://doi.org/10.34625/issn.2183-2705(37)2025.ic-2

Secção I

Investigação Científica / Scientific Research*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review* / The articles in this section have undergone a blind peer review process.

Harmonisation of contract law in the EU: Analysis of the process and its impact on the legal system of the Member States

Harmonização do direito dos contratos na UE: Análise do processo e do seu impacto no sistema jurídico dos Estados-Membros

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ABSTRACT: The problem of differences between national legal systems in the global context necessitates the creation of new methods of harmonisation and unification of legislation, especially in light of the accelerating globalisation processes. In the context of global and European integration, it is becoming increasingly important to promote the diversity of jurisdictions and provide answers to the main questions regarding the development of uniform contract law to preserve the role of law as a regulator of social relations at the supranational level. The following methods were used in the study: legal modelling, inductive, deductive, dialectical, formal-logical, and synergistic, as well as methods of analysis and synthesis. The purpose of the article is to analyse the process of harmonisation of contract law in the European Union and to determine its impact on the legal system of the Member States.
KEYWORDS: private law; contract law; contract; principles of contract law, legislation

RESUMO: O problema das diferenças entre os sistemas jurídicos nacionais no contexto global exige a criação de novos métodos de harmonização e unificação da legislação, especialmente tendo em conta a aceleração dos processos de globalização. No contexto da integração mundial e europeia, torna-se cada vez mais importante promover a diversidade das jurisdições e dar respostas às principais questões relativas ao desenvolvimento de um direito dos contratos uniforme para preservar o papel do direito como regulador das relações sociais a nível supranacional. Para o efeito, foram utilizados os seguintes métodos: modelação jurídica, indutivo, dedutivo, dialético, lógico-formal e sinérgico, bem como métodos de análise e de síntese. O objetivo do artigo é analisar o processo de harmonização do direito dos contratos na União Europeia e determinar o seu impacto no sistema jurídico dos Estados-Membros.
PALAVRAS-CHAVE: direito privado; direito dos contratos; contrato; princípios do direito dos contratos, legislação.

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1. Introduction

Bridging the gaps between legal systems is a major legal challenge in the international arena. National legislative and judicial organisations are largely responsible for establishing legal norms from the very beginning of the national law-making process. They write acts for a largely homogeneous population, usually defined by a common language and culture. However, this traditional image is rapidly changing in the modern era due to increasing globalisation. If the law is to retain its role as a regulator of social relations (even though it is no longer at the national but at the supranational level), it is important to develop new ways of making law and its content, as well as the processes of its implementation. In doing so, several fundamental questions need to be answered, one of which is whether legislators should strive for a uniform contract law, as in the national legal order, or whether they should promote the diversity of jurisdictions and the content of such rules. Another question is whether, even if there is a need to harmonise or unify the law, this uniformity is even possible given the divergence of legal orders and legal cultures in the area of contract law.

In the uncompromising and rapid process of global and European integration, states are trying to overcome national borders and create supranational bodies and rules of law to gain (not only, but mainly) economic advantages. It is in trade that cooperation first manifests itself, requiring first administrative and then legislative changes. Indeed, the private sector cannot and should not remain silent about interference in public law regulation. But, as will be rightly noted, the growth of trade and population mobility necessitates international cooperation and unification of legislation. Since contract law is a dynamic legal system, partial regulation in this area - which allows for more complex contractual arrangements in individual countries - is not sufficient, especially in light of the expanding influence of EU law on an increasing number of national legal systems. The critical stance in favour of full Europeanisation of contract law also calls for greater attention to these legislative procedures. This raises concerns about the nature and scope of EU law in the area under study, as well as about the procedures that would guarantee the development and application of unified contract law.

Several scholars have conducted research in the field of contract law. studied the impact of European law on national legislation and the need to harmonise the

contract law of Ukraine. Practical implementation of harmonisation contributes to economic development and enhances the protection of the rights and interests of citizens and businesses. Panchenko explored Ukraine's integration into the European political, economic and legal space, focusing on the ratification of the Association Agreement with the EU and its consequences. He discussed how the main goal of the association is to create conditions for strengthening economic and trade relations, integrating Ukraine into the EU internal market and harmonising legislation with the EU, in particular in the field of contract law. Houska critically assessed the costs and benefits of harmonising European contract law through the Common European Sales Law instrument, drawing attention to the unexpected circumstances that have arisen in the process. He examined the current path and possible directions for further improvement of this legal instrument. Mišćenić and Hoffmann examined the role of EU internal market harmonisation and its impact on the free movement of goods, persons, services and capital. They analysed the changes in the regulatory approach of the EU legislator, in particular the use of non-binding, minimally harmonising and so-called "open" provisions in directives and regulations. Ruiz and Blázquez studied the regulation of "illegal" or "void" contracts in European legal systems and their impact on attempts to harmonise contract law at the European level. He analysed various approaches to this issue and proposals for creating a unified approach through the Principles of European Contract Law and the DCFR. The purpose of the article is to analyse the process of harmonisation of contract law in the European Union and to determine its impact on the legal system of the Member States.

2. Methods

To achieve the stated purpose and objectives, the study used philosophical, general scientific and special scientific methods of cognition. The concept of "harmonisation of contract law" was studied using the dialectical method, which made it possible to identify certain characteristics of the phenomenon and reveal its interrelationships with other legal phenomena. For example, the trend of "Europeanisation of law", which is the gradual convergence of legal norms and standards between EU member states, was identified through a dialectical study.

This method helped to identify the main patterns and reveal the development of European law.

The formal logical approach to the study of the process of harmonisation of EU contract law proved to be very useful for analysing specific legal standards and procedures applied in EU Member States and allowed to identify logical patterns of the process of harmonisation and unification of legal acts, to establish the basis of their interaction and inconsistency. The formal logical analysis facilitated the identification of the logical consequences of the new norms and standards and their impact on the legal systems of all EU Member States. Clarification of the interactions between various components of this legal system and their impact on the integrity and efficiency of contractual relations regulation was made possible by applying the synergistic method in the study of the nature of the EU contract law principles. Identification of the emergent properties of the EU contract law system, i.e., the phenomena and attributes that result from the interaction between individual components and cannot be explained or predicted when considering these components separately, was made possible by the application of the synergistic approach. In addition, the synergistic approach made it possible to take into account the dynamics of the development of EU contract law and changes in its principles in the context of new challenges and needs of modern European society.

It was possible to systematise and take into account various aspects of legislative regulation in the context of the specific issue under study by using the method of analysis and synthesis in the study of the legislative component of the issue. Through the analysis of specific legal acts and their components, the main rules and guidelines governing the issue, as well as their connections and interaction, were established. These different aspects can then be combined into a single concept or model that presents an overall picture of the regulation and its potential impacts through a synthetic approach. The analysis of individual cases and information related to the harmonisation of contract law within the European Union was carried out using the inductive method. This allowed us to identify general patterns and trends in this procedure. Using the information obtained from the inductive analysis, the deductive method was applied to study the broad concepts and theoretical models underlying the harmonisation process. This method allowed for the identification of both specific cases where

harmonisation has affected the legal systems of Member States and a broader understanding of the laws and guidelines that govern the process. The European Union's perspective on contract law harmonisation has been developed through the use of legal modelling. This methodology facilitates the study of the deep and lasting effects of harmonisation and helps to formulate tactics aimed at achieving common goals and solving common problems of the EU member states.

3. Results

Empirical evidence suggests that economic organisations engaged in cross-border business transactions often face significant legal costs as a result of non-compliance with counterparty requirements. While it is difficult to quantify the losses suffered by international trade as a result of the divergence of contract law systems in many countries, it is a significant barrier that cannot be ignored, especially given its importance for the expansion of the single market. When problems arise with the fulfilment of the contractual terms, the situation deteriorates and eventually escalates into a dispute between the parties to the contract. The legal costs of resolving legal issues are growing exorbitantly and sometimes lead to critical consequences. This is why some business entities leave foreign markets altogether to avoid legal uncertainties in the future. Therefore, the elimination of inconsistencies between the national legislations of the countries regulating the contractual relations of the parties is the main goal of the supporters of European integration.

It should be noted that the last two decades have been characterised by high activity in the field of international trade regulation. This is reflected, in particular, in the adoption of several fundamental international legal documents, both regulatory and nonregulatory. There are two main areas of legal regulation of international trade: the first is the use of the conflict-of-laws method of regulation, and the second is the unification of private international law, primarily international trade law. While initially it was mainly about normative unification, a striking example of which is the 1980 United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention), more recently more and more attention has been paid to the development of acts of so-called non-normative unification: The 1994 and 2004 versions of the Principles of International Commercial Contracts and the 2003 version of the Principles of

European Contract Law (the EDP Principles). The emergence of the PIL Principles was met with mixed reactions. This is due, in particular, to the fact that these rules of contract law do not require any ratification or approval by states for their application by participants in international commercial transactions. In addition, the peculiarity of these documents is the extremely broad subject matter of regulation, which makes the provisions contained therein very general. The cautious attitude to the above documents is mainly explained by the fact that the question of their legal nature and, as a result, the possibility and procedure of their application remain open.[5]

The Europeanisation of EU contract law implies the influence of the EU's political, economic and legal systems on the development of contract law both at the EU level and within the EU Member States and third countries. Harmonisation is seen as a dynamic principle and implies a process aimed at achieving harmony. Therefore, the concept of "harmonisation" should be defined not in terms of a goal or result, but in terms of a process or activity. Harmonisation can be viewed as a process of purposeful convergence of legal systems in general or in particular areas, establishment of common institutions and norms, and elimination of contradictions. The author also rightly points to such a feature of harmonisation as purposefulness. In the theory of law, harmonisation can be carried out in two ways: spontaneously and purposefully. The spontaneous method lacks the very purpose of harmonisation of law, although legal experience is borrowed. The harmonisation of EU contract law should be identified with a volitional process that requires certain efforts to achieve consistency between different states. Only through targeted international cooperation is it possible to establish common principles in national contract law systems.

Thus, harmonisation is a process whereby common rules of conduct are introduced, mostly in specific narrow areas, across Member States to achieve a specific result, without the obligation to fully comply with EU law. Under this approach, Member States have a certain amount of discretion as to the precise rules to be adopted depending on the instrument used. Consequently, convergence through harmonisation does not lead to the creation of a

[5] KOVALENKO, I., 2023. The impact of European law on national legislation and the need to harmonize contract law of Ukraine [online]. 28. August 2023. B.m.: Uzhhorod National University. Available at: doi:10.24144/2307-3322.2023.78.1.30.

comprehensive single legal act, as it is inherently dependent on different national legislative processes. In today's world, the trend towards unification and harmonisation of private international law, as well as law in general, most clearly manifested in the context of integration taking place in Europe, primarily within the EU.[6] Many Western legal scholars speak of the trend of "Europeanisation of law". The process of Europeanisation, which two or three decades ago seemed to be something bizarre, impossible and inappropriate, has now covered most of the private law areas. There is an increasing European influence on national private law. In addition to individual directives and regulations, complex work is underway on joint acts in the field of European contract law, which demonstrates the comprehensiveness of EU lawmaking.

It should be noted that the "Europeanisation" of private law in general seems to be a controversial process, which is ambiguously perceived by both members of the public and various EU organisations. This topic is the subject of heated debate in academic and political circles. The peculiarities of the EU's organisation and functioning, as well as the distribution of powers between its institutions and member states, as defined by the founding treaties ratified throughout the organisation's more than 50-year history, affect the content of this process.[7] It is worth noting that the EU is one of the good examples of successful harmonisation. EU decisions through directives and regulations are an example of harmonisation because they require transposition into the domestic legal system of a member state. They can be transposed through legislation and are flexible enough to apply to national authorities in Member States with different legal regimes, allowing for the establishment of legal rules that take into account the laws of the Member States. At the same time, it should be noted that the dispersion of EU contract law in a huge number of EU secondary legislation does not always facilitate their adequate and full application.

The path to harmonisation is not just an aspiration; it involves the involvement of private organisations, public institutions and supranational structures that try

[6] ZIMMERMANN, Reinhard, 2020. The Significance of the Principles of European Contract Law [online]. 1. September 2020. B.m.: Kluwer Law International BV. Available at: doi:10.54648/erpl2020026.

[7] CHERNIAK, Olena, 2023. Harmonization of EU legislation in the field of compensation for damage caused by minors [online]. 2023. B.m.: West Ukrainian National University. Available at: doi:10.35774/app2023.03.124

to solve problems related to the understanding of common contract law and policy in this area. Despite the increased pace of harmonisation over the past few years, including by raising the question of the feasibility of creating a single codified act at the EU level, there are still several contract law institutions that are regulated at the level of national legal regimes but do not have a proper legal mechanism at the EU level. In particular, this applies to general contractual provisions, which are currently virtually absent in the EU legal system and are found only in soft law acts.[8]

In general, there are two ways of harmonisation: passive or active harmonisation. Active harmonisation involves the incorporation of agreed legal provisions into national legal orders, while passive harmonisation is implemented through voluntary agreements or directives. In the area of corporate law, a distinction is made between complementary and minimal harmonisation. Complementary harmonisation allows the parties to apply their national rules and to apply the rules of the directives separately for the internal market and separately for commercial relations within the EU. Minimum harmonisation, on the other hand, uses a single binding minimum set of uniform rules to be implemented in each Member State, which guarantees a similar legal system across all EU Member States.[9] In some cases, minimal harmonisation may not be the best solution to facilitate enforcement within regional or international legal orders. In such cases, unification is required. Harmonisation is different from unification, as the latter aims to replace several legal regimes with one single system. Unification, on the other hand, seeks to eliminate differences, coordinate and create standards between different pieces of legislation and emphasise voluntary participation of stakeholders, while maintaining order based on respect for the legal traditions of the members. Harmonisation does not implement legal solutions but seeks to bring different legal frameworks closer together, while

[8] TSIURA, Vadym, Ernest GRAMATSKYY, Liudmyla PANOVA, Roman SABODASH and Valentyn BAZHANOV, 2023. Contract law in the conditions of recodification: modernity and future prospects [online]. 30. August 2023. B.m.: Amazonia Investiga. Available at: doi:10.34069/ai/2023.68.08.28.

[9] ABROSIMOV, Serhii, 2020. The Concept and Content of Adaptation of Ukrainian Civil Legislation to EU Legislation in the Field of Sales [online]. 31. December 2020. B.m.: Leonid Yuzkov Khmelnytskyi University of Management and Law. Available at: doi:10.37491/unz.75-76.23

unification, on the other hand, replaces an existing legal system with a new legal order.

Harmonisation and unification are different legal phenomena. The former is based on the fact that different legislative bodies adopt regulations designed with similar content, but allow individual members to adopt their regulations for a common purpose; while unification involves the adoption of all rules in a single regulation. The general principles of building different legal systems can be united through consolidation, harmonisation, and unification. As for the codification of EU contract law, it should be noted that, depending on the political situation within the EU, the expediency or inexpediency of its implementation has been the subject of lively discussions both at the level of EU institutions and at the level of the scientific community over the past decade. Today, the main task of the study group on the development of the European Civil Code is to introduce an effective legal mechanism that would ensure the search for a combination of alternative methods of determining the general principles and foundations of contract law in national legal systems and traditional methods of unification, as the final stage that should lead to the adoption of a binding instrument. The form of such an instrument is still under discussion. Some authors are convinced that the method of complete unification of substantive private law is currently cumbersome and impractical, and therefore the code should follow the time-tested path of general principles. Other authors go further and argue that the EU does not have the legal power to adopt any complex civil code.[10]

The lack of political will of the EU institutions and the effective work of professional associations, specialised organisations and groups of scholars contribute to the development and dissemination of private codifications, including in the field of contract law. It is worth pointing out that such private codifications should not be attributed to the power and significance of autonomous legal systems but should be regarded only as a means of international commercial praxis to bridge gaps between national legal regimes. Nevertheless, they are essential because they document societal needs for legal regulation and can serve as an impetus for further lawmaking. Harmonisation in

[10] IVAKH, Maria. 2023. Harmonization of national civil legislation with EU law. Scientific Events of the Faculty of Law of the West Ukrainian National University. Available at: http://confuf.wunu.edu.ua/index.php/confuf/article/view/1065.

any form and methodology of its implementation, despite all the caveats, is the right tool to combat legal uncertainty by creating appropriate instruments regulating contract law, which will benefit all potential parties to contractual relations. Although European contract law is still in the process of being developed and refined, many efforts have been made over the past three decades, as can be seen in the Action Plan for the Harmonisation of Contract Law in the EU and the European Contract Law Green Paper, which explain policy options for making progress on European contract law for consumers and commercial actors.

It is also worth noting that the process of harmonisation of EU contract law is not an easy one, it requires significant economic, political and time costs. To successfully develop and implement a common European act in the field of contract law, the EU institutions will need to: collect sufficient reliable evidence on the actual state of relations to be regulated; consider a range of alternatives for each contract law institution; assess the likely impact of regulatory alternatives on the position of relevant individuals and groups; develop a single act, which may be costly depending on the type and duration of its development; invest political capital to convince society of the benefits of a common act.[11] All of these preparatory measures to realise the ambitious goal of harmonising contract law at the EU level already have complex political and economic implications, and this is even without abstracting the costs of all kinds that follow in the implementation and enforcement phase of such an act. A significant part of these costs will not depend on the number of entities that will benefit from the new legal regime. Some of these costs will not be significantly different if such an act is adopted in a jurisdiction with a population of 1 million or 100 million. Thus, a legislative reform that may not be cost-effective if it requires individual adoption by each Member State may be cost-effective if it is adopted at the European level.

The harmonisation approach of European law can be even more effective when the scope and complexity of the design of an act such as a single European act in the field of contract law is taken into account. The scale and complexity of the subject matter probably make the costs of the lawmaking process (e.g.

[11] FEDORENKO, Yurii, 2023. Formation and development of continental law and modern approaches to the norms of national legal systems of the EU [online]. 6. October 2023. B.m.: Kyiv University of Law of NAS of Ukraine. Available at: doi:10.36695/2219-5521.3.2023.50.

political capital) more than proportionate. The differences between the different legal regimes will be reduced in the process of creating an effective single supranational legal order if the harmonisation process is successful. Parties involved in contractual obligations, regardless of jurisdiction, will be able to rely on the legal rules to which they are prepared and will have confidence in such legal certainty. The results of harmonisation in any of its manifestations will gradually become as widespread and effective as possible, facilitating commercial relations both within the EU Member States and on the EU internal market. Such positive results can be achieved by using the right harmonisation tools aimed at meeting the needs of the parties interested in efficient contracting and performance and reducing contractual costs.[12]

There are currently several reservations about the harmonisation of EU contract law, including the choice of the form of such harmonisation. Although certain contract law institutions, such as consumer protection, have a greater scope of harmonised rules, progress in other areas has been noticeable in recent decades, including in connection with the development of the DCFR, which demonstrated the possibility of creating a single EU act on general provisions of contract law that would take into account the peculiarities of the various legal regimes represented in the EU to the maximum extent possible. This process is and should be gradual and, perhaps in some cases, has signs of coercion, but it should be noted that the culture of application of supranational (international) legal norms is not yet at the highest level required for the effective functioning of the EU internal market and, in fact, global commercial turnover. The need for harmonisation should be accompanied by proper knowledge and information in this area, and the application of such rules should be supported by motivation for Member States. Principles play an important role in the functioning of contractual legal relations. There is no unified system of contract law principles in the EU; each act in this area has its own set of principles and defines their meaning. At the same time, it is important to realise that the formulation and identification of contract law principles allow not only to development of a uniform practice of

[12] PANCHENKO, S. S. (2021). European Union law as a source of civil contract law. In 7 th Mogilian Legal Readings (pp. 24-29). Mykolaiv: Petro Mohyla Black Sea National University. Available at: https://chmnu.edu.ua/en.

applying legal norms but also to development of general principles of functioning and building relationships between parties to contractual relations.[13][14]

Given the above, it is important to determine the specifics of the content of certain principles of EU contract law, which directly affects the formation of a unified system of European contract law.[15] The need for adequate regulation of contractual relations has led to an intensification of scientific activity to develop non-normative generalisations of contract law. In the 1980s, on the initiative of professors of European universities in cooperation with practising lawyers, work began on the development of unified rules of contract law. The result of the activities of non-governmental organisations was the UNIDROIT Principles of International Commercial Contracts, the CENTRAL Code of Principles, Rules and Standards of lex mercatoria, the Principles of European Contract Law (PECL), the Draft Common System of Principles, Concepts and Model Rules of European Private Law (DCFR), etc. [16][17]

Given the text of these acts, a single system of EU contract law principles is not defined and formed, each of the studied acts refers to principles of different content and meaning. In some cases, the principles of freedom of contract, contractual equity and contractual certainty are distinguished, and a system of principles such as freedom, security of contract and efficiency is defined. These principles are present in the laws of all EU member states, as well as in all major acts of harmonisation of EU contract law that exist today. Each of them has several aspects. Freedom is relatively more important for contracts than unilateral obligations and obligations arising from them. Security, fairness and efficiency are equally important in all areas. At the same time, these principles are of varying

[13] PURWANINGSIH, Sri and Agnes Maria Janni WIDYAWATI, 2023. Contract Law and Its Development (Form, Principles and Substance) [online]. 2023. B.m.: Atlantis Press SARL. Available at: doi:10.2991/978-2-38476-024-4_15.
[14] YAROSHENKO, Oleg M., Volodymyr M. STESHENKO, Hanna V. ANISIMOVA, Galina O. YAKOVLEVA and Mariia S. NABRUSKO, 2021. The impact of the European court of human rights on the development of rights in health care [online]. 25. October 2021. B.m.: Emerald. Available at: doi:10.1108/ijhrh-03-2021-0078.
[15] HOUSKA, Daniel. 2020. Dusk over the European contract law? [online] The Lawyer Quarterly. Available at: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/373.
[16] PONCIBÒ, Cristina, 2020. A contract law for future generations [online]. 2020. B.m.: Centre for Evaluation in Education and Science (CEON/CEES). Available at: doi:10.5937/rkspp2002035p
[17] YAROSHENKO, Oleg M., Olena Ye. LUTSENKO and Natalya M. VAPNYARCHUK, 2021. Salary optimisation in Ukraine in the context of the economy Europeanisation [online]. 17. September 2021. B.m.: National Academy of Legal Sciences of Ukraine. Available at: doi:10.37635/jnalsu.28(3).2021.224-237.

importance. The effectiveness of contract law is a less fundamental principle than the others, but this does not mean that it should be absent, as the idea of effectiveness underpins several rules in the EU's contract law harmonisation acts, and they cannot be fully explained without reference to it. Freedom, security, fairness and efficiency are means to an end - promoting welfare, empowering contractors to achieve their legitimate aims and realising their potential. The fundamental principle of contract law for all national and supranational legal systems is the principle of freedom of contract.[18] There are several aspects of freedom as a fundamental principle in private law. Freedom is defensible, does not impose mandatory rules or other controls, and does not impose unnecessary formal or procedural restrictions on contractual relations.

As a rule, freedom of contract includes the freedom to choose the counterparty, content and form of the contract. These are the main ideas defined in the DCFR and PECL. Freedom of contract has the same meaning in the UNIDROIT Principles and the CENTRAL Code. The parties may also agree on the possibility of changing the terms of the contract or terminating it at any time. In a normal contracting situation, there is no incompatibility between freedom of contract and fairness. If the parties to a contract were fully informed of the terms and consequences of the contract and were in an equal bargaining position when it was concluded, their agreement is perceived as fair for the particular contract on the particular terms (Qui dit contractual, dit juste). In a normal situation, there is also no incompatibility between contractual freedom and the effectiveness of a contract.[19]

In general terms, it can be assumed that the agreements reached by the parties, provided they are informed and participate equally in the negotiations, will be as efficient as possible for all parties to the contract (without taking into account the economic costs of each party). The only limitation is the inability to impose contract-related costs on third parties. The freedom of contract has a certain limitation, defined in the CENTRAL Code, which is not stipulated in other

[18] MIŠĆENIĆ, Emilia. & HOFFMANN, Anna-Lena. 2020. The Role of Opening Clauses in Harmonization of EU Law: Example of The EU's General Data Protection Regulation (GDPR). EU and Comparative Law Issues and Challenges Series, 4, 44-61.
[19] LATIFIANI, Dian, 2020. RENEWAL OF THE NATIONAL CONTRACT LAW [online]. 30. October 2020. B.m.: Institute of Research and Community Services Diponegoro University (LPPM UNDIP). Available at: doi:10.14710/jhp.8.2.137-150.

harmonisation acts. It stipulates that contracts cannot be concluded to the detriment of a third party ("res inter alios acta alteri non nocet"). A treaty may affect the relations of only its parties, except as expressly provided for in the treaty. The previous version of the UNIDROIT Principles also defined such a limitation of the principle of freedom of contract. The DCFR and PECL do not contain clear provisions at such a general level regarding the rights and interests of third parties in the conclusion of a contract. From the text of the DCFR, it can be concluded that parties may enter into a contract only in their interests unless otherwise provided by contract or law and that contracts generally regulate only the rights and obligations between the parties that enter into them. The DCFR sets out exceptions, which mainly relate to the rules on representation and the rules on reservations for the benefit of a third party. The parties to a contract may not, for example, actually deprive a third party of property. If such provisions are present in a contract, they are dealt with partly under the rules on voidable contracts and partly under the rules of the DCFR Book B.I. on non-contractual liability for damages.[20]

A comparative analysis of EU legislation shows that each national legal system retains its method of defining the specifics of protecting the interests of third parties. There are some common characteristics. Most legal systems do not contain an explicit provision prohibiting parties from violating the rights of third parties. This can be explained by the fact that the principle of inviolability of third-party rights is part of the fundamental principle inherent in all legal systems of the inviolability of rights and interests and the prohibition of causing harm to others. Based on this rule, each of the national legal systems is recognised as more or less successful in preserving the rights and interests of third parties in the event of a contract.

Article 1:103 PECL also details the restriction of freedom of contract under mandatory rules. This provision allows the parties, where the applicable law is determined by the parties' choice of law, in the event of a dispute to choose to regulate their contractual relations using the PECL, excluding the application of national legal rules, except for those rules that apply independently of the law

[20] JÓZON, Mónika, 2020. Judicial governance by unfair contract terms law in the EU: Proposal for a New Research Agenda for Policy and Doctrine [online]. 1. October 2020. B.m.: Kluwer Law International BV. Available at: doi:10.54648/erpl2020054.

governing their contractual relations. Thus, the freedom of contract of the parties will not allow them to base their contract on PECL; to avoid compliance with other national, supranational and international rules of contract law, which always apply to the contract regardless of the applicable law. The freedom of the parties to a contract is thus systematically limited by fundamentally binding rules.[21] All EU legal systems recognise that mandatory rules impose restrictions on the freedom of contract. In theory, contracts that are contrary to fundamental morality or public policy cannot be challenged in court. All European legal systems, to varying degrees of explicit or implicit recognition, are aware of this rule. Several legal systems base the definition of what constitutes a valid contract on principles of morality and public policy. Illegal contracts are generally considered void. In English, Irish and Scottish law, contracts that are contrary to public policy or that are considered immoral are often defined as unenforceable before the courts. The parties in such a situation cannot claim either damages or performance in kind. The principle of freedom of contract has certain peculiarities about property rights, as the transfer of property rights very often affects the rights of third parties, so the parties to the contract are not free to create their own ground rules on property. Among other things, the DCFR states that the parties may not independently establish a prohibition on the alienation of property in the contract (Article VIII-5:101(1) DCFR).

When analysing the content of other principles of EU contract law, it is worth pointing out the importance of the principle of security in private law in general and contract law in particular.[22] The need for this principle can be explained by possible threats to the parties to contractual relations, which may be manifested in threats of violation of their rights and interests (both property and non-property), as well as violation of their specific legal status. Security, in particular, when planning the fulfilment of obligations in the long term, may be threatened by uncertainty about the outcome of the contract or its non-performance (improper performance) by the counterparty. This can be caused by the lack of effective

[21] BREMUS, Franziska and Tatsiana KLIATSKOVA, 2020. Legal harmonization, institutional quality, and countries' external positions: A sectoral analysis [online]. October 2020. B.m.: Elsevier BV. Available at: doi:10.1016/j.jimonfin.2020.102217.

[22] RUIZ, Infante. Francisco. Jose. & BLÁZQUEZ, Oliva. Francisco. 2022. Contracts contrary to fundamental principles and mandatory rules of European contract law. InDret. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4096658. 2, 1-56

legal regulation of certain relations, as well as by the conscious (or unconscious) actions (or inaction) of the counterparty, which one of the parties to the contract cannot foresee.

The UNIDROIT Principles define the following as the main components of contractual security: the binding force of contracts (except when the performance of a contract may adversely affect a party to the contract due to the prevailing circumstances) (Article 1.3). The same rule is defined in the CENTRAL Code (Art. IV.1 .2), in Art. 1.-1:103 DCFR; good faith in the performance of obligations (Art. 1.7 of the UNIDROIT Principles, Art. -1:103 DCFR); legal effect of the contract (special conditions, definitions in the contract related to interpretation, invalidity or performance) (Article 1.3 of the UNIDROIT Principles, Article 1.10 of the CENTRAL Code, Articles 1.-1:103 (1), 11.-7:301, II.-7:302 OF THE DCFR).[23] The DCFR also defines another component of contractual security - the availability of sufficient means (in combination with enforcement) to compensate for the non-performance of contractual obligations. The only aspect of contractual security that is mentioned in the UNIDROIT Principles but not in the DCFR is that third parties must respect the terms of the contract and can rely on its proper performance.

It is important to note that in some cases, the binding force of a contract is not considered a component of the security principle, but rather the content of the principle of contractual certainty. About the scope of the binding force of a treaty, it is important to determine what consequences the binding effect of the treaty may have on the parties. Naturally, the binding effect of a contract requires the parties to fulfil all obligations arising from the contract. However, they are also obliged to act in a manner that does not contradict the scope of their legal personality. The parties are obliged to fulfil the contract, but they must not do anything that could jeopardise the productivity of their activities. About clarifying the scope of the binding force of a contract, it is equally important to determine whether this is always an intangible principle or whether in certain situations it can be said to have a material aspect. This issue is related to the fact that a contract can be modified due to changes in circumstances (imprévision). Should

[23] VOLPATO, Annalisa, 2023. The legal effects of harmonised standards in EU law: From hard to soft law, and back? [online]. 18. July 2023. B.m.: Edward Elgar Publishing. Available at: doi:10.4337/9781802208917.00016.

the counterparties ignore an unforeseen change in circumstances to facilitate the mandatory performance of the contract at all costs, or is it permissible to reconsider its absolute nature in this case? The content of the harmonisation acts allows us to conclude that it is possible to revise the binding force of a treaty in the event of an unforeseen change in circumstances.[24]

In summary, it is important to remember that the fundamentals of contract law serve a practical, not a scientific purpose, ensuring proper and effective legal regulation in the area under study. For common types of contracts and common contractual difficulties, the effectiveness of the legal rules governing the dynamics of contractual relations is crucial by default. The fundamental concepts and structural elements of contract law are provided by the principles of contract law, which are crucial for the EU's ability to function as a supranational organisation, especially in the economic sphere.

4. Discussion

Creating common standards and regulations that will give businesses and consumers in each EU member state access to a unified legal framework is one way the EU hopes to harmonise its contract law. This may include harmonisation of consumer rights, contract law, product liability, dispute resolution and contract enforcement protocols. To facilitate communication and resolve possible disputes, the prospects also include further development of cooperation mechanisms between national legal systems and EU organisations. The expansion of international trade relations, the competitiveness of European businesses in the global market and the strengthening of the EU's internal market can all be explained by the harmonisation of contract law.

The harmonisation of contract law in the European Union can help to simplify international trade procedures by unifying legal norms and standards. For example, one of the results of harmonisation is the creation of a common legal framework such as the Common Electronic Commerce Regulation (CERP), which includes standard terms and conditions for transactions for the sale of goods and services. This allows businesses to conduct international transactions

[24] DIDZIULIS, Laurynas. 2021. EU digital content directive and evolution of Lithuanian contract law. Journal of Intellectual Property [Online] Information Technology and Electronic Commerce Law, Available at: https://www.jipitec.eu/archive/issues/jipitec-12-2-2021/5288.

with less legal risk and the cost of legal advice and adaptation to different national laws. Such harmonisation can also encourage the growth of small and medium-sized enterprises in the EU to engage in international trade, which contributes to the overall economic development of the region. The harmonisation of contract law in the European Union can help reduce the costs of complying with different legal requirements by unifying and simplifying business procedures. For example, unified contract standards, such as the Model Terms for International Commercial Contracts (INCOTERMS), allow businesses to avoid the complexities associated with different national laws and reduce the costs of legal advice and adaptation to different legal systems. Businesses are able to operate in a more transparent and predictable legal market, which increases their competitiveness. For example, the implementation of the Common European Sales Law (CESL) may contribute to the creation of a common legal market for goods and services in the EU, which will reduce barriers to international trade and increase the competitiveness of European businesses in the global market.[25]

In addition, by converging rules and procedures, the harmonisation of contract law in the European Union can increase the level of legal security for businesses and more effectively protect consumer rights. For example, a single standard of consumer protection is established across the EU through harmonised product liability regulations, such as the European Consumer Rights Directive. This makes it easier to settle disputes between companies and consumers and guarantees a more reliable and transparent market for all participants. In addition, harmonisation of contract law can lead to the development of uniform processes for resolving commercial disputes. This reduces legal risks and raises the bar for legal security for businesses.[26]

Another challenge that has many aspects is the harmonisation of contract law in the European Union. The European Union brings together countries with different languages and cultures, which makes it difficult to develop standard regulations that all member states would agree on. Reaching consensus on

[25] PRIER, Eric, Clifford MCCUE and Emily A. BOYKIN, 2021. Assessing European Union standardization: a descriptive analysis of voluntary ex ante transparency notices [online]. 9. April 2021. B.m.: Emerald. Available at: doi:10.1108/jopp-12-2019-0086

[26] CHEREDNYCHENKO, Olha O., 2021. Fundamental Rights, Contract Law and Transactional Justice [online]. 1. June 2021. B.m.: Walter de Gruyter GmbH. Available at: doi:10.1515/ercl-2021-2015

common rules and standards of contract law can be difficult, as the national legal systems of the Member States may have different traditions and views. Each country may have unique social, political and economic interests that shape its views on contract law. This can make it difficult to reach a consensus on common standards. Coordination between Member States and the various EU institutions is necessary for the adoption of standardised regulations in the EU, which can be a complex and lengthy process. Because of all these complexities, harmonisation of contract law in the EU is a difficult task and requires concessions and persistent attempts to get all stakeholders to agree on a common view.

5. Conclusions

Due to differences in contractual law systems and mismatches between counterparties, businesses engaged in cross-border transactions incur significant legal costs. This becomes a major obstacle to market expansion. In order to facilitate international economic turnover, the EU has unified and harmonised private international law, but this process requires careful consideration of national peculiarities. The trend of "Europeanisation of law", which implies an increasing influence of the EU on national private law through joint acts and other measures, is something that Western lawyers are paying attention to. The EU legal system is being harmonised and unified through this controversial process. As national legal systems differ, it is still difficult to achieve full harmonisation. The unification of EU contract law requires significant time, political and financial resources. In order to effectively develop and adopt a common European act in this area, it is necessary to gather sufficient facts, consider substitutes, assess their consequences and allocate political capital. The implications of these preparatory steps are complex and their value can only be realised if a European act is adopted that guarantees a reduction of the gap between legal systems. There are limitations, and this procedure should be done gradually, taking into account the legal and cultural traditions of the Member States. The general rules for concluding contracts are established by EU contract law. Their creation and implementation contribute to the growth of a coherent legal practice. It is important to understand these ideas to ensure that contractual relations in the EU are efficient and fair.

If permitted by the national legal system, the parties may, in the event of a dispute, choose to have the SCCP control the contractual relationship, as set out in Article 1:103 SCCP. This provision limits their freedom, as it requires them to comply with mandatory rules of contract law, which always apply regardless of the applicable law. Thus, the main mandatory rules systematically restrict the freedom of the parties to a contract. To protect consumer rights and streamline business processes, the EU has harmonised its contract law. This helps to reduce legal risks and facilitate international transactions by creating a single legal framework. Reconciling different national interests to reach a consensus on common rules can be challenging. All parties involved in this process must coordinate their activities and maintain a constant state of harmonisation.

REFERENCES

ABROSIMOV, Serhii, 2020. The Concept and Content of Adaptation of Ukrainian Civil Legislation to EU Legislation in the Field of Sales [online]. 31. December 2020. B.m.: Leonid Yuzkov Khmelnytskyi University of Management and Law. Available at: https://doi.org/10.37491/unz.75-76.23

BREMUS, Franziska and Tatsiana KLIATSKOVA, 2020. Legal harmonization, institutional quality, and countries' external positions: A sectoral analysis [online]. October 2020. B.m.: Elsevier BV. Available at: https://doi.org/10.1016/j.jimonfin.2020.102217

CHEREDNYCHENKO, Olha O., 2021. Fundamental Rights, Contract Law and Transactional Justice [online]. 1. June 2021. B.m.: Walter de Gruyter GmbH. Available at: https://doi.org/10.1515/ercl-2021-2015

CHERNIAK, Olena, 2023. Harmonization of EU legislation in the field of compensation for damage caused by minors [online]. 2023. B.m.: West Ukrainian National University. Available at: https://doi.org/10.35774/app2023.03.124.

DIDZIULIS, Laurynas. 2021. EU digital content directive and evolution of Lithuanian contract law. Journal of Intellectual Property [Online] Information Technology and Electronic Commerce Law, Available at: https://www.jipitec.eu/archive/issues/jipitec-12-2-2021/5288

FEDORENKO, Yurii, 2023. Formation and development of continental law and modern approaches to the norms of national legal systems of the EU [online]. 6. October 2023. B.m.: Kyiv University of Law of NAS of Ukraine. Available at: https://doi.org/10.36695/2219-5521.3.2023.50

HOUSKA, Daniel. 2020. Dusk over the European contract law? [online] The Lawyer Quarterly. Available at: https://tlq.ilaw.cas.cz/index.php/tlq/article/view/373

IVAKH, Maria. 2023. Harmonization of national civil legislation with EU law. Scientific Events of the Faculty of Law of the West Ukrainian National University. Available at: http://confuf.wunu.edu.ua/index.php/confuf/article/view/1065

JÓZON, Mónika, 2020. Judicial governance by unfair contract terms law in the EU: Proposal for a New Research Agenda for Policy and Doctrine [online]. 1. October 2020. B.m.: Kluwer Law International BV. Available at: https://doi.org/10.54648/erpl2020054

KOVALENKO, I., 2023. The impact of European law on national legislation and the need to harmonize contract law of Ukraine [online]. 28. August 2023. B.m.: Uzhhorod National University. Available at: https://doi.org/10.24144/2307-3322.2023.78.1.30

LATIFIANI, Dian, 2020. RENEWAL OF THE NATIONAL CONTRACT LAW [online]. 30. October 2020. B.m.: Institute of Research and Community Services Diponegoro University (LPPM UNDIP). Available at: https://doi.org/10.14710/jhp.8.2.137-150

MIŠĆENIĆ, Emilia. & HOFFMANN, Anna-Lena. 2020. The Role of Opening Clauses in Harmonization of EU Law: Example of The EU's General Data Protection Regulation (GDPR). EU and Comparative Law Issues and Challenges Series, 4, 44-61.

PANCHENKO, S. S. (2021). European Union law as a source of civil contract law. In 7 th Mogilian Legal Readings (pp. 24-29). Mykolaiv: Petro Mohyla Black Sea National University. Available at: https://chmnu.edu.ua/en.

PONCIBÒ, Cristina, 2020. A contract law for future generations [online]. 2020. B.m.: Centre for Evaluation in Education and Science (CEON/CEES). Available at: https://doi.org/10.5937/rkspp2002035p.

PRIER, Eric, Clifford MCCUE and Emily A. BOYKIN, 2021. Assessing European Union standardization: a descriptive analysis of voluntary ex ante transparency notices [online]. 9. April 2021. B.m.: Emerald. Available at: https://doi.org/10.1108/jopp-12-2019-0086

PURWANINGSIH, Sri and Agnes Maria Janni WIDYAWATI, 2023. Contract Law and Its Development (Form, Principles and Substance) [online]. 2023. B.m.: Atlantis Press SARL. Available at: https://doi.org/10.2991/978-2-38476-024-4_15

RUIZ, Infante. Francisco. Jose. & BLÁZQUEZ, Oliva. Francisco. 2022. Contracts contrary to fundamental principles and mandatory rules of European contract law. InDret. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4096658. 2, 1-56.

TSIURA, Vadym, Ernest GRAMATSKYY, Liudmyla PANOVA, Roman SABODASH and Valentyn BAZHANOV, 2023. Contract law in the conditions of recodification: modernity and future prospects [online]. 30. August 2023. B.m.: Amazonia Investiga. Available at: https://doi.org/10.34069/ai/2023.68.08.28

VOLPATO, Annalisa, 2023. The legal effects of harmonised standards in EU law: From hard to soft law, and back? [online]. 18. July 2023. B.m.: Edward Elgar Publishing. Available at: https://doi.org/10.4337/9781802208917.00016

YAROSHENKO, Oleg M., Olena Ye. LUTSENKO and Natalya M. VAPNYARCHUK, 2021. Salary optimisation in Ukraine in the context of the economy Europeanisation [online]. 17. September 2021. B.m.: National Academy of Legal Sciences of Ukraine. Available at: https://doi.org/10.37635/jnalsu.28(3).2021.224-237.

YAROSHENKO, Oleg M., Volodymyr M. STESHENKO, Hanna V. ANISIMOVA, Galina O. YAKOVLEVA and Mariia S. NABRUSKO, 2021. The impact of the European court of

human rights on the development of rights in health care [online]. 25. October 2021. B.m.: Emerald. Available at: https://doi.org/10.1108/ijhrh-03-2021-0078

ZIMMERMANN, Reinhard, 2020. The Significance of the Principles of European Contract Law [online]. 1. September 2020. B.m.: Kluwer Law International BV. Available at: https://doi.org/10.54648/erpl2020026

Data de submissão do artigo: 15/10/2024

Data de aprovação do artigo: 21/01/2025

Edição e propriedade:
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