Interpretation of EU Law

1. Subject and purpose

Neither primary nor secondary EU law contains interpretation rules similar to those in Arts 7–9 CISG, Arts 5:101–5:107 PECL, Arts 4.1–4.8 UNIDROIT PICC and Arts 31–33 VCLT (→ interpretation of international uniform law). Instead, the → European Court of Justice (ECJ) was created as an independent and supranational court with exclusive jurisdiction over the interpretation of European Community and Union law (Art 220 EC, now largely replaced by Art 19 TEU). This non-political body promotes unity, continuity and acceptance of EU law. The ECJ with its power to provide authoritative interpretation became a 'motor of integration' ensuring and extending the primacy of EU law.

The ECJ mainly uses the grammatical, systematic and purposive methods of interpretation. Von Savigny's fourth method, the historical-political approach, is rarely employed. The reasons for this are the often complex and incompletely published legislative history as well as the fact that European legislation often represents the result of compromises. However, the EU legislature does list recitals which the ECJ employs in its purpose-oriented interpretation. On the other hand the ECJ refuses to consider the minutes of the Commission, the Council or Parliament that are not reflected in the legislation (ECJ Case C-404/06 – *Quelle* [2008] ECR I-2685, para 32).

First and foremost, the ECJ uses the literal method. In particular, it uses coordinate versions of texts in the different official languages. This shows the influence of the French *Conseil d'Etat* which also explains the concise and deductive style of reasoning employed by the ECJ. This approach limits the Court's ability to make a contribution to legal theory and to the systematic development of European private law. The apodictic and self-referential nature of the judgments to some extent follows from the nature of the Court as an international panel of judges that has to reconcile different legal cultures and languages. It follows from this that an approach focused on the interpretation of the grammatical context and the analysis of common parlance within (autonomous) EU law must necessarily be limited.

This is why, crucially, the ECJ often employs purposive considerations, an approach not only used for resolving disputes caused by diverging versions of texts. This method is also suggested by the functional perspective chosen by the EU, trying to achieve the goals determined in the primary law, such as the creation of a common market. Considering the spirit and purpose of a provision as well as the comprehensive programme of the European Community can be problematic when different purposes (eg free market and protection interests) conflict. This applies to those directives that serve the overall interest of achieving the internal market but also address issues such as employee or consumer protection.

On the whole, the judgments often reflect *effet utile*. The practical effectiveness of EU law frequently seems to be the main objective of the court in its interpretation and development of law (→ principle of effectiveness). This approach can be witnessed in the extending of employment protection to part-time workers by classifying them as employees (ECJ Case 53/81 – *Levin* [1982] ECR 1035, para 15).

There is very little reference to → comparative law in the ECJ's judgments. References to the legal systems of Member States can more often be found in the opinions of the Advocate General. The lack of references to comparative law in the ECJ's judgments may appear somewhat surprising given that directives are often based on comparative law. It also seems natural to assume that a panel consisting of judges from different legal systems would employ this tool. However, comparative considerations are not explicitly incorporated in the judgments to prevent the EU's autonomous legal texts from being undermined by references to particular legal systems.

Nonetheless, comparative law has a role to play in filling gaps and developing general principles. For example, the ECJ explained state liability with reference to general legal principles, existing in international law and found in all the Member States (ECJ Joined Cases C-46/93 and C-48/93 – *Brasserie du pêcheur* [1996] ECR I-1029, paras 29 ff). Furthermore, Art 11(3) TEU/6(2) EU invites comparative references in providing that the common constitutional traditions of the Member States are a source of fundamental rights (see also Art 340(2) TFEU).

A distinctive feature of EU law is the fact that it is perceived of as an autonomous body of law. This is similar to the other Conventions over which the ECJ also has jurisdiction. In order for the rules and concepts of European law to be implemented consistently, their application has to be independent of national preconceptions. The Member States also have an obligation to uphold the autonomy of EU law. However, in the main it is the ECJ that creates interpretational guidelines having legally binding force (→ precedent, rule of). For this the ECJ depends on the willingness

and case-based obligation on Member State courts to refer cases according to Art 267 TFEU/ 234 EC.

2. Interpretation of primary law

Regarding law with constitutional status, the ECJ is willing to practice judicial activism. Judges are no longer *la bouche de la loi* as demanded by Montesquieu, but exceed the possible literal meaning and thus cross the line to the further development of law (→ judge-made law). Nowhere—not in the interpretation of EU law nor in other legal systems—is this line drawn clearly. However, a distinction should be drawn between interpretation and innovation since the judicial development of law demands an unintended regulatory gap and thus a higher effort of reasoning. According to Art 220(1) EC, which is now mainly replaced by Art 19(1)(I) TEU, the role of the judges of the ECJ is to develop EU law. This is justified on the basis that the Court has to 'ensure that in interpretation and application of this Treaty the law is observed' and the fact that the 'law' transcends the rules expressly stipulated in the treaties.

The most important legal principles developed through this process by the ECJ to complement the written primary law are the primacy (ECJ Case 26/62 – *Van Gend & Loos* [1963] ECR 3) and the direct effect of EU law (ECJ Case 6/64 – *Costa/E.N.E.L.* [1964] ECR 1141). Also significant are the application of fundamental rights in the EU (ECJ Case 29/69 – *Stauder/Stadt Ulm* [1969] ECR 419), the specification of fundamental freedoms (ECJ Case 120/78 – *Cassis de Dijon* [1979] ECR 649), state liability (ECJ Joined Cases C-6/90 and C-9/90 – *Francovich* [1991] ECR I-5357) and the extent of EU citizenship (ECJ Case C-184/99 – *Grzelczyk* [2001] ECR I-6193).

By developing these principles the Court is creating and specifying those elements of the rule of law required by a fully-fledged legal system. Ultimately, according to the conception of the ECJ, European law is not part of international law, which is characterized by a strong consideration of national sovereignty. Although concluded by way of an international agreement, the E(E)C Treaty is—in contrast to more common international treaties—the constitutional charter of an autonomous community based on the rule of law (ECJ Opinion 1/91 – *EEA I* [1991] ECR I-6079, para 21). This is why the ECJ expounded in *Francovich* that state liability is inherent in the EU legal system.

Case law regarding the effects of → directives is also fundamental. For example, once the time limit for implementation has expired, a directive can have a 'vertical' direct effect for the state. However, a direct 'horizontal' effect, ie between private parties, does not exist (ECJ Joined Cases C-397/01 to C-403/01 – *Pfeiffer* [2004] ECR I-8835, para 108). This rule is based on the systematic reasoning that a horizontal effect of directives would override the distinction between directives and regulations set out in the EC Treaty and now in the TFEU (ECJ Case C-91/92 – *Faccini Dori* [1994] ECR I-3325, para 24).

3. Rules of interpretation for national courts

These legal developments on the constitutional level affect European private law. Besides the relevance of the state liability doctrine for the law of torts, this is also true for the obligation of national courts to interpret national law in accordance with European law. Acting as a kind of meta-rule, this influences and controls the four above-mentioned methods of interpretation and does so in a way that is similar to the interpretation in conformity with the constitution (*verfassungskonforme Auslegung*) known to German law. Furthermore, the obligation of the Member States to interpret law in accordance with European law includes the compatibility with primary law and the conformity with secondary law. In particular, the Member States' courts are obliged to interpret their laws in a way that conforms to the directives. This has to be done by applying their own national methods of interpretation (ECJ Joined Cases C-397/01 to C-403/01 – *Pfeiffer* [2004] ECR I-8835, para 116).

Accordingly, the national law has to be interpreted on the basis of the wording and the purpose of the directive in question as far as feasible under national rules (ECJ Case C-106/89 – *Marleasing* [1990] ECR I-4135, para 8; also ECJ Case 14/83 – *von Colson and Kamann* [1984] ECR 1891, para 28). Such interpretation in accordance with a directive can directly affect and, therefore, disadvantage private individuals. This leads, in effect, to a horizontal effect which is otherwise excluded. The more generously this way of interpretation is permitted, the more the actual scope of state liability for legislative injustice is minimized (cf, however, for a mistake by the judiciary ECJ Case C-224/01 – *Köbler* [2003] ECR I-10239; ECJ Case C-173/03 – *Traghetti del Mediterraneo* [2006] ECR I-5177).

The obligation to interpret national law in conformity with directives, which commences upon expiration of the time limit for implementation (ECJ Case C-456/9 – *Centrosteel* [2000] ECR I-6007, para 17), is a consequence of the obligation to general loyalty under Art 4 TEU as the main replacement for Art 10 EC, Art 15(6)(I)(d)

TEU as the main replacement for Art 4(3) EU, and the obligation to a precise transposition of directives under Art 288 TFEU/249(3) EC. Because it allows the national court to guarantee full effect of European law within its jurisdiction, this obligation is also 'inherent' in the treaties (see ECJ Joined Cases C-397/01 to C-403/01 – *Pfeiffer* [2004] ECR I-8835, para 114).

The primacy of an interpretation and development of law in accordance with European law, which applies to the entire national law, is limited by the allocation of rights and duties between legislature and judiciary. Therefore, the obligation to interpret in conformity with a directive must not lead to a *contra legem* interpretation of a national norm (ECJ Case C-212/04 – *Adeneler* [2006] ECR I-6057, para 110). In such a case, the national courts have to refer the norm for examination to the ECJ or declare it inapplicable. (The underlying principle of separation of powers also applies at the EU level. The ECJ cannot 'cure' Union law that is contrary to primary law by way of interpretation, but has to declare it void in the course of an action for nullity or a reference for a preliminary ruling, ECJ Case 314/85 – *Foto-Frost* [1987] ECR 4199 4230 ff). In order to determine the appropriate understanding of a directive, a national court does not only have to observe the judgments of the ECJ, but also—as far as possible—the interpretation practised in other Member States.

4. Range of interpretation concerning secondary law

a) General

With the exception of the decisions mentioned above, where the ECJ is regularly practising constitutional activism, the Court usually oscillates between *effet utile* orientation and judicial restraint—this being the reason why the decisions are in practice often hard to predict. Examples of judicial activism in private law are the decisions in ECJ Case C-168/00 – *Leitner* [2002] ECR I-2631, according to which Art 5 Package Travel Directive (Dir 90/314) also constitutes a claim for non-material damages and ECJ Case C-350/03 – *Schulte* [2005] ECR I-9215 and ECJ Case C-229/04 – *Crailsheimer Volksbank* [2005] ECR I-9273, dealing with consumer rights in a credit-financed sales contract of real estate according to the Doorstep Selling Directive (Dir 85/577). The ECJ, which first and foremost is a court in constitutional and administrative matters, employs self-restraint in civil cases. Such an approach also allows the ECJ to limit the increasing number of preliminary rulings according to Art 267 TFEU/234 EC and thereby ease the strain on its (adjudicative) capacity.

b) Dealing with catch-all clauses

The desire to ease the strain on its capacity also explains ECJ Case C-237/02 – *Freiburger Kommunalbauten* [2004] ECR I-3403 which authorizes the national court to decide whether a pre-formulated contractual term is unfair in terms of Art 3(1) Dir 93/13. On the other hand, ECJ Joined Cases C-240/98 to 244/98 – *Océano Grupo* [2000] ECR I-4941 and ECJ Case C-473/00 – *Cofidis* [2002] ECR I-10875 suggested a deeper review of contractual terms by the ECJ itself. However, in *Océano Grupo* the jurisdiction clause in question challenged the effectiveness of legal protection by the courts regardless of the type of contract. This is why the ECJ was able to affirm the unfairness of the contract clause. In *Cofidis*, the ECJ then declared a limitation period in consumer credit law, as contained in the French *Code de la consummation*, to be incompatible with Dir 93/13, due to the Union law principle of effectiveness, although the directive itself does not stipulate any periods of limitation or foreclosures.

In *Freiburger Kommunalbauten* the Court draws a distinction based on whether a contractual term can be found to be unfair without examining all contractual circumstances and without evaluating the advantages and disadvantages of the contractual term according to national law. In accordance with *Freiburger Kommunalbauten* it is therefore for the ECJ to interpret the 'general criteria' that are used in the directive in order to define the concept of unfairness. The actual examination of contractual terms, however, is the task of the national courts. Nevertheless, the answer to the question of how exactly to distinguish this competence remains as unclear as the general criteria to be used in reviewing contractual terms for unfairness. Any social, political or economic consequences are left out of consideration by the ECJ because their observation would require examining the national particularities.

c) Implementation by over-compliance—gold-plating

Sometimes referred to as the practice of gold-plating, a particular problem is presented by the transposition of directives beyond the minimal level of protection required in the case of minimum harmonization (→ consumers and consumer protection law) or when the scope of a directive is extended in the course of national transpositions. The modernization of the German law of obligations led to many transposi-

tions of this nature in the field of consumer law. This raised the question of whether a divided interpretation or a consistent one should be employed.

In a case involving doorstep sales, the German Federal Supreme Court (BGH) decided in favour of the latter (BGH 9 April 2002, BGHZ 150, 248). In contrast to the directive, the → *Bürgerliches Gesetzbuch* (BGB) does not require the contract to be concluded in a typical doorstep situation for a right of withdrawal to arise (§ 355 BGB). According to § 312(1)1 BGB, it is sufficient that the contract was initiated in such a situation and concluded later. As the BGH points out, the need of coherence and the prevention of contradictory valuations are the arguments against a divided interpretation.

In ECJ Case C-3/04 – *Poseidon Chartering* [2006] ECR I-2505, the ECJ affirmed that a reference to the ECJ is possible in this context. The case concerned the implementation of the Commercial Agents Directive (Dir 86/653) in the → *Burgerlijk Wetboek* (BW). The ECJ argued that it is in the Community interest to avoid divergences and to interpret terms consistently. Furthermore, the ECJ only controls the relevance of questions referred to it for a preliminary ruling to a limited extent. The ECJ will only reject an application when the requested interpretation is self-evidently not related to the reality or the subject matter of the initial lawsuit or when the question is of general or hypothetical nature. This adds to an extensive influence of the ECJ on, for example, sales law (→ sale of consumer goods), which is implemented beyond the minimal level of obligation in the German civil code (→ *Bürgerliches Gesetzbuch* (BGB)), and opens a dialogue between the ECJ and the national courts—also concerning the interpretation of national law.

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Hannes Rösler

Interpretation of International Uniform Law

1. Fundamental issues of interpretation and application of international uniform law

In order to promote greater legal certainty through the international unification of laws, the mere adoption of conventions on → uniform law is insufficient. It is also necessary to ensure the uniform application and interpretation of such conventions by the courts. Although legal scholars and courts do not dispute the necessity of uniform application and interpretation, legal practice shows a clear homeward trend that is likely to endanger the project of legal unification. Of the factors which are crucial to achieving uniform application and interpretation, three stand out in particular. First, an autonomous definition of legal terms is required that is not overly infused with preconceptions imported from the respective jurist's domestic legal education. Secondly, the autonomous meaning of terms ought not to be discerned through application of domestic legal methodology. Instead, the interpretation must be found through an international, autonomous methodology. Thirdly, international uniform application of conventions requires that courts pay due regard to the findings of other countries' courts. Article 7(1) of the CISG, as well as similar provisions in other conventions, oblige contracting states and their courts to act accordingly. However, considering foreign courts' rulings not only requires the willingness of domestic courts to do so, but also the access to foreign judgments and the ability to understand them.

As to uniform private law conventions (regarding the interpretation of Union law see: → interpretation of EU law), a dichotomy in the nature of these conventions affects the choice of method of interpretation. While these conventions aim at governing the legal relations be-

tween private persons, the source of law is an international treaty, obliging contracting states to harmonize their respective laws. Due to the lack of an authoritative international judiciary, it is left to domestic courts to rule on these conventions. Moreover, these courts must obey their respective constitutional provisions on the relationship of public international law and domestic law, which may significantly influence the interpretation of conventions.

2. Applicable rules of interpretation

Before the entry into force of the Vienna Convention on the Law of Treaties (VCLT), legal scholarship disagreed as to whether the public international law rules on the interpretation of treaties could apply to uniform law conventions. However, after the VCLT (which does not exclude uniform law conventions) entered into force, the applicability of Arts 31 to 33 of the VCLT is now beyond serious challenge. Even where the Vienna Convention itself is not applicable due to its limited temporal scope (see Art 4 VCLT), its rules on interpretation apply as part of customary international law, as the International Court of Justice has confirmed (see *Oil Platforms (Islamic Republic of Iran v United States of America), Preliminary Objection, Judgment* [1996] ICJ 803 para 23).

The criticism regarding the application of public international law rules on the interpretation of treaties is founded on the argument that these rules are addressed to legal relations between states, but not between individuals. The former would be governed by the sovereign will of states, the latter by the → freedom of contract. The subjective and narrow interpretation oriented at the sovereign will of states would endanger the aim of → uniform law conventions, ie the creation of legal certainty in international commercial relations. Instead, a more objective understanding would be required. The rules of public international law should apply only when interpreting the concluding provisions that are directly aimed at states.

Even in the hypothetical absence of the VCLT, this criticism must be emphatically rejected. Those who oppose VCLT's application argue in favour of canons of construction yet to be developed by legal scholarship. It is questionable whether this method of interpretation *de lege ferenda* serves legal certainty. Though public international law rules on interpretation are indeed not suitable for contracts between private individuals, it is the uniform law treaty and not the → contract whose interpretation is in question here. In addition, the VCLT does not adhere to the distinction between contractual treaties and law-making treaties that sometimes appeared in international legal scholarship before the adoption of the VCLT. Instead, Art 31(1) VCLT gives preference to the objective literal meaning over the subjective will of the parties as evidenced in the *travaux préparatoires*. VCLT rules on interpretation and resolution of conflicts between conventions are thus not only pertinent and applicable, but also widely accepted by courts in practice. However, it must be admitted that the applicability of the VCLT to many different types of treaties necessitates a certain flexibility which may give rise to conflicts with the interest in legal certainty. Nevertheless, the VCLT offers a framework upon which legal scholarship can further build.

3. Rules on the interpretation of treaties and their application to uniform private law conventions

According to Art 31(1) VCLT, a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. By adopting textual, contextual, and also purposive methods of construction, the VCLT takes an objective approach. As Art 32 VCLT makes clear, the original intent of the parties as reflected by the *travaux préparatoires* is only accepted as a supplementary means of interpretation when the methods under Art 31(1) leave the meaning ambiguous or obscure, or lead to a result which is manifestly absurd or unreasonable.

a) Textual interpretation

The starting point for treaty interpretation according to the Vienna Convention is the ordinary meaning of the treaty's terms at the time of its conclusion, unless the parties intended, per Art 31(4) VCLT, that a special meaning should be given to a term. However, even the determination of the ordinary meaning can be difficult in the case of a multilingual convention. Though Art 33 VCLT provides for some rules on the treatment of multilingual treaties, it cannot entirely solve problems arising from the use of several languages for the same text. If a treaty has been authenticated in two or more languages, the text in each language is equally official entailing a presumption that the terms of the treaty have the same meaning in each. If, nevertheless, ambiguities remain and cannot be eliminated by adherence to Arts 31 and 32 VCLT, an interpretation in the light of the treaty's object and purpose shall be decisive. Interpretation is by no means

limited to the lowest common denominator for all authentic textual versions. In the case of divergent meanings, it seems advisable to choose the text that best corresponds with the treaty's object and purpose. Despite some argument in legal scholarship before the adoption of the Vienna Convention, Art 33 VCLT does not privilege the languages that were used in drafting. Nevertheless, the drafting languages become determinative when the *travaux préparatoires* are consulted as a supplementary means of interpretation.

However, these prescriptions must be confined as far as it concerns the application of uniform law conventions in domestic courts—their primary field of application. The practitioner in general will neither be able nor competent to perform a comparison of all authenticated texts. Instead, he will rely on the authenticated text version in his national language, or even a mere official translation supplied by his government if no authenticated text version in this national language exists, even though the latter has no binding value under international law. To the extent that divergences exist between these texts, domestic courts may—depending on the mode of incorporation of international treaties into domestic law under their respective constitutions—be obliged to apply the official text version in their respective national language, thereby breaching international law. Even where the constitution prescribes an interpretation of domestic law in the light of international law, textual divergences will not be evident to the judge. Consequently it remains for legal scholarship to assist and clarify the interpretation of uniform law conventions.

b) Contextual interpretation

Article 31(2) and (3) of the VCLT further clarifies the meaning of 'context' as mentioned in para 1 of Art 31. In addition to the text of the treaty, including its preamble and annexes, para 2 additionally incorporates interpretative agreements or declarations made by one or more state parties. When considering interpretive declarations by the parties, it is necessary, however, to bear in mind the thin line separating interpretive declarations and reservations. Paragraph 3 enlarges the scope of materials to be used in contextual interpretation to a) specific (even informal) agreements the parties concluded subsequently with regard to the treaty, b) to the subsequent practice in the application of the treaty, and c) any relevant rules of international law applicable in the relations between the parties. Rules of international law in this sense comprise treaties, customary law and general principles of law, but not non-binding restatements. This provision thus offers at least to a certain extent a means to resolve terminological inconsistencies between different conventions (see 4. below). As the application of uniform law by courts is also part of the parties' subsequent practice in the sense of Art 31(3)(b) VCLT, a consistent application by courts can also become relevant for interpretation, obviating the need for recourse to provisions like Art 7(1) CISG. Nonetheless, it cannot be denied that subsections (a) and (b) of Art 31(3) have a certain subjective connotation, which is undesirable for the purpose of uniform law since the boundary between interpretation of a treaty and its revision is likely to be blurred.

c) Interpretation consistent with aims and purposes

Interpretation in the light of the convention's objective and purpose is of utmost importance with respect to uniform law conventions. Although Art 31(1) VCLT only mentions the treaty as a whole, it also applies to the treaty's individual provisions that must be read in the light of their relation to the whole treaty. According to the International Law Commission, the purpose of a given rule must be found within the parameters set by the plain meaning of its terms. Despite this strict textual approach, some international legal scholars endorse a more extensive or dynamic interpretation, especially for law-making treaties (and therefore, inter alia, uniform law conventions), that can be similarly found in European Union law. But examples also exist in case decisions, like the famous *Fothergill v Monarch Airlines* judgment (House of Lords [1980] 2 All ER 696) in which the court rejected on the basis of purposive considerations a possible result under a strict textual construction. Indeed—considering the difficulty of the revision of uniform instruments once they are adopted—a more dynamic interpretation would facilitate constant adjustment to changing economic needs and social values. But one should not forget that one would at the same time open up a wide discretion for judges, thus endangering the uniformity of treaty application. In addition, the adjustment to existing needs and values would face difficulties if the uniform instrument itself only reflects a minimum consensus among contracting states. Nevertheless, whether the wording is unambiguous or not is a question of degree and not to be assessed by a simple 'yes' or 'no'. Thus, whether a purposive argument can outweigh a reasonably precise plain meaning depends on the importance of the particular objective at issue.

d) Historical interpretation

Although Art 32 VCLT stipulates that preparatory works and the circumstances of the treaty's conclusion are only a supplementary means of interpretation, recourse to the *travaux préparatoires* actually plays an important role for the interpretation of uniform law conventions. This paradox, however, cannot be gainsaid insofar as the notion of ambiguity or obscurity in Art 32(a) VCLT is itself quite ambiguous. Compared to domestic legislative materials like records of parliamentary debates, whose interpretive value is doubtful at times, the quality of preparatory works published by the drafting organization generally gives a better clue as to the 'correct' understanding of the convention. Nonetheless, a textual interpretation that is buttressed by contextual and purposive arguments can hardly be rebutted by invocation of the parties' original intent as reflected in the *travaux préparatoires*. Even if recourse is made to the preparatory papers for an interpretation based on historical considerations, the result must be, to some extent, based on an interpretation consistent with Art 31 VCLT.

4. Additional methods and maxims of interpretation

International legal scholarship has suggested additional means of interpretation such as comparative interpretation for uniform law conventions. Though the Vienna Convention does not refer to them, they are not necessarily incompatible. Moreover, they can be used at least to a certain extent within the frame set by the abovementioned canons.

Several authors call for an interpretation that considers the use of terms in the context of the respective convention as well as in other similar conventions. The terminology in a whole field of uniform private law would be thereby harmonized, thus promoting the uniformity of application. Article 31(3)(c) VCLT is amenable to this approach, as long as the resulting interpretation is buttressed by context as well as object and purpose. However, this approach would require that all contracting states are also parties to the other conventions containing the same terminology. If the drafters intended to refer to the terminology of other conventions, this intent may be considered in the light of a historical interpretation to the extent permitted by Art 32 VCLT.

It remains unsettled in legal writing the extent to which → comparative law may itself furnish a separate canon of interpretation. It has been argued that comparative legal analysis helps to fix the reading of treaty provisions in the varying contexts of different domestic legal systems. Moreover, comparative analysis helps to identify, among all the possible solutions in domestic legal systems, the 'best' one or at least a solution that is common, and thus acceptable, to all contracting states. In general, extensive comparative legal reports are submitted during the drafting process of a convention, forming a part of the *travaux préparatoires* in the sense of Art 32 VCLT. Moreover, by its functional character, legal comparison helps to discern the underlying (social) conflict that the convention's rule addresses, thereby elucidating its object and purpose. But even in the case of identical wording, the necessity of an autonomous interpretation necessarily excludes automatically transferring findings regarding national law to uniform law conventions. Although comparative studies are therefore somewhat useful in the interpretive process, one should not forget that courts are generally not in a position to base their judgments on extensive comparative studies.

Legal maxims, like *lex specialis* or—in the case of subsequent revision—*lex posterior*, can apply when interpreting the same convention. Other legal maxims customary to some domestic legal systems, like *expressio unius*, *argumentum e contrario*, as well as general principles of logic are in conformity with the Vienna Convention. However, as to the former it is imperative to recall that they lack the mandatory character as found in some domestic legal systems. Their role is merely limited to arguments that can be referenced in systematic and purposive reasoning. The applicability of public international legal maxims, like *in dubio pro mitius*, or *contra proferentem*, to law-making treaties, and thus uniform law conventions, remains contested insofar as their existence is accepted at all.

5. Gap-filling and analogical reasoning

While more recent conventions provide rules for filling gaps within the respective conventions themselves (see Art 7(2) CISG), the extent to which gap-filling is permissible as to older conventions remains unsettled. Some authors reject the use of analogies in public international law founded upon sovereignty. However, one might wonder whether arguments based on the sovereign will of states are pertinent insofar as they concern uniform law conventions. In general, efforts to revise unsatisfactory conventions fail not because of the contentious positions of the contracting parties, but rather because of a lack of interest on the part of their respective domestic

policymakers. Otherwise, fundamental notions of justice, as well as the guarantee of uniform autonomous interpretation (instead of recourse to the respective applicable domestic law) speak in favour of gap-filling by the judge. Despite its merits, the admissibility of analogical reasoning varies widely among domestic legal systems. Therefore, it remains unclear as to which gaps in international conventions are amenable to the judicial use of analogical reasoning.

6. Conflict of conventions

As a large number of conventions govern similar subjects, there is potential for conflict among these conventions. When conflicts arise, they diminish legal certainty, thereby endangering the whole project of legal unification. The Vienna Convention offers limited help. Insofar as the parties do not themselves provide for a solution (eg by including compatibility clauses), the *lex posterior* principle as enshrined in Art 30(2) and (3) VCLT will govern the relationship. Nevertheless, 'mutual rights and obligations' under the older treaty remain valid in relation to states that did not join the more recent treaty. As far as they concern uniform law conventions that are not based on strict reciprocity, conflicting obligations must co-exist. If a state becomes a party to two incompatible uniform law conventions, it will necessarily breach its obligations under public international law if this conflict cannot be solved by interpretation. In that event, the judge himself must decide which convention to apply and which to ignore. Legal scholarship has tried to develop criteria to address this issue: (1) the more efficient convention should prevail over the less efficient; and (2) the more specific convention should prevail over the more general. Although this question remains unsettled, it is largely accepted that substantive uniform law conventions take priority over conventions on the conflict of laws. Purposive considerations and Art 31(3)(c) VCLT support this result.

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Jan Asmus Bischoff

Interpretation of Statutes, History of

1. History of statutory interpretation and its importance for European Private Law

European private law, like any other modern law, is laid down in written legal texts. Each of these rules must be interpreted in order to decide whether it applies to a given set of facts. The interpretative problems arising with regard to European private law primarily concern the → interpretation of EU law and the → interpretation of international uniform law. They also include the interpretation of national law in areas that have been harmonized by the implementation of → directives. By contrast, traditional public international law treaties (which are interpreted according to principles that have a certain overlap with those applied in the → interpretation of contracts in private law) are hardly of relevance in European private law.

So far, there is no consensus on the rules and principles of interpretation of European private law. One of the most pressing tasks of legal scholarship is therefore to develop a European legal method. This must include, inter alia, common categories, rules and principles of interpretation, whilst taking into account national methods—which themselves are part of a long and common European tradition that left its mark on the interpretative methods of modern EU law and international uniform law.

Tapping this tradition can help to find methodological solutions that have a chance of being generally accepted today and in the future. It lets us see the existing commonalities of national legal methods. Many commonly accepted rules and maxims of statutory interpretation can be traced back to the Middle Ages and sometimes even to ancient → Roman law. This includes features which had fallen into disuse at some stage of legal history but that are again of importance in EU law, like the notion of taking into account

the *effet utile* of a provision. Further maxims which are *prima facie* innovative have at least structurally analogous precursors in legal history, eg the 'doctrine of indirect effect' (ie the interpretation of national law in conformity with EU law) or the frequently suggested maxim, according to which European consumer law (→ consumers and consumer protection law) must be interpreted *in dubio pro consumatore*.

In a similar vein, the consistent rejection of certain methodological features across legal systems frequently the result of shared historical experiences that hold at least limited lessons for the future. Since the days of the → *Corpus Juris Civilis*, for example, legislatures have often tried to ensure that the courts were not to decide cases that were not clearly covered by the wording of a legislative provision. They did so by enacting prohibitions on interpretation or, alternatively, obligations to refer such cases to the legislative authorities. The practicability of such models always proved to be limited in the day-to-day business of lawyers, and it would be unwise to ignore such experiences in establishing a European legal method.

The historical perspective not only assists in uncovering similarities but also explains the differences between legal systems and helps to assess them. Structural divergences in national legal methods (such as variations in the taxonomy and classification of interpretative rules) can be ascribed to varying national developments of a model that was commonly accepted in Europe up to the late 18th century. Specific domestic rules of methodology can also be explained by reference to particular historical circumstances. A well-known example is the traditional reluctance of English law to take into account parliamentary debates in the interpretation of statutes, or the French particularity of giving the Foreign Office exclusive interpretative competence in the construction of international treaties. A historical perspective helps to understand the origin of such rules in the context of the national methodological tradition and legal culture. Conversely, it also shows that many of these particularities do not necessarily make sense, or at least are not compelling, in the context of European (private) law.

Although the history of legal method is of great relevance to the interpretation of European private law, it is a relatively young branch of the discipline of legal history. While there have long been some detailed examinations of individual aspects of the topic, major studies that cover various periods of history across legal systems have only been undertaken in the past two decades or so, possibly inspired by the ongoing legal developments in Europe.

2. Interpretation of legal rules in Roman law

We do not know much about the interpretation of legal texts in Greek antiquity. By contrast, the numerous provisions on interpretation in the → *Corpus Juris Civilis* give an indication as to how the matter was dealt with in ancient → Roman law. The compilers of *Justinian's* code slotted most of the relevant fragments into four titles of the codification, thereby mostly ignoring their provenance and their original context. The respective titles are C. 14,1 (*De legibus et constitutionibus principum et edictis*), D. 1,3 (*De legibus senatusque consultis et longa consuetudine*) and the two final titles of the Digest (D. 50,16 and 50,17). (*De verborum significatione*) contains altogether 246 fragments concerning the question of how to define certain legal terms and phrases—a catalogue of statutory definitions of concepts such as 'dispute', 'parents', 'heirs', 'debtor', 'insolvent' or 'gross culpability' that was to be used in the interpretation of statutes, contracts and wills. A host of more general interpretative maxims can be found in the title *De diversis regulis iuris antiqui* (D. 50,17) that consists of 211 *regulae iuris*. It is not clear what precise function these 'rules' had in Roman law, although it may be assumed that they served as a convenient shorthand for older legal doctrines and, as such, were relevant for legal practice.

Neither the classical jurists nor Justinian's compilers developed a comprehensive theory of legal interpretation. They did not even make a strict distinction between the rules for the construction of → wills, contracts (→ interpretation of contracts) and pieces of legislation. Various fragments of the C*orpus Juris* spelt out rules that contradicted each other. This was, for example, the case with two sources that proved to be extremely influential throughout European legal history. According to the *lex Scire leges* (D. 1,3,17), 'knowing statutes' does not mean 'to cling to their wording'. It is rather their reason and purpose that is decisive. By contrast, the *lex Ille aut ille* (D. 32,25,1), a fragment on the interpretation of wills, provided that in the case of a clearly and unambiguously worded legal text the intention of the author of the text was irrelevant: *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*.

Today we assume that many of the types of argument used in statutory interpretation in Roman law were influenced by 'the theory of *stasis*' of Greek rhetoric. A common *stasis* ('point at issue') corresponding to the two fragments just

cited concerns the relationship between the written word and the intention or 'will' of the legislator or the legislative text, ie between *verba* and *voluntas* or *scriptum* and *sententia*.

In the centuries following the fall of the Roman Empire, the somewhat incomprehensive and unsystematic interpretative maxims from the Codex and the Digest were forgotten. Neither the early medieval folk laws nor the early canon lawyers of the 7th and the 9th centuries, such as Isidor of Seville and Hincmar of Reims, concerned themselves with statutory interpretation. Up to the turn of the millennium there were only a few canon law maxims for cases of obvious contradictions between certain legal rules.

3. Statutory interpretation in the Middle Ages and in early modern law

In the wake of the rediscovery of the Digest in the 11th century the *regulae iuris* assumed a pivotal role in → legal scholarship that remained in place until the beginnings of the modern natural law movement. The glossators put D. 50,17 at the heart of academic teaching and produced a number of treatises concerning one or the other interpretative maxim whilst remaining faithful to the approach of the Roman lawyers in that they did not develop a comprehensive doctrine of interpretation. The working method of the glossators not only entailed a → reception of the Digest's rules and principles of statutory construction, but also generated new maxims of interpretation. From the 12th century onwards the sources that had been glossed received further marginal annotations, the so-called *brocardica* or *generalia*. These were short and succinct maxims with normative content which emerged from the pros and cons of academic discourse and summarized the content of a fragment of the *Corpus Iuris*. Towards the end of the century the first collections of legal brocards were published. They reproduced the maxims in systematic or alphabetic order, although without resolving contradictions between them. Before long lawyers stopped distinguishing clearly between the *regulae* which were the authoritative texts and the *brocardica* which were mere commentaries on these texts. For centuries these compilations of brocards, which set out dozens of interpretative maxims, remained an essential part of legal literature and provided practitioners with useful armouries of arguments in litigation.

A further strand of the European interpretative tradition can be traced back to → canon law. Like the Digest, two important books of the *Corpus Juris Canonici*, the *Liber Extra* (1234) and *Liber Sextus* (1298), closed with a title *De regulis iuris*. Most of the *regulae* spelt out therein had a counterpart in D. 50,17; roughly a fifth corresponded verbatim to a fragment in the Digest. Many of these were maxims of interpretation that were included in the widely used collections of legal brocards. Canon lawyers were particularly concerned with promoting the requirements of *aequitas* (equity) in interpreting statutes. Until the 16th century the *Liber Sextus* played an important role in the first year syllabus of many European law faculties, equalled only by the Institutes and the two concluding titles of the Digest.

From the 18th century onwards, the importance attached to the *regulae* and *brocardica* diminished. However, earlier legal writers had already begun to rationalize and systematize the heap of interpretative maxims handed down through the centuries. The legal commentators (→ legal scholarship) invented new classifications. From the mid-15th century onwards a number of textbook-style legal monographs with an exclusive focus on statutory interpretation were published in northern Italy. Although based on maxims of Roman law, this historical origin was no longer examined. Instead the basic categories of interpretation were developed and became more sophisticated, eg the distinction between 'declaring', 'extensive' and 'restrictive interpretation' (*interpretatio declarativa*, *extensiva et restrictiva*) which can be traced back to Bartolus.

The 16th century marked the beginning of the golden age of theories of interpretation. Questions of statutory construction were not only dealt with in specific treatises, but also at the outset of comprehensive overviews of the law and in special collections of arguments called 'topics'. The latter had emerged in the 12th century and became increasingly popular—with their help, lawyers found the 'place' (*topos*, *locus*) of the argument they needed. Well-known types of argument which are still used today included the *topoi ad absurdum*, *a simili*, *e contrario*, *ex materia*, *ex effectu* and *ex coniunctis*; the best known topic of this age was written by the Dutch jurist Nicolaus Everardus. Twenty-eight editions were published between 1516 and 1604, and 131 *topoi* were analysed over nearly 800 pages. These were still based on the Roman sources but they were ordered in a more accessible way and were enriched with examples drawn from ancient literature, particularly from rhetoric.

4. Interpretation of statutes according to the schools of natural law and the law of reason

The writers of the schools of modern natural law and the law of reason still drew on the same sources. Hugo Grotius and Samuel von Pufendorf were primarily interested in the interpretation of contracts; according to their view, this exercise was mostly aimed at ascertaining the intention of the parties. Christian Thomasius adopted this position in the interpretation of statutes. He became the ancestor of an approach that would become prevalent in the 19th century and that would be called 'intentionalist', 'originalist' or 'subjective' by today's lawyers. Even more importantly, Thomasius attempted to rationalize the unsystematic catalogues of arguments in the topics; he devised a new classification that distinguished between 'grammatical' and 'logical' aids to interpretation, the former being based on the wording of the statute and the latter being based on external factors, including the intentions of the legislature.

5. Methods of statutory interpretation in 19th century nation states

Up to the late 18th century similar rules and principles of statutory interpretation were applied all over Europe; even England was but a province of the → *ius commune* with respect to statutory interpretation: at the beginning of the 19th century, there was not a single interpretative maxim that did not have a counterpart in the continental theory of construction.

The unity of the European doctrine of statutory interpretation only broke up in the wake of the major → codifications. This was not necessarily owed to the scarce and fragmentary codification of particular rules of interpretation, such as §§ 46–49 of the Introduction to the → *Allgemeines Landrecht für die Preußischen Staaten (ALR)*, Arts 4 and 5 of the French → *Code civil* and §§ 6–9 of the Austrian → *Allgemeines Bürgerliches Gesetzbuch (ABGB)*. It was rather a consequence of the nationalization of → legal scholarship. Depending on the legal system, the interpretative maxims of Roman law were pushed back to a greater or lesser extent without ever being completely forgotten.

National legal methods developed their own taxonomies and theories of interpretation. For example, the distinction between *interpretatio authentica, usualis et doctrinalis* (developed by Bartolus and referring to the institutional framework of statutory interpretation and the competences that are attributed to the legislature, the judiciary and legal scholars, respectively) still prevails in France, although it does not perform a useful function in modern French law. In a similar vein, French doctrine has preserved the dichotomy of 'grammatical' and 'logical' interpretation that had been developed by the natural lawyers. In Germany this was slowly superseded by a categorization introduced by Friedrich Carl von Savigny that divided the aids to interpretation into four 'elements' ('grammatical', 'historical', 'systematic' and 'logical'). German legal methodology has also embraced another fundamental distinction first suggested by Savigny, the rigid conceptual separation of 'statutory interpretation' and 'further development of the law' (a euphemism for judicial law-making). This distinction has never gained prominence in France. It is an endless source of irritation for English and German lawyers that the → European Court of Justice (ECJ) has adopted the French terminology and claims to 'interpret' EU law even when it clearly engages in judicial law-making.

Despite the different terminologies and categorizations of national theories of interpretation, even the 19th and 20th centuries saw a number of common European trends in legal methodology. Until the late 18th century a fairly liberal approach to statutory interpretation had prevailed across the continent. The judiciary enjoyed the power to deviate from the literal meaning of statutes by way of 'extensive' or 'restrictive' interpretations. Towards the end of the century continental legal systems adopted a much more text-based legal method. This approach was perhaps not as rigid as has been assumed by later generations of scholars who gave it labels such as 'exegetical school' or 'conceptual jurisprudence'. Nevertheless, it entailed a manifest readjustment of the weight accorded to different interpretative criteria and, thus, a clear break with the interpretative methods of the earlier → *ius commune*. A similar, possibly even more radical, movement towards a 'literal' or 'plain meaning rule' occurred in English law with a certain time lag, ie in the first third of the 19th century. Similar parallels can be observed in the respective countermovements towards more 'liberal', 'purposive' approaches to statutory interpretation, which are open towards evaluative and normative considerations, including arguments of fairness, reasonableness and equity. In continental Europe, this renewed emphasis on purposive reasoning and policy arguments emerged in the last quarter of the 19th century, whilst in England it only regained acceptance in the second half of the 20th century. As a result, there is today a fundamental unity in the interpretative practice throughout the European legal systems, despite

the prevailing differences in classification and terminology displayed in national writings on statutory interpretation.

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Stefan Vogenauer

Invalidity

1. Degrees of invalidity

All European legal systems know different degrees of invalidity. These are distinguished on the basis of who may invoke the invalidity, how it is invoked and what its consequences are. Normally, the pertinent provisions do not define these degrees. It is left to legal scholarship to conceptualize them and to bring them into a coherent system. Legal scholarship has tackled this task since the 19th century. In contrast, a coherent system of degrees of invalidity was unknown to Roman law and the earlier *ius commune*. Today, European legal scholarship has to engage in this task for the following three reasons. First, there are terminological and conceptual differences between the different European legal systems which must be understood. Secondly, there is a multitude of different terms at the European level that are in need of systematization: the draft of a → *Code Européen des Contrats (Avant–Projet)*, for example, speaks of *nullité*, *inefficacité*, *inexistence*, *annulation*, *rescision*, *extinction*, *[cesser] d'avoir effet*. Finally, legal scholarship should work towards a coherent use of the different degrees of invalidity in future projects of legal harmonization.

2. What are the objects of invalidity?

Invalidity is often discussed within the general principles of contract law (Italy, England, France) or as a problem relating to *Rechtsgeschäfte* (private → juridical act: Germany). As the → Principles of European Contract Law (PECL) and the → UNIDROIT Principles of International Commercial Contracts (PICC) are confined to contract law they only deal with the invalidity of contracts. Yet, judgments, statutes or administrative acts may also be invalid. When bringing the degrees of invalidity into a coherent system should these legal acts therefore also be included? There are, indeed, common historical roots: the action for retrial of a case, for instance, developed from the Roman *restitutio in integrum*, and the *restitutio in integrum* was also applicable if a contract was to be set aside on the basis of one of the contract parties being a minor. However, it would lead to a level of abstraction too high for practical purposes if one tried to bring the degrees of invalidity for all legal acts into one coherent system; and such attempts have in the past, indeed, proven to be unsuccessful.

Even within contract law and the rules relating to *Rechtsgeschäfte* (→ juridical act) one will often find special rules for the invalidity of special legal acts, such as for example in family law (marriages), → succession law (→ wills), labour law (contracts of employment) or company law (shareholders' resolutions and articles of incorporation). In such cases, however, the question as to who may invoke the invalidity, how it is invoked, and what its consequences are may receive different answers. European legal scholarship needs to identify the reasons which justify such departures from the general principles. Only then will it be possible to pave the ground for a coherent intellectual integration of these exceptions in future attempts at legal harmonization.

If the parties to an invalid contract have already exchanged their performances, the contract may be unwound (→ unwinding of contracts). Invalidity and the process of unwinding are distinct. Only legal acts can be invalid. The performance of a contract does not need to be a legal act. It may also be a real act which can be undone but which cannot be invalid. Moreover, the questions of the invalidity of a contract and of its unwinding are often conceptualized differently. Nullity is a degree of invalidity; it does not describe the process of unwinding the contract. Whether a contract is null and void is a question of contract law; a contract which is null and void has to be unwound, and that is a question of the law of restitution, or unjustified enrichment. In other instances, invalidity and the process of unwinding the contract are not as clearly separated and conceptual overlaps exist: the Spanish *acción de nulidad* aims at nullifying a contract, eg

for mistake, and is at the same time directed at undoing the contract; in England if a party wishes to rescind and, thus, to invalidate a contract, it has to make *restitutio in integrum*, and the term rescission is thus often used also to include the process of unwinding the contract. Finally, the PECL and UNIDROIT PICC, as part of their respective rules on validity, also deal with the unwinding of the contract as an effect of invalidity.

3. What are the reasons for invalidity?

In their chapter on validity, the PECL name the classical grounds for invalidity: lack of → capacity, immorality, → illegality of contracts, → mistake, → fraud and threats. All of these defects exist at the time of formation of the contract and avoid it *ex tunc*. Thus, invalidity seems to consist of three elements: it nullifies the contract, it has retrospective effect and the reason for invoking it exists at the time of the formation of the contract. The literature in many European legal systems follows a similar concept, and in Germany one finds a parallel approach to the invalidity of *Rechtsgeschäfte*. European legal scholarship, however, needs to be aware of its limits. For a number of reasons these three elements are only an approximation to, but not a definition of, invalidity: if one wanted to systematize the possible defects that may arise in the formation of contracts, invalidity is the wrong concept to start with as it denotes a consequence and not a defect. Fulfilment of a resolutive → condition, for example, also invalidates it even though it occurs only after the contract has been concluded. On the other hand, not all initial defects are included (eg → impossibility, initial) but only those which nullify the contract *ex tunc*. There is also no correlation between the time of a defect and its effect, as many legal systems hold that defects in the formation of contracts of employment, for example, only operate prospectively. If one were to focus only on the nullifying effect in order to define invalidity, then unenforceability would be excluded (which is, at least in England and Scotland, considered to be a degree of invalidity); in addition, all cases in which the parties are only excused from performing of the contract (initial impossibility, → non-performance) would equally be excluded. Similarly, the PECL in their chapter on validity refer to illegality as a reason for invalidity, but in their chapter on illegality they designate illegal contracts only as ineffective and provide a flexible list of degrees of invalidity, including unenforceability.

Invalidity should be defined as a response whereby an invalid contract is understood as either failing (fully or partially) to create its intended legal effects or as losing them subsequently. A ground for invalidity is a cause that generates such response. According to this definition unenforceability is a degree of invalidity. This definition simplifies comparison: today it is more and more frequently acknowledged that termination for non-performance and initial impossibility do not nullify a contract; they merely excuse the parties from making performance, and a terminated contract does not allow the parties to keep what they received under the contract (Germany). Yet, in some European legal systems initial impossibility still renders the contract void (France, Italy, Portugal, Hungary), and in others termination annuls the contract *ex tunc* (France, Spain, Austria). With the proposed definition, these differences only appear as different degrees of invalidity. They do not demarcate a fundamental divide in the approaches to initial impossibility and termination. The proposed definition also simplifies future efforts of legal harmonization as it provides draftsmen with a graded system of degrees of invalidity to choose from. Finally, the definition does not stand in opposition to any legal system in Europe. Even though they all make use of the concept of invalidity, they do not define it as a generic term; nor do they presuppose a certain definition. European legal scholarship is free to develop a concept of invalidity that best serves the purposes of comparative research and legal harmonization.

4. Who may invoke the invalidity?

If only one of the parties can invoke the invalidity this is referred to as relative invalidity. The invalidity is absolute if either party, or even third parties, may rely on it. Sometimes only certain third parties may invoke the invalidity, as is the case with challenges to a will. This may also be referred to as relative invalidity. The borderlines between absolute and relative invalidity, on the one hand, and between voidness and voidability, on the other hand correlate in most, but not all, cases. Absolute invalidity does not necessarily equal voidness just as relative invalidity does not necessarily equal voidability. Under the PECL illegality can have the effect that only one party is barred from enforcing the contract. Invalidity is thus relative in such cases. However, the judge will consider *ex officio* that the contract is only enforceable by one party. The contract is neither void nor voidable. In Germany, if a marriage has been entered into although impediments to marriage existed, the marriage may be annulled by judicial decision. It is voidable. Yet an action can

be filed by a public authority, and this corresponds to an absolute invalidity, as the public authority will represent the general public.

Whether a contract is absolutely or relatively invalid depends on the policy considerations underlying each individual ground for invalidity: does it protect the interests of the general public or only those of a specific person? European legal systems find different answers to these questions for the different grounds of invalidity, as for example in the case of lack of → capacity (absolute: Germany, Poland, Greece; relative: France, Italy, the Netherlands) and unconscionability (unfair advantage-taking) (absolute: Germany; relative: France, Italy, Poland, Hungary, the Netherlands, PECL).

5. How is invalidity invoked?

In some cases one party, or a third party, needs to take special steps before the legal act in question can be disregarded; in other cases invalidity may be taken into account without such special steps having to be taken. The former is true for voidability, the latter for voidness. The distinction between void and voidable acts is known to most legal systems (Portugal, Italy, England, Scotland, Ireland, the Netherlands, Germany, PECL, UNIDROIT PICC, Draft → Common Frame of Reference (DCFR). However, the term 'void' does not only point to the fact that the act is considered automatically as invalid, but it also denotes that it is null and void in every respect *ab initio*. Thus, the term 'void' also points to the consequences of this degree of invalidity. Moreover, voidness is not the only degree of invalidity which will take effect without the need first to invalidate the legal act: the same is true for unenforceability.

There are different ways to rescind a voidable contract. Many legal systems regard avoidance as a judicial remedy: the party who is entitled to ask for the contract to be avoided has to bring an action, and only the judge may nullify the contract (France, Belgium, Greece, Spain). If an action is brought against this party, it may rely on the invalidity also by way of defence. These legal systems stand in the tradition of the → *ius commune*. During the time of the *ius commune* avoidance was also, as a rule, enforced by way of *actio* and *exceptio*. Yet, in recent times the idea has prevailed that avoidance is a self-help remedy: the contract is avoided by notice to the other party (Germany, Poland, PECL, UNIDROIT PICC, DCFR). Thus, the English discussion to abolish rescission as a self-help remedy (O'Sullivan) seems to be regressive. Dutch law recognizes both judicial rescission and rescission by notice, but the latter is the paradigmatic case. All legal systems which, as a rule, allow avoidance by notice provide for exceptions, especially for those → juridical acts that affect the status of a person or for acts affecting a multitude of parties. In Germany, for example, shareholders' resolutions in → stock corporations and marriages can only be invalidated judicially. Where rescission by notice is sufficient, usually no special form needs to be observed (PECL, UNIDROIT PICC, DCFR). In some legal systems the notice has to be in writing (Poland). In others a special form only needs to be observed when certain types of contracts are to be avoided, for example in Germany in case of the avoidance of a contract of inheritance. In addition to judicial avoidance and avoidance by notice, a third way to avoid juridical acts was known in legal history. Savigny discussed the possibility of avoidance in the form of an 'obligation to execute a legal act that is directed at the result that is contrary to an earlier legal act'. Today, this kind of avoidance is of little importance.

Many modern legal systems strictly distinguish between avoidance, termination for → nonperformance and a → right of withdrawal (England, Scotland, Germany). In these legal systems one only refers to avoidance if the contract is avoided *ex tunc*. Yet, avoidance has this narrow meaning only within the general principles of the law of contract. Outside of this field the term avoidance is often used in a much wider sense (Germany). In England the term rescission was until recently also used to encompass termination. If one simply defines rescission as that degree of invalidity of which a judge only takes account after one party has invalidated the contract, by notice for example, then there is no problem with including termination in such a wide concept of rescission.

The modern model rules do not draw further distinctions within avoidance, narrowly conceived (PECL, UNIDROIT PICC). Some European legal systems, however, still distinguish between different forms of avoidance, such as for example English law between rescission at law and at equity, and as Italy, France and the draft of a → *Code Européen des Contrats (Avant–Projet)* which all recognize a special type of avoidance for lesion.

Most European legal systems distinguish between voidness and voidability. However, there are exceptions (France, Spain). In France, for example, the distinction is rather drawn between *nullité absolue* and *nullité relative*. *Nullité absolue* is said to correspond to voidness, but it is a judicial remedy. To speak of nullity if the invalid-

ity has to be enforced by way of action seems at first sight surprising. But outside the field of general contract law other legal systems also refer to voidness, even though the invalidity needs to be enforced by means of a legal action: in Germany a court judgment may be void (*nichtig*), but the voidness has to be enforced by bringing an action (*Nichtigkeitsklage*). In Austria the same is true for void marriages.

It is generally accepted throughout Europe that non-compliance with a → formal requirement will make a contract void whereas defects in consent will make the contract only voidable. In contrast, there is again no agreement as to whether lack of → capacity and unconscionability (unfair advantage-taking) will lead to voidness or voidability. Under the PECL, unfair contract clauses which were not individually negotiated are voidable rather than void. In general, it will again depend on the policy considerations underlying the ground of invalidity whether a contract, or a contractual term, is void or only voidable: does it protect the interests of the general public or only those of a specific person? However, other considerations will also influence this decision. Important or complex legal acts and legal acts that affect a multitude of persons will often not simply be void but will need to be avoided by (perhaps formal) notice or by bringing an action.

6. What are the consequences of invalidity?

With regard to the consequences of invalidity there is first the question of whether it should work retrospectively or only prospectively. In general, the term 'void' entails *ex tunc* effect, as does avoidance for defects in the formation of a contract. However, all European legal systems know exceptions to this rule as, for example, in the case of contracts of employment or articles of incorporation.

Then there is the question of partial invalidity: if only part of a contract is invalid, will the rest of it remain in force? During the time of the *ius commune* it was deduced from the Roman sources that the invalidity was, as a rule, indeed only partial (*utile per inutile non vitiatur*). In Germany § 139 → *Bürgerliches Gesetzbuch* (BGB) departed from this rule: a partial invalidity will normally render the entire contract invalid. Yet, both case law and legal scholarship have, in accordance with the predominant position in Europe, again adopted the reverse position: if only part of a contract is invalid the rest of it will, as a rule, remain in force. The question of what factors will justify exceptions to this rule is answered differently within Europe: in some legal systems the will of the parties is decisive (Greece); in other jurisdictions the answer to this question depends on whether the invalidity concerns an integral part of the contract or not (France), or whether the part affected by invalidity and the remainder are inseparable (the Netherlands). Under the PECL, the UNIDROIT PICC and the DCFR, the answer to this question turns on reasonableness: the invalidity will not only be partial if it would be unreasonable to uphold the remaining contract. Finally, in all legal systems the policy considerations behind the ground for invalidity will be of importance.

Furthermore, there is the question of whether the invalidity of a contract will also affect the validity of a conveyance which was executed in fulfilment of the contract. Legal systems which adopt the principle of abstraction will, as a rule, answer this question in the negative (Germany, Scotland); legal systems where this principle is unknown will answer it, as a rule, in the affirmative (Italy, France, the Netherlands, Portugal). One may also make a distinction on the basis of whether the invalidity is final or whether there is a state of pendency. Finally, if one considers termination and withdrawal as being merely different degrees of invalidity, further distinctions have to be drawn concerning the effect of these remedies for the contract. Voidness and voidability regularly nullify the contract *ex tunc* in every respect. Termination, as a rule, nullifies the contract *ex tunc* in so far as it provides a cause allowing the parties to keep what they have received under the contract: the contract will have to be unwound. In other respects, eg with regard to limitation, exclusion, and arbitration clauses, termination usually only operates prospectively.

7. How can an invalid contract be rescued?

All European legal systems provide for various instruments to remedy invalidity, eg convalescence, conversion, ratification and confirmation. Furthermore, in many European legal systems and according to the PECL, an interpretation which leaves the contract intact is to be preferred over an interpretation which would render it invalid.

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Phillip Hellwege

Investment Funds

1. Meaning and development of investment companies

Investment funds serve as legal entities for joint investment, especially in securities. They enable investors to spread the investment risk by investing small amounts. At the end of 2007, almost €8 trillion (€7,909 billion) were held by European investment funds. Due to the financial crisis, this value was reduced by almost two trillion Euros to €6.088 trillion in 2008, while by the end of 2010 the amount had risen again to €8.025 trillion. Equity was the class of assets that experienced the sharpest decline, although it still remains the most important investment type. Quite remarkably, a truly European market for investment funds has emerged. The largest European market for investment funds is in Luxembourg, followed by France, Germany, Ireland and the United Kingdom. In 2006, Luxembourg ranked as the world's second largest location for investment funds, trailing only behind the United States. The bulk of the investment funds in Europe are subject to the European → directive relevant in this regard.

The origins of the investment business go back to the 19th century. As early as the first half of the 19th century, business trusts in the United States were in practice closely linked to the insurance business and many banks were founded as 'Trust & Banking Companies'. In Europe, the first investment companies emerged in the second half of the 19th century in Scotland and England. They shared many characteristics with the Anglo-Saxon → trust. Later, in the 19th century, the idea of collective investment in investment companies spread to continental Europe, namely to Switzerland and the Netherlands. It seems that in Germany, two entities existed in the 1920s which could be classified as investment funds. At the beginning of the 1930s, an attempt was made to establish so-called capital management companies. Ultimately this led to the tax obstacles for investment funds merely being relaxed rather than abolished, and investment funds only asserted themselves in Germany after World War II. Investment funds were codified for the first time in the United States with the Investment Company Act of 1940, which heavily influenced the German Investment Companies Act of 1957.

2. European regulations

At the European level, investment funds have since 1985 been subject to the directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS Directive, Dir 85/611), which was revised several times before being substituted recently by Dir 2009/65. The UCITS Directive was one of the first directives to achieve the desired internal market and, in particular, provides for a → European passport for investment funds. In November 2006, the European Commission issued a White Paper as part of a fundamental review of the UCITS Directive. One question currently under review is whether to harmonize investment funds not currently covered by the UCITS Directive, such as open-ended real estate investment funds. This would make all investment funds subject to common rules, thus entitling them to a European passport. A further proposition is to facilitate the investment by professional investors in non-mutual funds and to liberalize such cross-border transactions. Finally, new rules are being put forward to facilitate cross-border merger of funds.

Directive 2009/65 consolidates the text of the UCITS Directive and carefully develops the UCITS Directive itself. The numerous amendments to the UCITS Directive in 1985 are integrated in the new UCITS Directive. Furthermore, the new directive includes provisions for national and cross-border mergers of investment funds. Also included are new provisions for master/feeder structures, in which a UCITS (feeder-UCITS) invests all or almost all assets in another UCITS (master-UCITS). Another focus is on the provisions of investor information. The reporting requirements, which make possible the Euro-

pean-wide distribution of UCITS, have been simplified and improved.

Undertakings for the collective investment in transferable securities (UCITS) have the sole purpose of investing and managing joint accounts with funds that have been raised from the public. Under national law, the collective investment in transferable securities may assume a contractual form (managed by the management fund), a trust form (unit trusts) or the form of an investment company. The principle of risk diversification is essential. The investment policies and barriers are included in the UCITS Directive as well as in an implementing directive. Securities within the meaning of the UCITS Directive are shares and other securities equivalent to shares, bonds and other forms of securitized debt, and all other marketable securities that authorize the acquisition of securities within the meaning of the directive by subscription or exchange. UCITS are subject to approval and the approval is valid for all Member States. The safekeeping of the assets of a UCITS is transmitted to a depositary.

3. Historical development of selected national rules

The German law of investment, which was initially contained in the Investment Company Act of 1957 and is now found in the Investment Act, is characterized by the management of several investment funds through one company and, especially, the so-called investment triangle. In addition to the investment fund and the investor, the deposit bank is a compulsory part of the investment triangle. The investment company instructs the custodian with the safekeeping of the fund and the issuance and redemption of units on the subject. The involvement of a custodian is modelled on the US Investment Company Act of 1940, in terms of which the unit investment trusts must install a bank as trustee or custodian. According to the German legislation on investment companies, the UCITS Directive requires a depositary, which also has supervisory tasks. The redemption obligation and the prohibition on borrowing were also based on the US model and are now subject to the UCITS Directive.

In England, the UCITS Directive constituted an impetus for the creation of investment companies. The traditional unit trust schemes, in which the assets are held for the investors in trust, were also further developed. For unit trust schemes to participate in the European market using the single passport, special provisions for authorized unit trust schemes have been created. In order to comply with the rules of the UCITS Directive, the Financial Services Markets Act of 2000 prescribes that the functions of the trustees and the managers of unit trusts be separated.

Luxembourg's first investment fund was founded in the 1950s. Investment funds are now regulated by the *Loi du 20 décembre 2002 concernant les organismes de placement collectif*. The companies covered by the UCITS Directive are described as OPCVM (*organisme de placement collectif en valeurs mobilier soumises à la Directive 85/611*). Investment companies, described as SICAF (*société d'investissement à capital variable*), have been regulated since 1980 and are thus the oldest of their kind in the European Union.

In France, investment funds are regulated in the *Code monétaire et financier*, Art L 214-1-146. Much emphasis in French legal literature is placed on the regulation by the Financial Supervision Authority, the *Autorité des Marchés Financiers* (AMF). As is the case in Luxembourg, the investment companies are called SICAF. Other investment funds exist by the name of FCP (*Fonds Commun de Placement*).

4. Public and special funds

The European UCITS Directive regulates only those investment funds that raise money from the public. In principle, two types of investment companies exist, namely investment funds and special funds. Management in mutual funds is a sub-form of standard asset management. In Germany, special funds which are subject to the Investment Act are used particularly by private pension institutions as a special investment vehicle for pooled assets. These investment vehicles are thus aligned with a particular investment strategy. Since no investment in securities occurs in real estate investment funds, the latter are not subject to the UCITS Directive.

5. Use of investment funds for occupational and individual pensions

The use of investment funds as a vehicle for occupational and individual pensions has thus far not been regulated at the European level. The Pension Funds Directive regulates only → pension funds as vehicles for → occupational pensions. In its White Paper, the Commission nevertheless recognizes the importance of greater investment for retirement as a means of expanding the single market for investment funds. Internationally, the investment in investment funds is widespread in the context of individual and occupational pensions since no (biometric) guarantees must be given for preferred tax treatment. Based on this phenomenon, the European

investment community has provided a study of defined contributions for occupational pensions. In Germany, in order to obtain preferred tax treatment, the contributions made must be guaranteed. This also applies to an individual retirement under the *Riester* pension regulation as well as *cum grano salis* for occupational pensions. A pure defined contribution provision is not possible in Germany as both the Occupational Pensions Act and the related tax provisions in the German Tax Act require guarantees.

In Germany, since the *Riester* pension reform, individual pension investment companies (*Altersvorsorge-Sondervermögen*) are regulated in a special part of the Investment Act. Individual pension investment companies are barred from being used for a limited duration and from distributing their income. They are subject to specific investment provisions. The investment provisions set limits on investment in shares and property funds, although it is required that more than half the assets be invested in these two asset classes. The individual pension investment company has to offer the individual investor a retirement-savings plan. As with other descriptions in investment law, the description of the individual pension investment company is specially protected. In German practice, individual pension investment companies play only a minor role. They are not accepted as pension vehicles under the German Occupational Pension Act.

6. Publicity

Under the UCITS Directive, prospectuses and periodic reports are to be published. Investment funds are to inform potential and actual customers as well as the market by making available simplified and full prospectuses, as well as annual and a semi-annual reports. The simplified prospectus is to be handed over to potential subscribers before the conclusion of the contract. The essential elements of the simplified and the full prospectus are to be updated. Unlike the European insurance regulation, the UCITS Directive requires information regarding the investment policy of the investment fund to be made available. The revised UCITS Directive also provides for a revised version of the information requirements.

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Markus Roth

Investor Protection

1. Concept and scope of investor protection

For many centuries, investor protection has been the reaction to speculation, fraud on investors and stock exchange crashes. Laws for the protection of shareholders and investors have existed since the very beginning of the stock corporation and the stock exchanges. Traditionally, investor protection was primarily shareholder protection with some specific rules for stock exchange trading. True investor protection, ie protection of the investors who buy and sell publicly offered shares and debentures, has its roots in the United States securities regulations of the 1930s. Countries in Europe followed thereafter, first the United Kingdom and Belgium, and later France. In Germany, the concept of investor protection was only developed in the 1970s (Klaus J Hopt).

The concept of 'investor' reaches beyond investment in shares, debentures and investment funds and encompasses the investment in all publicly offered financial products. The concept of investor protection corresponds to this definition. The traditional shareholder protection by company law, ie protection within the organization, has been complemented with protection by securities regulation, ie protection on the markets. These markets no longer include just the stock exchanges but all relevant capital markets. The European term for securities regulation is

therefore → capital markets law, also encompassing → takeover law. In capital markets law, one can distinguish between investor protection in the primary market, ie issuance of the shares, and in the secondary markets, ie when the shares and financial products are traded.

Investor protection in a larger sense includes depositor protection, though in legal terms there is a fundamental difference between shareholders who are members of the company and creditors who are mere partners to a commercial contract. Yet for the investor there is little difference whether he entrusts his savings to a bank or invests in an investment fund or buys shares. The latter is, of course, the most risky investment, but it correspondingly also promises the highest yields. Even when buying shares, investors usually start by being the creditors of a bank that buys the shares for them at the stock exchange. Looking at the rules on the solidity and responsible behaviour of banks and other financial intermediaries that are also performing an important service for the investing public, investor protection by company law and capital markets law is complemented by protection of the investors through banking law and the law of financial intermediaries.

2. Functions of investor protection, corporate governance

Investor protection aims at both protection of the individual investor (or the investor public) as well as protection of the market, called 'functional investor protection'. Typical examples for individual investor protection can be found in stock corporation law, eg when individual shareholders or a minority of them have rights within the organization (voice) or on the market (exit, ie buying and selling). Yet individual investor protection also contributes to the good functioning of the capital markets and ultimately promotes the economy. In this sense, individual and functional investor protection are but two sides of the same coin. The key to investor protection is investor confidence as shown through all the long history of the companies and the stock exchanges. Telling examples are the tulip speculation in Amsterdam, the South Sea Bubble or the Mississippi Company and most recently the financial crisis of 2008–10. According to some writers, individual and functional confidence protection should be distinguished (Holger Fleischer). More recently, legislatures seem to prefer protecting the investors only via functional investor protection, ie without giving them individual rights or standing to sue. For example, this is the case for disclosure or the prohibition of market manipulation or stricter bank supervisory law as has been enacted everywhere as a consequence of the financial crisis. Though this is hardly ever openly conceded by the legislatures, it must be seen that most often this is done out of fear of incalculable financial risks and an opening of the floodgates to the courts. In any case, it is true that investor protection, like every legal protection, must not be exaggerated since otherwise dysfunctional effects arise. Thus investor protection against the wishes of the investor leads to paternalism, too much disclosure brings unnecessary financial burdens for the company or the bank, too much investor protection in the case of takeovers frightens off possible bidders and prevents bids that might be useful for the shareholders of the target company and for the economy as a whole. Similarly, at the stock exchange there must be segments with fewer requirements and investor protection, eg for start-up companies, risky investments and economically useful speculation.

The relevance of investor protection for the capital markets and the economy has long been well known. But more recently, American economists (Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer, Robert Vishny: LLSV) have even claimed that there is a close relationship between the degree and quality of investor protection in a country and its financial development, and they provide empirical data for this claim: '[L]egal protection of outside investors limits the extent of expropriation of such investors by corporate insiders, and thereby promotes financial development' (La Porta et al). They conclude that the Anglo-American legal orders are better than the continental European and other legal orders, in particular than the French and other Romanic ones. This is highly controversial—particularly, of course, in Europe—but also in the United States. One of the questions is causality, ie whether investor protection the cause of financial development or the other way around. Under the impression of the financial crisis, even the partisans of this new theory concede that their thesis concerning investor protection, market, competition and globalization, while being sound in general and for normal times, must still be tested empirically for, and possibly adapted to, crisis situations.

Investor protection is not the same thing as → corporate governance, though there are similarities. Corporate governance concerns not only the shareholders and investors, but also other persons or public goods involved in the governance of the company, such as labour or environment (stakeholders). But in corporate govern-

ance, too, the protection goes beyond the protection of individuals and groups and concerns the governance of the corporation more generally. While investor protection is basically a legal concept, corporate governance reaches out beyond law and is inherently interdisciplinary.

3. Typical investor risks

No investment is without risk. Typical investor risks are the risk of losing the investment, the information risk, the risk of investment administration, the risk of intermediation and the contract and price risk (Klaus J Hopt). The UK Financial Services Authority speaks of 'prudential risk, bad faith risk, complexity or unsuitability risk and performance risk', and one may add the systemic risk of the market (Holger Fleischer). In essence, the question is one of information and control.

Historically, the main risk for investors is the danger of totally or partly losing their investment in the company or their deposit with the bank or other financial intermediary. Share fraud and crashes of companies (eg Enron or Parmalat) or of banks and financial intermediaries (eg the German New Market or Lehmann Brothers 2008) are the most blatant forms of the risk of losing one's investment. But there are less obvious forms of this risk, such as disregard of shareholder rights in the companies, the looting of a company, the illegal transfer of company assets or profits by the controlling shareholders to themselves or to companies belonging to the same group (known as tunnelling), the so-called starving of shareholders by systematically refusing to pay out dividends or the illegal squeeze-out.

Investors need information not only on the company itself, but particularly also when they invest or when they hold an investment (information risk). Without → disclosure and → transparency, shareholders cannot make proper use of their rights in the company or of the chance to sell their shares and to reinvest their money in another company or investment. Small investors are usually not in a position to make sensible investment decisions by themselves; they need disclosure and advice from → financial intermediaries who are knowledgeable and not in a position of → conflict of interest.

The risk of investment administration lies in the various practices that work to the disadvantage of investors when the investment transaction is carried out (such as unnecessary fee-bringing transactions on behalf of the client, called churning), but also independently of a transaction (eg manipulation of the stock price or the market (→ market manipulation)).

The risk of intermediation arises, for example, if investors mandate their bank or another proxy to exercise their voting rights at the general meeting and the intermediary does not act in the interest of the investors. This risk exists particularly if the intermediary has a conflict of interest.

The contract and price risk concerns the price asked for and the business conditions offered by the companies, banks and other financial intermediaries. Part of this refers to the clauses of exoneration for liability for malperformance or a lack of or bad advice. Such clauses are often hidden in the standard contract terms found in the forms of the bank or financial intermediary.

4. Legal and extralegal instruments of investor protection

Investor protection, as well as any protection of the weaker party, eg of consumers, can be carried out in many different ways, partly by law, partly by extralegal instruments. The best investor protection is still the personal responsibility of investors themselves. Yet here the insights of modern behavioural finance must be taken into account. This is particularly relevant for the contract and price risk. In a market economy, the most important contract condition—the price—is left to the market, with the exception of usury and other extreme limits. As far as information is concerned, the personal responsibility of investors is the starting point. Investors may refuse information and advice or may nevertheless choose risky investments in hopes of benefiting from high yields. There is also a collective responsibility for market confidence, as shown by → private rule-making and codes of conduct.

Disclosure and transparency are the legal rules that enable investors and the market to judge for themselves how things are with the company and the investment. They are the least interventionist and conform most to the market economy. Mandatory disclosure rules have a long tradition. In company law, they date back to the Gladstonian reforms of 1844 in England. As far as the stock exchanges and the capital markets are concerned, the US securities regulations of the 1930s have been the model for all later capital markets laws and regulations in the world. Disclosure is only as good as it is reliable. Therefore, auditing, voluntary or mandatory, contributes towards creating and maintaining the confidence of investors and the market.

Investor protection rules of a very different kind exist in company and organizational laws (voice), in stock exchange and capital markets

laws (exit), in banking law and the law of financial intermediaries, including investment law and the law of banking, insurance and securities markets supervision. The depositor protection rules and various insurance schemes also belong here, as well as more generally the regulation of access to the market, market behaviour, competition and the separation of investment banks and credit banks.

Last but not least, general civil rules protect the investors, eg by liability imposed if company or capital markets law rules are infringed or in case of fraudulent behaviour. Procedural law is also important for investor protection, eg access to court, due process, reasonable length of proceedings and enforcement. Here there are particular weaknesses and gaps in the laws of many developing countries.

5. European harmonization of shareholder protection

European harmonization of the shareholder and investor protection law consists mainly of a considerable number of company law harmonization directives. Yet unlike the harmonization of stock exchange and capital markets law, company law harmonization is less advanced, though it is open to controversy as to whether this is good (→ competition between legal systems) or even legally mandated (subsidiarity principle in European law). In any case, it is a fact that European company law with a few exceptions covers only listed companies. Unlisted public companies, and even less so private companies, are not covered. Even for listed companies, core parts of company law and shareholder protection law are not or are only very selectively harmonized, eg the law of the company organs (→ board), the competences of the general meeting and the law of groups of companies. The plans of the → European Commission to harmonize core company law by a 5th Directive on the structure of the public company and by a 9th Directive on groups of companies have, for now, been abandoned. For details and more sources of investor protection and European company law, → company law and → stock corporation.

European company law usually aims, directly or indirectly, at the protection of shareholders. Examples are the 2nd Directive of 13 December 1976 (Dir 77/91); the so-called Capital Directive, which mandates the raising and maintenance of the capital for the company and most recently has become highly controversial; the 4th and 7th Directives of 25 July 1978 (Dir 78/660) and 13 June 1983 (Dir 83/349) concerning annual accounts and consolidated accounts; the 8th Directive on statutory audits of 10 April 1984 (Dir 84/253; this Directive has been replaced by the Directive of 17 May 2006 on statutory audits, Dir 2006/43); the Regulation on the application of international accounting standards of 19 July 2002 (Reg 1606/2002); and the two recommendations concerning the board of 14 December 2004 on board members' remuneration (Recommendation 2004/913, including the modification by the recommendation of 30 April 2009 (Recommendation 209/385) and of 15 February 2005 on directors and committees of the board (Recommendation 2005/162). As to the former, see also the recommendation of 30 April 2009 on remuneration policies in the financial sector (Recommendation 2009/384). The Directive of 11 July 2007 on the exercise of certain rights of the shareholders of listed companies (Dir 2007/36) should also be mentioned. The Action Plan of the European Commission of 21 May 2003, which goes back to the work of the High Level Group of Company Law Experts, gives an idea of the work envisaged for modernizing company law and enhancing corporate governance in the European Union. The short-term measures contained in the Action Plan have already been enacted by several directives and recommendations. It remains to be seen whether the new Commission will take up some of the other measures. For details, → corporate governance.

6. European harmonization of investor protection

European harmonization of investor protection that goes beyond shareholder protection is much further advanced. Originally this harmonization covered only the stock exchange law with four Directives of 1979, 1980, 1982 and 1988 concerning the admission of securities to official stock exchange listing (Dir 79/279), the prospectuses and other requirements for admission of securities to official stock exchange listing (Dir 80/390), the information to be published on a regular basis by companies whose shares have been admitted to official stock exchange listing (Dir 82/121) and the information to be published when a major holding in a listed company is acquired or disposed of (Dir 88/627). These Directives were consolidated in the Stock Exchange Listing Directive (Dir 2001/34). For details and further legal sources on investor protection by European stock exchange law, → exchanges.

More recently, European harmonization moved its focus from the stock exchange to the capital markets. In 1993, the Investment Services Directive was enacted. This Directive was replaced by Dir 2004/39 of 21 April 2004 on mar-

kets in financial instruments (MiFID, Markets in Financial Instruments Directive). This Directive has become the basic law of financial markets in Europe. In the meantime, it has been transposed into the various Member State laws. Other important directives promoting investor protection deal with insider trading, market manipulation and takeovers. For details and further legal sources on investor protection by European stock exchange law, → capital markets law.

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Klaus J Hopt

Islamic Countries, Influence of European Private Law

1. The uncodified Islamic law

→ Islamic law is primarily case law, ie law that has mainly been developed by Islamic scholars on the basis of individual rulings and specific cases. The law books subsequently compiled, the *fiqh* works, have been complemented over the centuries by a multitude of further texts, textbooks, commentaries, monographs and legal opinions by Islamic jurists (*fatāw*). These legal works were not systematically arranged according to subject matters. General legal issues were dealt with by means of single provisions. In order to solve a legal problem, those applying the law had to examine the existing material for directly relevant or comparable cases until a case pertinent to their issue was found. This task was extremely time-consuming and difficult, not only because of the multitude of *fiqh* works, but also because of their ponderous language. It was only at the end of the 19th century when efforts were made to summarize and codify Islamic law.

2. The first codifications in the countries of the Greater Middle East

A first attempt to codify Islamic law had been made at the end of the 8th century in early Islamic legal history. In order to ensure legal uniformity with regard to the emerging schools of law, Ibn al-Muqaffa', the foreign minister of caliph Al-Mansur, suggested codifying Islamic law. However, this attempt foundered on the resistance of the scholars who did not want to renounce their monopoly on the interpretation and deduction of law. Only 11 centuries later, in the 19th century, were the first codifications of the law put into force in the Ottoman Empire and in Egypt. Additionally, Iran codified its private law at the beginning of the 20th century.

a) The Ottoman codifications

The Ottoman *Mecelle* of 1876 (turk. *Mecelle-i Ahkâm-ı Adliye*) is the first systematic compilation of Islamic law. The *Mecelle* may also be called a restatement of Islamic law. It clothes the Islamic jurisprudence in a new garment borrowed from the European legal systematics, namely a code of law. The *Mecelle* was part of a far-reaching reform movement in the Ottoman Empire, the tanzimat movement, in which European models were used in order to reorganize the legal system and establish legal institutions. Thus, the Ottoman Commercial Code adopted in 1850, the Penal Code of 1858, the Code of Com-

mercial Procedure of 1861 and the Code of Maritime Commerce of 1863 are all based on the French model.

The *Mecelle* is mainly based on the Hanafi school of Islamic law. It regulated mainly civil law, especially contract, tort and procedural law, leaving matters of personal status (namely family and inheritance law) uncodified under the jurisdiction of the *sharīʿa* (sharia) courts. The *Mecelle* separated for the first time ritual law from law regulating human transactions and was applied by specially established national courts. It therefore had a visible secularizing effect. Its systematic structure is similar to European codes, as it is subdivided into books, chapters and articles. Whereas the general part is kept very brief, for lack of a general contract theory in Islamic law, detailed regulations on special contract types dominate. Although the system of the *Mecelle* is not consistent throughout, it made law clearer and easier to access. It is on account of its editorial style that the *Mecelle* met with immediate success.

In 1917, the family law of the Ottoman Empire was also codified. In contrast to the *Mecelle*, the Ottoman Family Code was not exclusively based on Hanafi rules, but incorporated provisions of other Sunni schools of law as well, especially the Maliki school. Moreover, it broke with two traditions: first by not being applicable to Muslims alone, but also to Christians and Jews, ie the so-called People of the Book, and secondly by assigning jurisdiction in matters of personal status to state courts. In the Ottoman Empire and later in Turkey, the Ottoman family code was only 18 months in force. In the other successor states of the Ottoman Empire, Syria, Jordan, Lebanon, Palestine and Iraq, it remained in effect until well into the mandate period or until new laws were enacted.

The tanzimat reforms thus curtailed the influence and application of Islamic law in favour of secular law. Although care was still taken to link reforms to the sharia, the process of secularization had reached numerous areas of law.

b) The Egyptian codifications

Although Egypt was nominally part of the Ottoman Empire, the *Mecelle* never came into force there. Rather, instead of compiling Islamic law, efforts were undertaken to adopt European law. Since the end of the 18th century, Egypt had developed into a centre of European commercial interests. This led to the emergence of consular jurisdictions. The foreign consuls were exclusively competent to hear and adjudicate all legal disputes of their nationals. Having to accommodate up to 20 competing jurisdictions, the law became more and more fragmented. At the end of the 19th century, in order to unify the law and institutionalize modern courts, two codes of law were enacted, the *Code civil mixte* in 1875 and the *Code civil indigène* in 1883. Whereas the *Code civil mixte*, an extract from the French *Code civil*, applied to legal disputes between (all) foreigners and between foreigners and Egyptians and was applied by the so-called mixed courts, the *Code civil indigène*, based to a large extent on the *Code civil mixte* and only slightly adjusted to Egyptian conditions, was applied by the national courts to legal disputes between Egyptians. These laws were in force until the enactment of the Egyptian Civil Code on 15 October 1949.

In contrast to the Ottoman *Mecelle*, where contract and tort law were based on Islamic law, the Egyptians followed French law very early on and adopted the French texts literally. Furthermore, the commercial, procedural and criminal provisions followed the French model as well. As with the *Mecelle*, matters of personal status were not included in these codification efforts and were only codified at the beginning of the 20th century in piecemeal legislation.

c) The Iranian codifications

Iran has no direct colonial history. However, since the 18th century, the United Kingdom and Russia have exerted great influence on Iranian politics. In search of a politically more honest broker, the Iranians looked towards France. The school system as well as the university education system had already been imported from France. Even today, sufficient knowledge of the French language is a precondition for the admission to doctoral studies in law at Iranian universities. In the years 1928–35, the Iranian Civil Code was adopted. It regulates all legal fields of civil law and, in contrast to the *Mecelle* and the *Code civil mixte* and *indigène*, also matters of personal status, ie family and inheritance law. The commission charged with drafting the bill was composed of Shiite Islamic scholars and secular Iranian jurists who had also been trained in France, Switzerland and Belgium. Although the civil laws of these countries were consulted, the legal provisions of the Iranian Civil Code are predominantly a reproduction of the Islamic Shiite provisions, particularly in the field of contract and property law. The European law penetrated the code only to a limited extent and only in certain fields, such as the law of nationality, the law of domicile or the regulations on law enforcement. In some parts, the blending of European and Islamic law becomes quite visible. Thus, the Ira-

nian Civil Code has retained the provisions on temporary marriage, a particularity of Shiite law, and those on the divorce by repudiation, whereas the provisions on the registration of all matters of personal status bear a clear European signature. Codifications in other fields of law, as in criminal, commercial and procedural law, follow the French models as well.

3. The reception of European law

After the collapse of the Ottoman Empire following World War I and the establishment of the mandates in the Greater Middle East, there were further receptions (→ reception) of European law. Turkey exhibited the most radical break from its legal tradition, as it abandoned the *Mecelle* and thus Islamic law as a whole. The → Turkish Civil Code is thus a reception of Swiss civil law including its family law. Although law reform also took place in the new Arab states, Islamic law was only overtaken in commercial and economic law, while it still applied to matters of personal status. The *Mecelle* initially remained in force in many countries, eg Syria, Palestine and Jordan. In the meantime, the reception of European law and the secularization of law also continued during the mandate period and especially thereafter.

The reception of European law in Islamic countries is closely linked to their colonial history. However, not all the countries adopted the legal systems of the ruling colonial power. This holds particularly true for the countries under British rule and British mandate. Apart from a few exceptions, most countries adopted the civil law tradition. The reasons for this preference are manifold: first, the relatively late British colonization of the Middle East, compared to the longer presence of the British in India/Pakistan, has to be mentioned. Besides, many states had already adopted the French school system and educational system. In Lebanon, there were, furthermore, centuries-old religious ties to Catholic France. In Egypt, French influence was prominent due to the Napoleonic conquest (1798–1801) and the later construction of the Suez Canal; the British, in contrast, came to Egypt at a time when the legal and judicial system had already been implemented. Ultimately, it was in the nature of things that codified laws were better suited as a model than the casuistic → common law. Clear, all-embracing codifications were needed in order to regulate the legal systems thoroughly and, for this purpose, the continental European codes seemed to be best suited.

The exceptions were India/Pakistan, Sudan and Palestine/Israel. In India/Pakistan, the common law system was adopted very early. As early as 1772, British judges were sitting on Indian benches, assisted by Islamic jurists in matters of personal status. Thus, the dual court system existing in other Islamic states was avoided and the so-called Anglo-Muhammadan law emerged. Furthermore, the British also resorted in some fields of law to the codification of English law; thus, in 1860 a penal code, in 1872 the Contract Act and in 1882 the Transfer of Property Act were enacted.

In Sudan, as opposed to Egypt, the British barely found any legal and judicial structures on which to build. Thus, the principles of the common law system, particularly the principles of 'justice, equity and good conscience', were adopted and a unified judicial system was introduced.

In Palestine, the Palestine-Order-in-Council of 1922 provided for the application of the existing Ottoman laws—particularly the *Mecelle* and the Ottoman Family Code—and British law. In addition, the courts were ordered to apply English common law and → equity by residuary power. British judges or judges trained in Great Britain filled the courts and their application of common law quickly became the norm. Appeals against their decisions could be lodged with the Judicial Committee of the Privy Council in London.

In Iraq and Jordan, which were under British mandate as well, however, the influence of the common law was much weaker. There were neither British judges nor could the common law be drawn upon as a gap filler. These countries remained mostly influenced by continental European law.

In the Maghreb States (Morocco, Tunisia, and Algeria) and other countries under French domination, like Syria and Lebanon, the influence of the French *Code civil* was direct and very strong. In Lebanon, the *Mecelle* was substituted in 1932 by the Code of Obligations and Contracts that had been drafted by French jurists and adapted to Lebanese conditions by Lebanese jurists. However, Lebanon also consulted the legal systems of other European states. Thus, in the Lebanese Code of Civil Procedure of 1935, the influence of the Austrian legislation is evident, whereas the Penal Code was inspired by the Italian Penal Codes of 1890 and 1930.

4. The codifications after World War II

By the end of World War II and with the emergence of independent Arab states, the reception of law continued. This period was particularly marked by Pan-Arabism and the idea of the Arab

unity. Whereas before the focus was mainly directed on French law, now dual emphasis was being placed on rediscovering Islamic law as a common legal tradition of all Arab Muslim states and on consulting other European systems of private law. This extensive legal comparison and the endeavour to do justice to the local conditions led to the enactment of the Egyptian Civil Code in 1949 (Law no 131/1948). It was drafted under the leadership of ʾAbd al-Razzaq Ahmad al-Sanhuri (1895–1971), an Egyptian professor, judge, lawyer and politician who had been a disciple of Edouard Lambert in Lyon. Sanhuri aimed to blend Islamic law and adopted provisions of European law to create a new code. Hence, the laws in force in Egypt until 1949, the judicature of the Egyptian courts as well as provisions of Islamic law and European codes were incorporated into the Egyptian Civil Code. As a result, provisions of different origin can be found in the Egyptian Civil Code. For example, one finds provisions on the Islamic institution of preemption (*shufʿa*) along with provisions of tort law which are a literal reproduction of French tort law, whereas the objective theory of the declaration of intention has been adopted from the German legal system.

The Egyptian Civil Code has functioned as a role model for almost all the subsequent Arab civil law codifications. This is ascribed to the common Islamic tradition and the similar social conditions in many Arab countries. So far, it has been adopted with or without modifications in more than 10 states having very different political, economic and social structures, and it has proved itself everywhere. Thus, the Egyptian model influenced the civil law codifications of Syria (Law no 84/1949), Libya (Royal Decree of 28 November 1953), Algeria (*Ordonnance* no 75–78 of 26 September 1975) and Somalia (Law no 37/1973) significantly. This also holds primarily true for the civil codes of Iraq (Law no 40/1951), Jordan (Law no 43/1976), Afghanistan (Law of 5 January 1977), Kuwait (Law no 67/1980), Sudan (Law no 6/1984), the United Arab Emirates (Law no 5/1985) and finally Yemen (Law no 19/1992). *Sanhuri*'s Egyptian Civil Code together with his extensive commentary on civil law *al-wasīṭ fī sharḥ al-qānūn al-madanī al-jadīd*, comprising about 12,500 pages, virtually have the rank of legal sources in the Arab states. They are consulted by the courts of Arab states in order to interpret their own legal provisions and fill legal gaps.

5. Impact of European law on contemporary economic legislation in Islamic countries

In its initial stage the reception of European law in many Islamic countries was a reception of its systematics and structure. Islamic law was meant to be presented with the methodological tools and systematic approach of European law. Later on, whereas family and succession law still remained Islamic based, European-based secular law prevailed in the field of commercial and economic law in all Islamic states, since classical Islamic law offered no solutions for many of the complex legal matters that emerged.

Even today, European private law continues to influence legislation in Islamic countries. Many modern economic, company and commercial law codifications continue to orientate themselves on Europe. In addition, the influences of international agreements are clearly discernible. Thus, the Iranian Commercial Code, which had been adopted from the French model in 1932, is currently being reformed in view of the membership of Iran in the WTO. This also holds true in the field of competition law where, for instance, the legislative activities closely follow the European models and the international agreements. Examples to be mentioned are the Tunisian Competition and Prices Act of 29 July 1991, inspired by the French Order no 86–1243 of 1 December 1986 and the Competition Rules of the EU, as well as the provision on unfair competition added to the Egyptian Commercial Code in 1991 which is similarly based on European legislation. The same applies in the field of intellectual property: the Egyptian Law on the Protection of Intellectual Property Rights of 2 June 2002 is based on the model of the French *Code de la propriété intellectuelle* and itself served as a model to the Jordanian legislature in 2003 for the reform of copyright law.

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Nadjma Yassari

Islamic Law

1. Definition

The term 'Islamic law' or *sharīʿa* (sharia) is generally used to refer to the religious law of Islam. These terms, however, are not synonyms. It would be an oversimplification to equate 'sharia' with law. It is rather a generic term for the entire set of rules of conduct imposed on Muslims without differentiating between legal, moral or ethical norms. The sharia thus encompasses more than just legal norms. Islamic law conversely is derived from the sharia; however, there is no uniform Islamic law. It is rather divided into schools of law which have developed at different places and different times.

2. Sources of Islamic law

a) Primary sources

The sources of Islamic law are divided into primary and secondary sources according to their origin and their relevance. The primary sources are the Qur'an (*qur'ān*), the holy book of revelations, and the traditions, which are narrations of the deeds and words of the Prophet Muhammad related by a chain of reliable transmitters (*sunna*). The Shiite legal doctrine additionally acknowledges the traditions of the 12 Imams. The secondary sources of Islamic law comprise the consensus of the jurists (*ijmᶜ*) and the legal findings by means of analogy (*qiyās*) and logic (*ᶜaql*).

The final compilation process of the Qur'an was accomplished under the third caliph 'Uthman (AD 644–656). The Qur'an is neither a scientific work nor a legal text. Of its approximate 6,200 verses, only 500 are declared legal provisions with the majority of these verses dealing with acts of worship and ritual law, such as prayer, washings or fasting. Of these 500 verses, about 80 to 100 have legal content, primarily assigned to succession, penal, procedural, marriage and sales law. These represent areas that desperately needed regulation in pre-Islamic Arabia and include the introduction of inheritance and proprietary rights for women, the protection of widows and orphans, the rule of good faith in commercial transactions and the prohibition of gambling and interest. Since the verses of the Qur'an above all want to set ethic principles, they mostly refrain from ordering worldly sanctions. Wrongdoers will be punished on the Day of Judgment in the afterlife, as will observants be rewarded.

In order to complement and interpret the Qur'an, the traditions, ie the deeds and words of the Prophet, were consulted. The traditions are based on individual narrations or messages (*hadīth*) about the behaviour and views of the Prophet, reports on his decisions as a judge as well as his judgments on particular behaviours and deeds. In the course of its development, the validity of the *hadīth* did not depend on their contents, but rather on the reliability of the authorities in the chain of transmitters. The narrated material was considered authentic if a chain of transmitters (*isnād*) back to the Prophet gave reason for the conviction that the transmitted event had happened exactly that way and not otherwise.

b) Secondary sources

Because of the complex language and meanings of the Qur'anic verses and the *sunna*, it became apparent in the early era of Islamic law that not all legal questions could be answered by directly applying provisions from the primary sources of law. The task of deducing the law in such cases, ie interpreting and explaining the Qur'an with the aid of the traditions, was incumbent on scholars specially trained in grammar and syntax of the Arabic language as well as in jurisprudence and theology, the *mujtahid*. The work they performed, *ijtihād*, means 'making an effort' in Arabic; in the legal sense, *ijtihād* is the effort of a jurist to solve a legal question by independent reasoning and interpretation of the sources. If the answer to a question was unambiguous in the sources, the scholar did not need to make an effort to find the solution, ie exercise *ijtihād*, but could apply the provision directly. In contrast to this, where the rule was not directly apparent from the texts, the scholars had to find a solution by using their own skills. These findings consequently reflected the scholar's personal opinion on a particular question and had to be specified as such (*zann*). If a majority of the scholars came to the same results or if gained insights met with the approval of the majority of the scholars, the subjective assumption of a scholar turned into secure knowledge (*ᶜilm*). In a next step, the legal rule supported by the consensus of the jurists,

ijmāᶜ, was elevated to the status of a source of law.

The doctrine of consensus was crucial for the development of Islamic law and an important tool for adapting law to social changes. It was the basis for many legal concepts emanating neither from the Qur'an nor from the traditions. Additionally, it allowed the ruling academic circles to express their opinions. Indeed, consensus in the rapidly spreading Islam was regional, often limited to the respective geographic sphere in which the emerging schools of law were particularly influential.

Finally, the fourth source of law is legal reasoning through analogy (*qiyās*) in Sunni Islam and through rational analysis (*ᶜaql*) in Shiite Islam. They are better referred to as methods of legal reasoning, since it is actually the application of *ijtihad*. *Qiyās* is the extension of a ruling from an original case to a new case due to a similar divine reason underlying both. The prohibition of consuming grape wine, for instance, has been extended to other intoxicating beverages, like date wine, because both dull the senses and make people incapable of fulfilling God's commandments. The Shiite doctrine, on the other hand, follows the thesis that everything dictated by reason is God's will as well. In compliance with this rule, norms may thus also be obtained by rational analysis. These include, for instance, the permission of an act implying the prohibition of its opposite and the principle of causality.

3. Deducing law

The result of these deductive efforts is called *fiqh*. The Arabic word *fiqh* means literally 'understanding' or 'insight'. Islamic jurisprudence differentiates clearly between the deduced *fiqh* law and the sharia as such. The sharia is of divine origin and hidden in the revelation without being spelled out in a precise legal manner. The Islamic jurist forms the necessary link between God and men by formulating the *fiqh* law. This *fiqh* law is the result of human and therefore fallible analysis. Another possible description of this relationship is to refer to the sharia law as God's law and to the *fiqh* law as jurists' law.

The *fiqh* works are not systematically arranged according to subject matters. Rather, general legal issues are dealt with by reference to single provisions. These works deal meticulously and in detail with a particular problem, thereby disclosing the method of analysis and the rules of deduction applied. *Fiqh* works classify human behaviour into five categories: besides the legally binding categories of the obligatory and the prohibited, there are also the categories of the recommended, the disapproved and the indifferent, which, however, are not legally binding and are only of moral importance.

4. Schools of law

The first schools of law developed during the first half of the 8th century, particularly in the competition between the cities of Kufa (in contemporary Iraq) and Medina. Different interpretations of the primary sources as well as the disparate social structures of the two cities led to the development of divergent schools of Islamic thought. While, for instance, in the consistently homogeneous and tribal society of Medina a young woman needed the consent of her legal guardian for marriage, in the cosmopolitan and more penetrable society of Kufa, women of legal age were allowed to marry independently.

Eventually, the connection to geographic regions gave way to adherence to the doctrines associated with an eminent personality. The four major Sunni schools of law that emerged were: the Hanafi school of law, which emerged from the school of thought in Kufa, founder Abu Hanifa (699–767), prevalent in central Asia, Pakistan, Turkey, Syria, Jordan, Egypt; the Maliki school of law, the former school of Medina, founder Ibn Malik (715–795), prevalent in North and West Africa, Sudan and some Gulf States; the Shafi'i school of law, founder al-Shafi'i (767–820), prevalent in East Africa, Indonesia and Far East; and the Hanbali school of law, founder Ibn Hanbal (780–855), prevalent in Saudi Arabia and Qatar.

The main difference between these schools lies in the weighting of the *hadīth*. On the one side, the so-called people of the traditions (*ahl al-hadīth*) measured the authenticity of a *hadīth* by the formal criterion of the *isn d*, ie how strong and reliable the chain of transmitters was, and took the view that the Qur'an could only be understood with the aid of the traditions. On the other hand, the so-called people of opinion (*ahl ar-ra'y*) did not confine themselves to the formal criterion of the *isn d* when evaluating a *hadīth*, but measured the *hadīth* against the yardstick of a rationalistic interpretation of the Qur'an. Within the Sunni schools of law, only the Hanafi school belongs to the *ahl ar-ra'y*. Shafi'is and Hanbalis adhere to the *ahl al-hadīth*. The Malikis, too, are counted among the *ahl al-hadīth*, although they also possess elements of the *ra'y* school. Nevertheless, the schools of law cannot be clearly classified under categories such as 'static' or 'dynamic'. The Hanbali school of law, for instance, is regarded as being very conservative in the field of family law; however, it

is the only Sunni school of law which acknowledges the principle of → freedom of contract within the framework of Islamic ethics (prohibition of interest and speculation).

Furthermore, there are several Shiite schools of law. The prevailing Shiite school is the Twelver Shia, also called Ja'fari school of law, founder Ja'far al-Sadiq, the 6th Shiite Imam (702–765), prevalent in Iran, parts of Afghanistan, in southern Iraq and Bahrain.

5. Codification of Islamic law

Until the 20th century, the *fiqh* works of the respective schools of law essentially remained the main sources of law. Although there are movements declaring that the process of independent legal reasoning by jurists had come to an end after the 11th century and the gates of *ijtihād* had been closed, as a matter of fact, Islamic scholars—Sunni as well as Shiite—have continually applied *ijtihād* as a method of legal reasoning until today. They have enriched and further developed (secondary) law over the past thousand years via a multitude of textbooks, commentaries, monographs and legal opinions.

Only the emergence of the → codification movement has challenged the dominance of the uncodified Islamic legal provisions. Thereby, the European civil codes, particularly the continental European codes, acted as models. Even today, the impact of European private law on the laws of the Islamic countries is evident (→ Islamic countries, influence of European private law). Apart from a few exceptions, like Saudi Arabia, today justice in Islamic countries is dispensed on the basis of modern private law codifications. The uncodified classical Islamic law only applies where there is a lacuna in the law. Thus, for instance, Art 3 of the Iranian Code of Civil Procedure refers to 'the Shiite law' and Art 1(2) of the Egyptian Civil Code to 'the principles of Islamic law'.

6. Islamic law in Europe

According to the central institute of Islamic archives in Germany (*Zentralinstitut Islam-Archiv-Deutschland*), in 2008 approximately 15 million Muslims were living in the European Union. About 2.2 million nationals of Islamic countries are living in Germany. Thus, according to the provisions of the conflict of laws rule, European courts may have to apply family and inheritance laws of these countries in cases involving their nationals (→ foreign law (application)). This sometimes presents the courts with difficult qualification problems and conflicting views on the compatibility of the foreign rule with the value system of the European Union. For example, provisions on child custody often refer to rigid age boundaries instead of relying on the principle of the best interest of the child. Furthermore, in most Islamic countries, there are different divorce laws for men and women, and in inheritance law, female heirs are disadvantaged over male heirs simply because of their gender. This has led, in Germany, for instance, to an increased application of the → public policy (*ordre public*) proviso (Art 6 EGBGB (Introductory Act to the German Civil Code)), according to which a foreign norm does not apply if the result of its application is evidently repugnant to the basic principles of German law (*Grundrechte*). Therefore, family and inheritance law influenced by Islam is applied in European courts subject to the guaranteed basic rights.

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Nadjma Yassari

Ius Commune

1. The idea of a European common law

The concept of *ius commune* designates the 'European common law' (*gesamteuropäisches Gemeinrecht*, Wieacker) and thus the common object of the learned European legal discourse in the time between the 12th and the 19th centuries. For modern lawyers, this idea of a legal discourse being independent of the actual rules that are applied before the local courts is difficult to