

TSIBANOULIS & PARTNERS  
LAW FIRM

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**'AN OUTLINE OF RELEVANT ACADEMIC WORK CURRENTLY UNDERTAKEN AT EU LEVEL'**

The Legal Certainty Group has been assigned to identify and analyze issues of legal uncertainty in the absence of an EU-wide framework for the treatment of interests in securities held with an intermediary and *inter alia* issues regarding the owning and holding of securities. The Group is not sole in this assignment. Relevant work is being undertaken by several other organized groups in the EU level which operate in parallel and the findings of which will complement rather than duplicate the workings of the Legal Certainty Group.

If there is any other work being undertaken that should have formed part of the survey that is reflected in this note, the authors would be grateful to know about it, and will pass the information on to the Legal Certainty Group accordingly.

D.G. TSIBANOULIS, Dr. jur.  
E.D. BAILAS, LL.M.  
G.K. SIGANIDIS, Dr. jur.  
C.M. FRIEDRICH, Rechtsanwältin  
E.E. AVGOULEAS, Ph.D.  
G.N. PAPASTYLOS, LL.M., B.A.  
V.X. VOUGA, LL.M.

.....  
A.E. APOSTOLAKI  
M.A. PERRAKI, LL.M.  
T.G. KATSAS, Dr. jur.  
D.K. KARAMAGIOLIS, Dr. jur.  
E.N. KOMIS, D.E.A.  
M.D. LIOUTA, LL.M.  
C.P. FRENTZOS  
A.N. GOULANDRIS, D.E.A.  
M.I. STENO, LL.M.  
E.K. KONTIADI, LL.M.  
M.P. STAMATOGIANNI, LL.M.  
P.L. ATHANASSIOU, LL.M.  
E.P. GOUNARI, LL.M.  
A.A. LEOUTSEA, LL.M.  
T.G. TOMPRAS  
T.C. MITROPETROU, LL.M.  
E.E. BOURBOU  
C.E. TRIHAS, J.D., New York Bar  
N.A. TRYFONIDOU, LL.M.  
A.G. MASSAVETAS, LL.M.  
R.P. MARKOU  
G.C. LIVIERATOS  
P.G. MARIS, LL.M.

**A) From the 'Lando Commission' to the 'Study Group on a European Civil Code'**

The following is relevant to the workings of the Legal Certainty Group since the Group and the initiatives explained below all have as an ultimate aim the achievement of an integrated single market. Since we live in times that movement of services or capital, cross-border transactions or relationships between agents and principals cannot be achieved without contracts, a unified European Contract Law will contribute in overcoming a number of barriers to the single market and will assist the effort of the Legal Certainty Group for harmonisation of the rules regarding securities.

**a) The Lando Commission**

An initial attempt for drawing together the private law of Member States was triggered by the European Parliament which, in its resolution of 26 May 1989, asked that a start be made on the essential preparatory work for the drafting of a Common European Code of Private Law. This was accelerated by the workings of the Commission on European Contract Law, better known as the Lando Commission, named after Prof. Ole Lando who was head of the initiative. The Lando Commission progressively worked towards the harmonization of different European contract law regimes, through three separate phases: Part I was completed in 1995 and dealt with issues of breach of contract and remedies, being republished alongside Part II in 2000 which dealt *inter alia* with formation, issues of offer and acceptance, the authority of agents to bind principals, validity, interpretation and contents of contracts. Finally, Part III was published in 2003, with the complete work bearing the title "*Principles of European Contract Law*" (PECL) and dealt with plurality of debtors and creditors, assignment of claims, substitution of new debtor and transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest. The actual purpose of the PECL is to be the initiative or the basis for a future unified European Civil Code.

**b) Study Group on a European Civil Code**

The work of the Lando Commission has now been absorbed into a more comprehensive project currently being undertaken by the Study Group on a European Civil Code under the leadership of Prof. Christian von Bar. The Study Group is comprised by legal academics and practitioners from across the EU. Its main objective is to 'advance the process of Europeanisation of private law' and aims to draft a codified set of principles covering the main areas of the European private law and most importantly of contract law and property law with regard to movables. The Group is making an

extensive research in a number of interrelated areas of law. Such areas are sales and service contracts, security rights, unjust enrichment, transfer of property or trust law. It must be noted that the Group has been identified in a European Parliament's Resolution (COM (2001)398-C5-0471/2001-2001/2187 (COS)) as one of the bodies that will contribute in the preparation of a 'Common Frame of Reference' as envisaged by the EU Commission in its Action Plan published on 12 February 2003.

i) The Study Group has recently published an extensive research paper, entitled "*Study on Property Law and Non-Contractual Liability as they relate to Contract Law*" which was submitted to the European Commission Directorate General on Health and Consumer Protection (SANCO B5-1000/02/000574). This work is primarily a study on the interrelationship between different contract, tort and property regimes of Member States, mostly focusing on borderline cases, where these areas of law become significantly converging. Part III of the Study refers *inter alia* to the relationship of contractual security rights in movables and contract law and to the impact that a contract between the grantor of a security and a grantee may have on proprietary security rights. It also deals with the impact of invalidity of the security agreement upon the security right, the dependence of the security right upon the secured claim and the scope of freedom of contract.

More specifically, concerning rights in securities the authors underline the importance of the potentially divergent impact that a contract for the creation of a security may have on the corresponding proprietary right. Additionally, regarding the creation of security rights the distinction between a security agreement and the creation of a contractual security right is emphasised in the Study to conclude that '*a system of harmonized or unified European Contract law would apply directly to security agreements*'. Part III of the Study also identifies some intra-European cross-boarder issues the overriding concern ultimately being whether a security validly created in one country will meet obstacles regarding its validity under the property laws of another country upon its transfer in the latter's jurisdiction.

ii) It is important to note that the work of the Study Group is arranged into smaller working groups one of the most relevant for our purposes being the **Working Team on Credit Securities (The Hamburg Working Team)** headed by Dr. Ulrich Drobniig (Max Plank Institute for Foreign and Private International Law). The Group has contributed in Part III of the Study on Property Law. Currently, the Team is focused on the study of two separate topics the first concerning personal security (e.g. guarantees) and the second security over movable property. Having concluded its workings regarding the first topic the Team has currently embarked upon the study regarding security in movable property. It is still an open issue whether the Team will include in its study all kinds of movable assets including all forms of real securities. This issue is in a preliminary stage and the Team has not gone far to that direction. So far, none of this work has been published.

#### **B) The Academy of European Private Lawyers (Pavia Academy)**

The Academy seated in Pavia was founded in 1992 and is headed by Prof. Giuseppe Gandolfi. It has published the Pavia Draft of a "*European Contract Code*" which was presented and discussed before the European Parliament and was considered by the European Commission in its Communication of 11th July 2001. The Code is an effort to unify contract law in the EU and to propose clear and simple rules regarding contracts that will ultimately facilitate achievement of an integrated internal market. The rules are accompanied by practical solutions to avoid problems that might occur in their uniform application. The Academy's effort was to draft rules which are acceptable and understandable in all Member States.

#### **C) European Research Group on Existing EC Private Law (Acquis Group)**

The Acquis Group was founded in 2002 with participating scholars from across the EU. The Group's principal task is a comprehensive arrangement of current Community law that will assist in clarifying the aspects of the ever-emerging Community private law. As support for the building of the Commission's Common Frame of Reference, the Group is at present undertaking a project titled "*Principles of the Existing EC Private Law*". This project will not seek in any event to supplement the already existing PECL since it is unique for solely focusing upon genuine EC law, instead of comparing different national legal systems. Foremost the triple aim of the project is to prepare: a)

legal rules based on genuine political and economic intentions, b) a clear set of definitions of legal terms often used in Community legislation in the form of a dictionary and c) an explanatory note to facilitate the uniform application of the legal principles.

#### **D) The Leuven Center for a Common Law of Europe-*ius Commune* Casebook project**

The Center is active since 2001 and aims to be a central point for research on the developing of a European *ius commune*. Its research methodology will focus on the interaction between different legal fields and methods not only of the EU. Among the Center's objectives is the research for the *Ius Commune Casebook project*. This started in 1994 by Dr. W. van Gerven and aims to produce a collection of casebooks on several areas of law. These materials will relate to factual situations in various legal regimes and will focus on the interaction of law, rather than legislation, in an EU and international level. A casebook on contract law entitled *Contract Law* (Oxford, Hart Publishing, 2002) by H. Beale, H. Kötz, A. Hartkamp and D. Tallon is published, while a second revised edition is imminent. The Centre has started working on a casebook on property law which will partly deal with issues of securities like property rights as security interests. V. Sagaert and C. Lebon are in charge of this section of the casebook. Also a casebook on company law is also in preparation. These casebooks are scheduled to be published in 2007.

#### **E) Imminent and recent Publications**

##### **a) Society of European Contract Law (SECOLA)**

SECOLA was established in 2001 by S. Grundmann, M. Bianca and H. Collins and has many participating members. The Society mostly operates as a discussion forum for issues of European contract law aiming at clarifying basic concepts, so as to lay the ground for a gradual drafting of a European codex of contract laws. The book by S. Grundmann entitled "*An Academic Green Paper on European Contract Law*" (2002) is characterised as 'the executive summary of what European academia thinks of the future of European Contract Law and a European Code'. The publication of the second edition is imminent.

##### **b) European Capital Markets Institute (ECMI)**

The ECMI was established in 1993 as a forum for market participants and academics, to discuss issues of the increasingly converging European capital markets. One of the Institute's latest research projects has been commissioned to Ignacio Gómez-Sancha with title "The potential impact of "The Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary" on the EU securities law and industry (in particular, on Securities Settlement Systems)". The author will deal with the impact of The Hague Convention on domestic and EU securities law and industry with special focus on the possible consequences of applying a uniform conflict of law rule that pivots on party autonomy in every jurisdiction, notwithstanding the fact that securities have different legal nature in different jurisdictions, mostly concentrating on Securities Settlement Systems and other institutions with transcendental role in the EU financial system. The project will be finalised in May 2005 in Spanish and in June 2005 in English.

##### **c) The Common Core of European Private Law (The Trento Group)**

The Common Core Project was initiated in Trento, Italy in 1993 with the involvement of the Late Prof. R.B. Schlesinger. The members of the Group embark upon a comparative analysis of European legal systems in the fields of Contracts, Property and Torts. In 2004 a book titled "*The Common Core of European Private Law, Essays on the Project*" by M. Bussani and U. Mattei was published as a collection of academic opinions on the possibility of making a European Private Law. Another book published in 2004 within the ambit of the Project is "*Security Rights in Movable Property in European Private Law*" by E.M Kieninger. The book outlines a survey of the law relating to secured transactions in all Member States. The national reports are centered on 15 hypothetical cases dealing with issues of secured transactions such as the creation of security rights in different business situations, the relationship between debtor and secured creditor, the nature of the creditor's rights and their enforcement as against third parties. Finally, a general report evaluates the possibilities of European harmonization.

**d) Individual academic work**

i) Dr. E. Micheler (LSE, Vienna University of Economics) has recently published a comparative book on securities settlement in German entitled '*Wertpapierrecht zwischen Schuld-und Sachenrecht (Springer Vienna 2004)*'. She is in the process of writing a book in English with the following working title '*Path-dependence and convergence in the law of investment securities*'. The English book will focus more on the potential for convergence of law and harmonisation of the rules on investment securities. Its publication is expected next year.

ii) Dr. J. Benjamin (LSE) has published in 2001 a book entitled '*Interests in Securities: A Proprietary Law Analysis of the International Securities Markets*'. The book analyzes the impact of computerization and globalization in International Securities Markets and the corresponding effect of the use of custodians, depositaries, and other intermediaries by investors and collateral takers holding interests in securities. A revised second edition is currently under preparation.

**Nadia Tryfonidou**

Tsibanoulis & Partners  
Omirou 18  
GR 106 72 Athens  
tel: +30 (210) 3675100  
fax: +30 (210) 3675188  
e-mail: [n.tryfonidou@tsibanoulis.gr](mailto:n.tryfonidou@tsibanoulis.gr)

**Pavlos Maris**

Tsibanoulis & Partners  
Omirou 18  
GR 106 72 Athens  
tel: +30 (210) 3675100  
fax: +30 (210) 3675188  
e-mail: [p.maris@tsibanoulis.gr](mailto:p.maris@tsibanoulis.gr)

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