

Ukrainian Private Law and the European Area of Justice

Edited by
EUGENIA KURZYNSKY-SINGER
and RAINER KULMS

*Max-Planck-Institut
für ausländisches und internationales
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und internationalen Privatrecht*

Mohr Siebeck

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Preface

More than five years have passed since the *Euromaidan*, when Ukrainian citizens protested vigorously for their country's orientation towards the European Union. In May 2014, Ukraine and the European Union concluded an Association Agreement that provides for gradual integration into the Internal Market by way of progressive approximation of Ukrainian law. The Association Agreement represents a deliberate policy choice which combines political conditionality with the Europeanisation of Ukrainian private law.

Ukraine's pro-European approximation process has never been linear. The country's potential for accommodating the *acquis communautaire* is severely tested, for both external and domestic reasons. Ukraine has to master the problems typical for a transition economy. The country also needs to organise its trajectory from the traditions of Soviet legal thinking to the sophisticated set of rules of European Union law which the Association Agreement is ushering in. Approximation presents legislators and scholars with a formidable challenge; sometimes the results are not fully convincing.

This volume assembles contributions from scholars from the region and from Germany. The underlying intention is to present a case of first impression as Ukrainian scholars assess modernisation of specific fields of their country's private law. This comes very close to taking a snapshot of private law issues that are subject to further evolution in the years to come. The non-Ukrainian contributors explore the impact of the Association Agreement and the *acquis communautaire*, and supply comments on the country's institutional needs. A final section reviews the EU's policy towards other East European neighbours in order to highlight transition analogies and reflect on potential alternatives to current integration models.

Hamburg, November 2018

Eugenia Kurzynsky-Singer
Rainer Kulms

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Abbreviations

AA	Association Agreement
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
Am. J. Comp. L.	American Journal of Comparative Law
Art(s).	Article(s)
BGB	Bürgerliches Gesetzbuch
bn	billion
BRICS	Brazil, Russia, India, China and South Africa
Brussels I	Regulation (EU) No 1215/2012
CC	Civil Code
cf.	compare
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
DCFTA	Deep and Comprehensive Free Trade Area
DRS	State Regulatory Service of Ukraine
EAEU	Eurasian Economic Union
EaP	Eastern Partnership
EC	Economic Code
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ed.	edition
ed. / eds.	editor/editors
EFTA	European Free Trade Association
EMCA	European Model Company Act
ENP	European Neighbourhood Policy
ERCL	European Review of Contract Law
et al.	et alii
etc.	et cetera
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GNP	gross national product
GOST	Gosudarstvennyj Standart (State Standard)
HQCJ	High Qualification Council of Judges
i.e.	id est

X

Abbreviations

IACL	International Association of Constitutional Law
ibid.	ibidem
ICC	International Criminal Court
id.	idem
IMF	International Monetary Fund
IRZ	Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit
JSC	joint-stock company
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
LLC	limited liability company
n.	note/footnote
NABU	National Anti-Corruption Bureau of Ukraine
NGO	non-governmental organization
No.	Number
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
OPEC	Organization of the Petroleum Exporting Countries
p. / pp.	page/pages
para(s).	paragraph(s)
PCA	Partnership and Cooperation Agreement
PIC	Public Integrity Council
PIL	Private International Law
pos.	position (section)
PPO	Public Prosecutor's Office
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. dr. unif.	Revue de droit uniforme
RF	Russian Federation
RG	Rossijskaja gazeta
Rome I	Regulation (EC) No 593/2008
Rome II	Regulation (EC) No 864/2007
RPR	Reanimation Package of Reforms
Rus.	Russian
SAA	Stabilisation and Association Agreement
SBOF	Statistical Branch for Organizational Forms of Economic Entities
SCO	Shanghai Cooperation Organization
SGiP	Sovetskoe Gosudarstvo i Pravo [Soviet State and Law]
SMEs	small and medium-sized enterprises

SNG	Sodruzhestvo Nezavisimykh Gosudarstv [Commonwealth of Independent States]
Solvency II	The Solvency II Directive (2009/138/EC)
SPS	Sanitary and Phytosanitary Measures
SRO	self-regulated organization
SSR	Soviet Socialist Republic
subpara.	subparagraph
SZ RF	Sobranije zakonodatelstva Rossijskoi Federacii [Collection of Laws of the Russian Federation]
TASS	Russian News Agency
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UAH	Ukraine Hryvnia (national currency)
Ukr.	Ukrainian
UNIDROIT	Institut international pour l'unification du droit privé
UNO	United Nations Organisation
UNTS	United Nations Treaty Series
US	United States
USAID	United States Agency for International Development
USSR	Union of Soviet Socialist Republics
Venice Commission	European Commission for Democracy Through Law
Vol.	Volume
vs.	versus
WiRO	Wirtschaft und Recht in Osteuropa
WTO	World Trade Organization
ZEuP	Zeitschrift für Europäisches Privatrecht

I. From Association to Harmonisation

EU Private Law in Ukraine

The Impact of the Association Agreement

Jürgen Basedow

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The Association Agreement (AA) concluded in 2014 between the European Union (EU) and Ukraine¹ will have far-reaching consequences for the future of private law in Ukraine, a topic which will be explored in this paper. It will set out with a general survey of the Association Agreement (I.), then turn to its impact on private law (II.) and finally outline some considerations relevant to implementation (III.).

I. The EU–Ukraine Association Agreement

I. The agreement and the external policy of the Union

The Treaty on the Functioning of the European Union (TFEU)² distinguishes two types of association agreements: those concluded with former colonies and dependant territories of some Member States, and those transacted with

¹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3.

² Treaty on the Functioning of the European Union, consolidated version in OJ 2016 C 202/47.

other countries. The former are specifically regulated in Part IV, see Articles 198–204, and have lost much of their significance in the course of decolonization.³ The latter are just one type of international agreement which the Union may conclude in accordance with Title V of Part V, see Article 217. The EU–Ukraine Association Agreement is a treaty of the second kind, based upon Articles 217 and 218(5) and (8) TFEU.⁴

From treaty practice several types of association agreements emerge:⁵ Alongside agreements on “development association“ based upon the above-mentioned Article 198 TFEU, there are treaties concluded under what is now Article 217 TFEU providing for a “free trade association”, such as the one with South Africa,⁶ and others establishing an “accession association” considered as a first step of the respective country on the road towards full membership in the EU; many countries which are now Member States have in fact concluded such association agreements some years before their accession, laying down clear commitments on both sides to allow the non-EU party to “participate in the process of European integration”.⁷ The EU–Ukraine Agreement appears to fall into a fourth group of agreements providing for a close cooperation, in particular a Deep and Comprehensive Free Trade Area (DCFTA), without however making explicit the Contracting Parties’ intention of a future accession.⁸ Since this agreement was concluded in the context of

³ See *A. Zimmermann*, Vorbemerkung 1 zu Art. 198 AEUV, in: von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. Baden-Baden 2015.

⁴ Council Decision (2014/295/EU) of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ 2014 L 161/1.

⁵ On the following classification see *Bungenberg* in: von der Groeben/Schwarze/Hatje, supra n. 3, Art. 217 AEUV, para. 90.

⁶ Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, done at Pretoria on 11 October 1999, OJ 1999 L 311/3.

⁷ See for example for Latvia the second paragraph of the preamble of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, done at Luxembourg on 12 June 1995, OJ 1998 L 26/3.

⁸ See on this issue *Tiede/Spiesberger/Bogedain*, *Das Assoziierungsabkommen zwischen der EU und der Ukraine – Weichensteller auf dem Weg in die EU?*, *KritV* 2014, pp. 151–159, in particular p. 153 f. Contrary to the Europe Agreement of Latvia, previous n., paragraph 6 of the preamble of the EU–Ukraine Agreement simply points out that the EU “acknowledges the European aspirations of Ukraine”, but it does not contain a political or legal commitment of the EU to accept Ukraine as a full member; this is considered as a novel concept designated as ‘integration without membership’ by *Van der Loo*, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*, Leiden and Boston 2016, pp. 175 ff.

the Neighbourhood Policy of the EU, one may refer to this type of association as a “neighbourhood association”.

Although the EU–Ukraine Agreement does not express the Union’s commitment to further integration of Ukraine, it provides for a far-reaching assimilation of structures and an approximation of laws, see below. This may be perceived as a certain contradiction between legal means and political objectives, enhanced by the trade-related provisions concerning third States. Articles 25 and 26 AA confine the free trade envisaged to “trade in goods originating in the territories of the Parties”, excluding goods from third States, in particular Russia. While this may appear as a normal corollary of a bilateral trade agreement, it cannot be ignored that Russia is the most important trading partner of Ukraine⁹ and that some manufacturing industries in both countries are closely integrated due to the common history. The exclusionary character of the EU–Ukraine Agreement is further exacerbated by the prohibition, enshrined in Article 39(1) AA, against maintaining or establishing customs unions or free trade areas with other States which are in conflict with the trade arrangements of the EU–Ukraine Agreement. These observations explain the critical assessment of the Agreement by some leading politicians.¹⁰

2. Liberalization and approximation

a) The Internal Market

The core element of the European Union is the Internal Market. It has brought about unprecedented prosperity on the continent and contributed to an integration of peoples that was previously unthinkable. Consequently, all applicants for membership have primarily been attracted by the Internal Market, and the various association agreements have mainly pursued the objective of preparing the candidate States for the later participation in the Internal Market. This is also the general thrust of the EU–Ukraine Agreement.¹¹

⁹ According to statistics provided by the private statistics portal Statista, 32.4% of Ukrainian imports from the year 2012 originated in Russia, while 31.0% originated in all EU Member States. 24.9% of the exports had a destination in the EU and 25.7% in Russia, see <<https://de.statista.com/infografik/1944/importe-und-exporte-der-ukraine>> (13 August 2016). The author *Andreas Gries* concludes that Ukraine needs both the EU and Russia. Statistics for the year 2014 published by the Broad College of Business of the Michigan State University indicate a share of 23.3% of Ukrainian imports coming from Russia and a share of 18.2% of all exports going to Russia; although these shares are lower than those given for 2012, Russia is still by far the most important trading partner, see <www.global.edge.msu.edu/countries/Ukraine/tradestats> (13 August 2016).

¹⁰ The Wikipedia entry “Assoziierungsabkommen zwischen der Europäischen Union und der Ukraine” cites critical statements by three former German Chancellors: *Helmut Schmidt*, *Helmut Kohl* and *Gerhard Schröder*.

In *economic* terms the Internal Market is a market, i.e. a device governing the production and distribution of goods and services. The demand and supply of such goods and services are balanced by the price mechanism: a shortage of supply will lead to rising prices, which incentivize suppliers to offer additional products and buyers to change to substitutes or reduce demand. By the same token, an excess of supply will have the converse effect, through falling prices, on both supply and demand. It is essential for this mechanism that prices be determined by the free interplay of supply and demand and that neither the State nor private third parties interfere, i.e. that resources can freely flow to the place of their most efficient use and that competition and freedom of contract are undistorted.

These objectives were enshrined and enlarged, from the national to the European scale, by the Rome Treaty of 1957,¹² under the designation of the Common Market, which was re-named the Internal Market by the Single European Act of 1986.¹³ As a *legal* concept, the Internal Market is defined as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured [...]”¹⁴ These basic freedoms are secured and specified by Articles 34 f. TFEU (free movement of goods), 45 (free movement of workers), 49 (freedom of establishment), 56 (freedom to provide services) and 63 (free movement of capital and payments). They are meant to protect the Internal Market against interference by Member States. In addition, Protocol no. 27 annexed to the TFEU makes clear that the Internal Market “includes a system ensuring that competition is not distorted”,¹⁵ and Articles 101 ff. TFEU in fact prohibit certain types of private anti-competitive conduct.

In the real world the free flow of resources encounters numerous obstacles. Many of them are caused by legislation of the various Member States: technical standards for goods; licence, education and quality requirements for services; currency exchange regulations; intellectual property rights; mandatory provisions relating to the establishment of companies, contracts and liability; etc. They all make it difficult and costly for foreign competitors to adjust, or even exclude, their operation in a national market; as a result, competition is distorted. Consequently, in order to be effective the liberalization ensured by the basic freedoms has to be supplemented by an approximation of the national rules governing the operation of the markets. The TFEU pro-

¹¹ *Tiede/Spiesberger/Bogedain*, An der Schwelle zum Binnenmarkt: Wirtschaftlicher Teil des Assoziierungsabkommens zwischen der EU und der Ukraine, WiRO 2014, pp. 321–324.

¹² Treaty establishing the European Economic Community, done at Rome on 25 March 1957, 298 UNTS 11.

¹³ Single European Act, done at Luxembourg on 17 February 1986, OJ 1986 L 169/1.

¹⁴ See now Article 26(2) TFEU.

¹⁵ Protocol (no. 27) on the Internal Market and Competition, see OJ 2016 C 202/308.

vides for such approximation in many contexts; the most important provision is Article 114 TFEU, which allows for harmonization measures for the “establishment and functioning of the Internal Market”. They are adopted by the approval of the European Parliament and by a qualified majority of the Council, i.e. even against the opposition of individual Member States.

b) The Association Agreement

This model has guided the drafters of the EU–Ukraine Association Agreement. The objective of free trade is laid down in Article 25 AA; the ban on prohibitions and restrictions of imports and exports, and of all measures having an equivalent effect, is stated in Article 35 AA. With regard to the right of establishment and the cross-border supply of services, both sides grant each other treatment no less favourable than the treatment accorded to subsidiaries, branches etc. of their own companies, Articles 88, 94 AA (“national” treatment); however, the cross-border supply of services is only liberalized in accordance with specific commitments relating to single sectors, Article 93 AA and Annexes XVI B and XVI E. The freedom of payments is ensured by Article 144 AA, and the free movement of capital is regulated in greater detail in Article 145 AA. Private anticompetitive practices and conduct are declared to be incompatible with the Association Agreement in Article 254. It is only the free movement of workers that is not enunciated as an objective; decisions on greater mobility of workers are reserved for the future and left to the Association Council, Article 18 AA.

As a supplement to these provisions on liberalization, Ukraine has accepted a great many obligations to adjust its law to EU standards. Article 474, which has a general bearing on all parts of the Agreement, provides that “Ukraine will carry out gradual approximation of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement, based on commitments identified in Titles IV, V and VI of this Agreement, and according to the provisions of those Annexes.” Title IV on trade and trade-related matters (Articles 25–336 AA) and Title V on economic and sector cooperation (Articles 337–452 AA) contain numerous provisions that stipulate the approximation of Ukrainian law to legislative acts of the Union; long annexes specify these commitments in terms of both content and timeframe.¹⁶ Apparently, the

¹⁶ On the interaction between the general and the specific approximation rules see *Van der Loo*, supra n. 8, pp. 301 ff. Specific approximation rules are to be found in Articles 56 and Annex III for technical standards, 64 and Annex V for sanitary, phytosanitary and animal welfare regulations, 114 and Annex XVII for postal and courier services, 124 and Annex XVII for electronic communication, 133 and Annex XVII for financial services, 138 and Annexes XVII and XXXII for transport services, 152 f. and Annex XXI for public procurement, 256 for competition law, 387 and Annexes XXXIV to XXXVI for company law, 394 and Annex XVII for the information society, 397 and Annex XXXVII for broad-

law of intellectual property had the greatest significance for the drafters; its adjustment is not left to the Annexes but is regulated with regard to both substance and enforcement in not less than ninety-six articles by the Association Agreement itself.¹⁷ Some of the commitments relating to private law will be dealt with further in Part II below.

While the overall structure and content of the Agreement resemble the European Treaties, there are some profound differences. In particular, not a single provision of the Agreement can be construed as conferring rights or imposing obligations which can be directly invoked in court proceedings.¹⁸ The lack of direct applicability has the effect of reserving for both sides the possibility of withdrawing from any undertaking laid down in the Agreement. If Ukraine does not implement the legal changes it has promised and an EU Member State therefore declines to grant one of the freedoms to Ukrainian products or nationals, no judicial remedy will be available in the EU. This clearly differs from the direct and unconditional effect of some provisions of the EU Treaties, in particular the basic freedoms¹⁹ and the rules on competition.²⁰ At some points the Association Agreement even goes a step further, indicating that access to the Internal Market will be granted only after progress in the area of approximation has been ascertained by the Trade Committee.²¹ Thus, the Association Agreement, while binding in terms of public international law, rather constitutes a programmatic scheme from the perspective of private actors in the markets.

II. The impact on private law

1. *Private law of the EU – General aspects*

The purpose of the European Union was not the unification of laws but the integration of markets. To date, the Treaties do not contain a mandate for

casting and television, 405 and XXXVIII for agriculture, 417 and Annex XXXIX for consumer protection, 424 and Annex XL for employment and social policy, 428 and Annex XLI for public health.

¹⁷ See Articles 157 to 252 AA; see *Van der Loo*, supra n. 8, pp. 284 ff.

¹⁸ This has explicitly been stated in Article 5 of the Council Decision, cited supra in n. 4.

¹⁹ See CJEU 8 November 1979, case 251/78 (*Denkavit*), [1979] ECR 3369 para. 3 for the prohibition of import restrictions (now Article 34 TFEU); CJEU 21 June 1974, case 2/74 (*Reyners*), [1974] ECR 631, paras. 29–32 for the right of establishment; CJEU 3 December 1974, case 33/74 (*van Binsbergen*), [1974] ECR 1299, paras. 18–27 on the freedom to provide services; CJEU 4 December 1974, case 41/74 (*van Duyn*), [1974] ECR 1337, paras. 4–8 for the free movement of workers.

²⁰ CJEU 30 January 1974, case 127/73 (*BRT v. SABAM*), [1974] ECR 51, paras. 15–16.

²¹ See Article 154 AA on public procurement and Article 4 of Annex XVII on access to some services markets.

harmonization or unification of private law or business law at large. But as pointed out above, market integration is not possible without a certain approximation of the legal standards which determine the cost of production and distribution; where the national standards differ too greatly, the Member States will decline to open their markets to foreign products and nationals.²²

Over more than fifty years, three layers of EU law have emerged which impact private law. The first consists of the Treaty provisions which are directly applicable. In the circumstances of the case they may determine private law relations; thus, anticompetitive agreements are void under Article 101(2) TFEU. Second, the Court of Justice has given effect to, or rather “discovered”, certain general principles of law which serve for interpreting EU law or filling gaps, and sometimes even for reviewing the compatibility of national law with EU law.²³ The third and most important layer is legislation approximating the national laws of the Member States that has been enacted ever since the late 1960s; such legislation has been adopted by EU institutions based upon numerous provisions of the TFEU, in particular Article 114.

Given the historical purpose of the Union, the lack of a comprehensive legal basis, the complicated legislative procedure of the Union and the sovereignty claims of Member States, EU legislation has only tackled specific issues which are considered to be obstacles to the operation of the Internal Market. As a result, EU law in general and EU private law in particular is fragmentary; there is no overarching concept or system. While more recent years have witnessed attempts at consolidation in more comprehensive legal acts, the basic approach is still to pinpoint individual problems. Thus, there is no general contract law but a directive on distance contracts,²⁴ and not even a general sales law but only a directive dealing with certain aspects of the sale of consumer goods.²⁵

²² See *supra* section I.2.a), the text following n. 15.

²³ See *Metzger*, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht*, Tübingen 2009; *Basedow*, *General Principles of European Private Law and Interest Analysis – Some Reflections in the Light of Mangold and Audiolux*, *European Review of Private Law* 2016, pp. 331–352.

²⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19, now replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

²⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

EU law is enacted in different forms of legislation:²⁶ the most frequent one for private law is the *directive*, which does not apply as such in national courts but has to be implemented by the Member States in accordance with their own legal systems. By contrast, *regulations* are directly applicable in the Member States. Some of them are compulsory in the sense that they supersede national law; we find examples in the field of competition law²⁷ and transport law.²⁸ Others are optional, allowing private parties to avail themselves of the legal regime laid down in the regulation as an alternative to the otherwise applicable national law; examples are the Community Trade Mark²⁹ and the *Societas Europaea*, a corporation established under EU law.³⁰ *Decisions* are a further form of EU legislation; they are primarily issued for the implementation of international conventions concluded by the EU in the internal law of the Union; an example is the Hague Convention on Choice of Court Agreements.³¹ These different forms are of course irrelevant for the EU–Ukraine Association Agreement, which does not produce any direct effect anyway and simply lays down obligations requiring Ukraine to approximate its law to the various EU instruments; it does not matter whether these instruments are directly applicable in EU courts or not.

The private law of the Union is not clearly separated from public law; the policy orientation of EU legislation often leads to a mix of private and public law rules, which are both considered as tools for achieving certain policy goals. The body of private and business law which Ukraine will have to adjust to is immense and covers multiple areas, including company law, consumer law and labour law.³² Some exemplary remarks must suffice in this context. They will touch upon financial services, *infra* 2., and consumer law,

²⁶ See Article 288 TFEU, where three binding forms are listed; the regulation exists in dual format, see the following text.

²⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1, dealing with exemptions from the prohibition and invalidity of vertical agreements restricting competition.

²⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/1.

²⁹ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1.

³⁰ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L 294/1.

³¹ Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ 2014 L 353/5.

³² See *supra* n. 16.