DESPARATELY SEEKING SUBSIDIARITY: DANISH PRIVATE LAW IN THE SCANDINAVIAN, EUROPEAN, AND GLOBAL CONTEXT

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THE SIXTH ANNUAL HERBERT L. BERNSTEIN MEMORIAL LECTURE IN INTERNATIONAL AND COMPARATIVE LAW

AS HELD AT DUKE UNIVERSITY SCHOOL OF LAW
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NOTE FROM THE EDITOR

In this volume the DJCIL is pleased to publish Professor Joseph Lookofsky's Bernstein Memorial Lecture held last November at Duke University School of Law, as well as the introductory remarks presented on that occasion by Dean David Levi and Professor Paul Haagen.

The text which follows the introductions consists mainly of a verbatim transcription of Professor Lookofsky's lecture. However, since his lecture at Duke was enhanced by a series of graphic (on-screen) illustrations, the DJCIL editors and Professor Lookofsky have found it appropriate to edit and adjust selected passages in the transcription, so as to retain the gist of the illustrations and thus the essence of the original lecture. Readers can also (re)experience the lecture in its original form, including its graphics, at [http://www.law .duke.edu/webcast?match=Bernstein+Memorial+Lecture].

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Professor Lookofsky wishes to express his sincere appreciation to Professor Henning Koch (of the University of Copenhagen) and Professor Peter Møgelvang-Hansen (of the Copenhagen Business School) for their valuable comments and suggestions in connection with the preparation of the Bernstein Memorial Lecture at Duke.

DEAN DAVID F. LEVI**

Welcome to the Sixth Annual Herbert L. Bernstein Memorial Lecture. This lecture series celebrates the life's work of Professor Bernstein, who was a wonderful teacher, scholar and colleague at Duke Law School for 17 years before he passed away in 2001.

Born in Hamburg, Professor Bernstein had a harrowing boyhood during World War II. He was educated at the University of Hamburg, distinguished himself as a practitioner and scholar of the law at an early age, and eventually made his way to the University of Michigan Law School in 1962. He then taught at the Universities of Hamburg, Berkeley, and Southampton before coming to Duke in 1984. His fields of scholarship included comparative and private international law.

Professor Bernstein was a much beloved figure here at Duke. Because I did not have the privilege of knowing him personally, I've talked to others who did, and certain words and phrases constantly recur. People recall his respect for others, his warmth, his kindness, that he was a gentleman of the old school, his commitment to justice, his wonderful sense of humor. It's clear that he had a profound effect on all of those who were fortunate enough to come to know him.

It's a particular pleasure to see that his wife, Professor Bernstein's wife, Waltraud Bernstein is able to be with us here today. Thank you for coming.

This speaker series is made possible by the Duke Center for Comparative & International Law as well as by contributions from Professor Bernstein's many friends and from the alumni of this law school, and we are grateful to all of those who have made possible this wonderful event.

We are honored to welcome here to Duke one who is no stranger to Duke. Professor Joseph Lookofsky of the University of Copenhagen will be delivering the Bernstein Lecture today. A friend and colleague of Professor Bernstein, it is fit and proper that he should be our speaker here today. Introducing Professor Lookofsky is our own Professor Paul Haagen. Professor Haagen is a scholar of history and law. He was a Rhodes scholar. He holds a Ph.D in history from Princeton and a J.D. from Yale. He joined our law school in 1985. His scholarship focuses on contacts and arbitration, particularly in the professional sports arena, as well as in the social history of law.

** Dean David F. Levi is Dean and Professor of Law, Duke University School of Law.

He's particularly interested in debtors and debtor's prison. Professor Haagen.

PROFESSOR PAUL H. HAAGEN***

And I am indebted to Dean Levi for those comments. As Dean Levi noted, this is the Sixth Herbert Bernstein Memorial Lecture in International and Comparative law. It is a series that gives those of us who knew and had the privilege to work with Herbert a time and opportunity to reflect on his many contributions to this institution and to the field of international and comparative law.

Herbert was a wonderful colleague, a man of penetrating intellect, grace, dignity and deep humanity. It's a great honor and privilege to introduce and welcome back to Duke Law School Joseph Lookofsky, Professor of Obligations and private International Law at the University of Copenhagen, and among his many other accomplishments, Herbert Bernstein's distinguished co-author, collaborator and friend.

Professor Lookofsky's education and experience are in many ways the mirror image of Professor Bernstein's. Professor Bernstein, as the Dean has noted, was educated first in Kiel and then in Hamburg before beginning a distinguished academic and professional career in German law. He then came to the United States to study American law at Michigan and teach American contract and insurance law here. He brought to comparative law the expertise of a scholar and practitioner at home in both the common and civil law traditions.

Professor Lookofsky has taken the opposite and, I suspect, more difficult and less common route to a similar expertise. Educated at Lehigh University and the New York University School of Law, he practiced law as an in-house counsel at United Artists before going to Denmark to study law at the University of Copenhagen, where he joined the faculty in 1981. Professor Lookofsky has been a visiting professor at the Universität Freiburg Institut für Internationales Privatrecht and here at Duke Law School. In addition to serving as Secretary General for the Danish Committee for Comparative Law, Professor Lookofsky coordinates student exchange programs with Duke Law School and the New York University Law School.

*** Paul Haagen is Professor of Law, Duke University School of Law.

I believe alone among the Bernstein lecturers, and probably among this audience as well, Professor Lookofsky has the distinction of being a member of a chivalric order, having been awarded the Order of the Dannebrog by Her Majesty Queen Margrethe II of Denmark in September of this year for his distinguished service to Denmark. Professor Lookofsky's teaching and publications relate to contractual and delictual obligations, sales, private international law, commercial arbitration, and comparative law. His lecture today is entitled "Desperately Seeking Subsidiarity: Danish private Law in the Scandinavian, European, and Global Context."

Subsidiarity is a principle of European Community Law first established and defined in Article 5 of the Maastricht Treaty of 1992. It is intended to ensure that decisions are taken as closely as possible to the citizen, and that the community can only take action if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states. It is somewhat similar, Professor Lookofsky has noted, to the principles set out in the Tenth Amendment to the U.S. Constitution. He will explain why he and other Danish jurists are seeking but not finding subsidiarity in the private law field. Professor Lookofsky.

PROFESSOR JOSEPH M. LOOKOFSKY

Thank you very much, Paul, for that kind and very generous introduction.

Dean Levi, colleagues, students and friends: Thank you for this great honor to lecture at this fine law school today in memory of my dear friend and colleague Herbert Bernstein. This is my fifth visit here, and I have wonderful memories.

Last January Dean Levi's predecessor, Dean Bartlett, invited me to come here to Duke to lecture comparatively, in Herbert's honor, on a topic in Danish or Scandinavian law. In response to that kind invitation, I will speak about subsidiarity, mainly within the context of Danish, Scandinavian and European private law. Thank you, Paul, for helping to me to introduce the subsidiarity concept. That will save me a bit of time during the first part of my lecture.

Now, to help introduce the comparative context of my lecture, I ask you to imagine a map composed of concentric circles or rings, a map which depicts the "private law universe."

At the center of this universe, within the innermost circle of this map, lies the private law of Denmark. Just outside this, the map's second ring depicts private law applicable in all of Scandinavia, in

particular, certain private law rule-sets known as the Scandinavian "Model Laws."

Both of these inner rings are surrounded by a third ring which represents the law of the European Union,[1] and this ring is the one in which the concept of subsidiarity lies.

Finally, we imagine the outermost "global private law" ring, which comprises certain private law rule-sets adhered to not only by European States, but also by many non-European countries, including (e.g.) the United States and China. Within this last ring we find such commercially significant treaties as the Convention on the International Sale of Goods (CISG) and the New York Convention on International Commercial Arbitration.

This map serves to depict *my* private law universe, and it's not so unusual that I see things from my own location and perspective. After all, I've been in Denmark for some thirty five years, and so Denmark *is* the center of my universe, not only as regards private law, but as also as regards life and society in general. I realize that might be hard for an American audience to understand, since I was born and lived here in the United States for twenty seven years, but I have lived in Denmark for an even longer period of time, and the center of my universe shifted (or at least drifted) towards Scandinavia some time ago.

As I proceed with my lecture, I'll ask you to keep my private law universe in mind. I'll use Denmark (the innermost ring) as my starting point and then work outwards. Before I tell you about Danish private law, I'll say a few things about Danish society in general. I think these observations about the societal context might make it easier to explain some of the perhaps unusual concepts of Danish law which I intend to mention later.

I will also make a few general points about Scandinavian law. There are, to be sure, many similarities between Danish and Scandinavian law, but there are also many differences. There is, in fact, no real "Scandinavian Law," as there are no (regional) Scandinavian rules which regulate conduct throughout Scandinavia,[2]

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1. The author notes that in a more perfect map of this "private-law universe" the third ring would account for the fact that one of the Scandinavian States (Norway) is not a member of the European Union.

2. A few Scandinavians once dreamed of "federalizing" Scandinavian private law. In 1947, a prominent professor at the University of Copenhagen presented his Draft for a Nordic Civil Code. Although the idea never took hold anywhere in Scandinavia, his Draft was later

but we do have some similar private law legislation in Denmark, Norway and Sweden, because these statutes were originally drafted on the basis of models which reflect a Scandinavian consensus. So, just as parts of the New Jersey version of the UCC closely resemble the corresponding parts New York or North Carolina law, because they were all drafted on the basis of a uniform model, we find parts of Danish private law which resemble parts of Norwegian and Swedish private law.

But my main focus today will be a comparison between Danish and European law. That will be the main comparative context. I think many of the things I say will also invite other comparisons in your own (American) minds, but I must say that from a Danish point of view the main comparative interest these days is the relationship between Danish law as such and European Community law (which is of course becoming part of Danish law as well), as opposed to comparisons between Danish and American law. But, as I'm here in the United States today, I will also make some comparative comments in that American law direction as well.

There is a trend towards what I permit myself to call the "federalization" of Private law in Europe. The word "federalization" is in quotation marks here in my notes, since some constitutional scholars in Europe would debate or contest the validity of that term, at least technically speaking, but there's no question that some key areas of private law that were previously the exclusive province of the Danish legislator and part of Danish sovereignty have been federalized and have become (or been replaced by) European law common to all Member-States of the European Union, and Denmark is, of course, one of these States.

I will be illustrating this point as I go along and explaining with concrete examples—as many as I have time for—and at the end of my lecture I even hope to reach some global comparisons (the outermost ring on my map). These comparisons will be few and brief: one is about arbitration—the New York Convention on Arbitration, and the other one is about the International Sales Convention, the CISG, since I hope to say a few words regarding Denmark's special position in relation to these two significant treaties.

Well, I don't have to tell you what "subsidiarity" means, since Paul [Haagen] did that for me, but you might still ask why I (or

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published in English. *See* FR. VINDING KRUSE, A NORDIC DRAFT CODE (Else Giersing trans., Munksgaard 1963).

anybody) might be desperately seeking *that*? Well, a lot of people are desperately seeking *something* these days. Indeed, when I *Googled* the words "desperately seeking," I got more than *two million* hits.[3] A large number of them, it seems, were related to the film entitled *Desperately Seeking Susan* (with Susan played by Madonna, herself) – that film was, by the way, one of the "top ten" films of 1985.[4]

And then there are the many others, those desperately seeking other things—everything from *snoozin'* (a good night's sleep) to *sanity*.

But why seek *subsidiarity*? Well, if you search for the term in Google (one of the great sources of law these days actually), you'll see that subsidiarity had its origins in Catholic Church doctrine from the late 1800's. So, even the Church once sought subsidiarity. And though this information (subsidiarity's religious origin) is actually quite interesting,[5] I won't take the time right now to say more about that.

Instead, I'd like to discuss what subsidiarity means in the European Union context. As you said, Paul, the term became prominent in 1992, around the same time that the European *Community* was moving towards (developing into) the European *Union*. I think it's fair to say that subsidiarity, as it was used then, was a kind of signal to the peoples of Europe who thought (and feared) that Europe was harmonizing too quickly, becoming one single "State." To counter (or slow down) that trend, the European Community, and later the Union, could "put the brakes on," if you will, by using the subsidiarity concept.

In Danish we "translate" (or re-write) the term subsidiarity to something we call—get ready—"*nærhedsprincippet*."[6] This is (literally) the "closeness-principle," the idea that decisions should be taken as closely as possible to the citizens. I think that (our own freely translated) version serves to explain the *ideological* aspect of subsidiarity.

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3. Google, http://www.google.com/ (search "desperately seeking") (last visited Oct. 5, 2008).

4. RogerEbert.com, Movie Answer Man, http://rogerebert.suntimes.com/apps/pbcs.dll/article?A ID=/20070816/ANSWERMAN/70817006/1023 (last visited Oct. 5, 2008).

5. Interested readers can easily obtain a wealth of information on this subject. *See, e.g.*, Google, http://www.google.com/ (search "subsidiarity, Catholic Church") (last visited Oct. 5, 2008).

6. Pronounced in Danish (something) like this: *nair–heds–prin–seep–it*.

And then we have the more technical, "constitutional" aspect of subsidiarity, and this is the idea that the European Union does not (or at least should not) take action unless such (centralized/federalized/ European) action is deemed to be more effective than action taken at the national level.[7] The Union should, in other words, not go beyond what is "necessary."

But even that, I would venture to say (and I'm not a constitutional scholar), is also at the moment a kind of an ideological concept. It's just a signal; it hasn't really "put the brakes on." Denmark did, to be sure, send a shockwave through the Community by voting "No" to the Union in 1992, and for a brief period our "no" put the brakes on the entire unionization of Europe. So it was perhaps then appropriate that the European Council sent the signal of subsidiarity, saying: "Don't worry Denmark; we're not going to take over more than is absolutely necessary in terms of federalizing European law."

The more recent (draft) European *Constitution* – which was subsequently renamed the (draft) Reform *Treaty* (to make it sound less "federal," I suppose)—includes provisions purportedly enhancing the principle of subsidiarity.[8] As expressed in the Treaty on the European Union,[9] the principle "is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at the national, regional or local level."[10]

Together with this new version of the subsidiarity principle, the Reform Treaty establishes an "Early Warning System," which gives the individual EU Member States the chance to say: "Wait, please don't federalize *that*, if you are going in that direction." Essentially, the warning system permits national parliaments to "ask the

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7. Except in the areas within its "exclusive competence", *see* Europa Glossary, http://europa.eu/scadplus/glossary/subsidiarity_en.htm (last visited Nov. 18, 2008), and we can leave that exception alone, since it does not concern us here today.

8. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Dec. 13, 2007, 2007 O.J. (C 306) 150, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007 :306:SOM:EN:HTML [hereinafter *Lisbon Treaty*].

9. *See also* Treaty on European Union, tit. II, art. G(B)(5), Feb. 7, 1992, 1992 O.J. (C 191) 1, amended by Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 5, para. 2, Oct. 2, 1997, 1997 O.J. (C 340) 57.

10. *See generally* Europa Glossary, *supra* note 7.

Commission to review a legislative proposal if they consider that it violates the principle."[11]

Well, as I said, I am going to be looking at this from the point of view of a "private" lawyer, and since the term "private law" (in Danish: *privatret*) sounds more European than American, I'll try to explain it this way: Private law is, quite simply, *what I do*. It's not a strange thing. In some legal systems, I should say, the distinction between private and public law has technical and important significance. We have a scholar here today, Ralf Michaels, who has written about that,[12] and all I want to say is that in Denmark the distinction is of no particular significance. It's just a convenient division of labor among faculty members. Some "do" private law and some public law. People who do public law concern themselves with constitutional law, criminal law, administrative law, whereas the people who do private law do things like contracts, torts and property. I "do" obligations and that includes contractual obligations, as well as delictual obligations (the things you call torts), and I also do private international law and comparative law as they relate to contract and tort.

Now, that is a non-American way of doing things, I think. In the United States, and even in much of Europe, private international law, also known as conflicts of law, is something that is done by specialists, and I think that we have some of those specialists with us today. In Europe, in Denmark at least, it is not uncommon for the person doing contracts to be responsible for comparing (e.g.) Danish contract law to the contract law of other legal systems—contracts in German law, American law etc.—and also to address related conflict-of-laws matters, including the applicable law (choice of law). So I do these things too. It's a system (division of labor) which has both advantages and disadvantages, which I won't go into now. I just wanted to explain what I mean by private law when I talk about it.

And now I would like to take you on an imaginary trip, a tour from the Duke University Law School, located on Science Drive in Durham North Carolina, to the place I work in Copenhagen, which is on *Studiestræde* (that means "Study Street," which is quite similar to the German term).

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11. *See* Europa Glossary, *Together 50 Years - Subsidiarity*, http://www.together50years.eu/EN/gloss/index.htm.

12. *See generally* Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006).

There are, of course, various ways to get to Denmark from Duke. If you were to go eastward, as the crows or jets fly, towards what is now the tiny Kingdom of Denmark, you would pass by parts of the formerly *enormous* Kingdom of Denmark. We ruled Greenland (which we still "rule," though they wouldn't like me to say it that way; they now have "home rule"). Denmark also ruled most of Norway and even part of Sweden at one time. It was indeed an enormous kingdom, and a mighty one – you know, the Vikings and all of that.

But, we could also approach Denmark from the south, which I think is more interesting today, because if we came up that way, the way the Roman Legions did, we would pass through what is now the German Duchy of Schleswig, and we would pass the Eider River. But if we did what the Romans did, we would actually stop at the Eider, because there is (or at least was) a stone there saying (excuse my Latin): *Eidora Romani Terminus Imperii,* (i.e.) "The Roman Empire Stops Here."[13]

And that inscription remains significant today, because the "Civil law" stops there, too. And it is incorrect, although a common error, to include Scandinavian law within the Civil law group of law families. There are, to be sure, numerous similarities between Scandinavian and Civil law; many of them came afterwards, when we stole or borrowed or imitated a lot of German principles in certain fields, including private law. But the Scandinavian States never adopted the super-structure of the Civil law system, and that fact might help you understand some of the things I am going to say about the Scandinavian position on the world comparative map, and more specifically, the Danish position.

Before moving further in that direction, however, I thought that it might be appropriate to say something about the societal context, "where I'm coming from," if you will, after living and working in Denmark for some 35 years.

Denmark is the oldest kingdom in the world. It was originally ruled by King Knud[14] (his Danish name was later translated as "Canute") and the Viking tribe that he led. And the term "tribe" is still used about the Danish people, because Denmark is such a tightly knit society, such a small and nearly homogeneous society that it is

13. *See, e.g.*, Wikipedia, http://www.wikipedia.org/ (search "Eider River") (last visited Oct. 5, 2008).

14. Pronounced: *Keh-nood* (as in "*nood*le").

often figuratively speaking described as a tribe. And I'll give you some examples of that.

Today, we're not only a kingdom; we're also a modern Welfare State. That's Welfare with a capital "W" (welfare is not a dirty word for us).

And ours is also an extremely Democratic society (another key Danish word). Today, as fate would have it, there is a parliamentary election in Denmark.[15] It is a very closely contested election, and it looks like we are going to go over 85% in terms of voter turnout, which is going to break the Danish record. And that is also the highest voter-participation in the world, if we exclude the countries where you *must* vote (by law).

So, we are going to break our own record today. And when we do that, 98% of the people who cast their votes will be represented by politicians with seats in the Danish Parliament (*Folketing*).[16] It is not a winner-take-all system, which is not so unusual for parliamentary democracies, but it is unusual when the cutoff or borderline is as low as 2%, as it is in Denmark, and that means that nearly everyone in Denmark is represented in Parliament by someone who shares his or her political view, and that fact, some of us think, may contribute to the very peaceful nature of the Danish society. If people want to "do battle" and argue about things, they do it in the Parliament and not on the streets.

Well, what else should I say about Danish society? Other key words on my list here include Compromise, Realism, and Pragmatism. I'll be returning to these concepts, but I should also mention Secularity: Denmark might well be the least religious country in the world. Don't be fooled by the large symbol on the Danish flag; ours is a very secular society. We don't have politicians talking about religion during our elections, at least not in the sense of wearing their religion (if they have one) on their sleeves.[17]

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15. The election in Denmark was held on the same date as this Bernstein Memorial Lecture at Duke University School of Law: 13 November 2007.

16. *See* Folketinget, http://www.folketinget.dk (follow "English" hyperlink) (last visited Oct. 5, 2008).

17. *See generally* PAUL ZUCKERMAN, SOCIETY WITHOUT GOD: WHAT THE LEAST RELIGIOUS NATIONS CAN TELL US ABOUT CONTENTMENT (2008). During a press conference televised on Danish public television on 28 February 2007, the Danish Prime Minister said: "In my opinion, we should have less religion in the public space (*det offentlige rum*)." *Fogh Strongly Condemns Religious Særhensyn*, DR NYHEDER, Feb. 28, 2007, http://www.dr.dk/Nyheder/Politik/2007/02/28/113931.htm. *See* John Hansen & Kim Hundevadt, *The Cartoon Crisis—How It Unfolded*, UDLAND.JP.DK, Mar. 11, 2008, http://jp.dk/udland/article1292543.ece (regarding

We also have great Prosperity in Denmark. The Danish Kroner is strong (we don't have the Euro, but we have linked ourselves firmly to it). And we have a concept called *Flexicurity*,[18] which even the French are thinking about imitating: security and flexibility in the job market. We have "S & M" as well: do you know what that is? Socialized Medicine! And we are happy about that. We don't really call it that; we just call it the Healthcare System.[19] But everyone in Denmark is covered by it, and it works fairly well.

Sharing, Honesty and Happiness. We are also "number one" in these categories.[20] Denmark is on top in Sharing in the sense of having the smallest disparity between rich and poor in the world (closely followed by, I think, Bangladesh, which it is of course on a different scale).[21] Denmark also has lots of Honesty, in the sense that we have – according to the people who do these surveys, I don't know how they do them – the least corruption in the world.[22] And then there's Happiness: how do they measure that? Well, however they measure it, they tell us that we are the happiest people in the world.[23] Some have contested that and said: "Well, you Danes don't have very high expectations; that's why."

We are also "number one" is some other categories, including— this is the downside I guess— Taxation. Of course, you need high Taxation (and Sharing) to get the very, very small disparity between the wealthy and the poor; we have, in fact, no "poor" in Denmark in the sense that you (in America) understand poor. That is the result of heavy taxation, heavily progressive heavy taxation. But Danish

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the Danish "Cartoon Crisis", which engendered considerable political debate in Denmark and elsewhere, both about religion and freedom of speech).

18. *See, e.g.*, Wikipedia, http://www.wikipedia.org/ (search "Flexicurity") (last visited Oct. 5, 2008).

19. In Danish: *Sundhedssystemmet*.

20. According to various surveys easily accessible in Google. *See infra* notes 21-23 and accompanying text.

21. *See, e.g.*, Financial Security–Income Distribution, http://www4.hrsdc.gc.ca/indicator.jsp?lang=en&indicatorid=22 (last visited Oct. 5, 2008) (describing the Gini coefficient, which measures income disparity, ranged from 22.5 for Denmark to 48 for Mexico).

22. Tied for first place with Finland and New Zealand. Infoplease, The 2006 Transparency International Corruption Perceptions Index, http://www.infoplease.com/ipa/A0781359.html (last visited Oct. 5, 2008) (providing the 2007 Corruption Perceptions Index scores). *See also* Christian Bjørnskov, Combating Corruption: On the Interplay Between Institutional Quality and Social Trust (unpublished and undated manuscript, on file with the author).

23. This has been the case for several years running. *See Denmark 'Happiest' Country in the World*, CNN, July 2, 2008, http://edition.cnn.com/2008/HEALTH/07/02/nations.happiness/; *Denmark 'Happiest Place on Earth,'* BBC NEWS, July 28, 2006, http://news.bbc.co.uk/2/hi/5224306.stm.

people pay it willingly, and the voting (in the Parliamentary election) today is not about whether we should have less taxes, but rather about whether we should reorganize the taxes.

Moonlighting is another negative: it seems we have the highest rate of moonlighting in the civilized world.[24] Teenage Drinking – we have a lot of that too. And then we have problems associated with what I might label "Tribal Initiation." I'm not sure whether we are first in that category, but we certainly have had a lot of publicity about it, especially as regards "initiating" foreign newcomers as Members of the Danish Tribe, which is, as I said, a societal system characterized by high participatory Democracy and high Sharing (redistribution of wealth). These things have been hard for some newcomers to understand, and so it's been hard for them to become Members of the Danish Tribe.[25]

Well, now that you know the societal background, or at least something about it, I return to the subject of Danish private law. My first Danish private law book was a book about called "*Den Borgerlige Ret.*" This was in 1975, in my first course in elementary Danish contract law. This was my first "hornbook," if you will. I have it with me here today, and I'd like to translate one sentence in it. It says this: "Article 1 (§ 1) of the Danish Contracts Act lays down the fundamental rule that promises and contracts are legally binding."

I read that a few times in 1975: "Promises – and therefore also contracts – are legally binding." And then I began another kind of desperate search, desperately seeking (but not finding) some key concepts I had learned during my American legal education, things like "consideration,"[26] writing requirements and other formalities. And if you searched today (instead of in 1975) you might, as an American-educated jurist, also look for (but not find) the Law and Economics concept of "efficient breach."

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24. Also sometimes referred to as the "black economy". The Danish Tax Department considers "[m]oonlighting [to be] when you are offered and accept a job where neither you nor your employer informs SKAT [the Tax Authorities] about the employment and the pay you receive." SKAT, TAX IN DENMARK, 18 (2005) *available at* http://www.skat.dk/Vejledninger/Personserien/Pnr_37_eng2005.pdf.

25. Author's note: Lest I be accused of jingoism, I'll readily admit that my lecture-statement on this point oversimplifies a complex set of related problems—some of them also attributable to the way *some* Native (born-in-Denmark) Tribal Members treat newcomers to Danish territory.

26. *E.g.* Wikipedia, http://www.wikipedia.org/ (search "consideration") (last visited Oct. 5, 2008) (defining consideration as the "value paid for a promise").

Well, I searched for some of these things in 1975, but I found none of them. There is no consideration requirement in Danish law. Indeed, there are, quite simply no formalities at all. No contract needs to be "supported" by consideration, nor does any contract need to in writing.

Nor do many Danish jurists concern themselves with "efficient breach," not even today, and there are several reasons for this. There happens to be an article in the American Journal of Comparative Law this month which explains why many Civil law systems are not interested in efficient breach.[27] I won't go into that in detail, but I will say that the core explanation for us is that promises are not only "legally binding" in Denmark; they are also *morally binding*, and so how could Danish lawyers go out and encourage people to (efficiently) breach their promises? It would not work very well.

So, in our "homemade" (pre-EC and pre-EU) version of Danish private law, promises are binding, period, Well, at least all *reasonable* promises are binding, because there's another rule in the Contracts Act which guards against *unreasonable contract terms*.[28] That too applies to all contracts: consumer contracts, contracts between merchants, whatever. There are, to be sure, weak and strong merchants, and the prohibition against unreasonable terms, including promises which would be unreasonable to enforce, is applied more restrictively as between merchants, but it's there and it's the same rule.

As for our "homemade" law of Torts, I'll mention one principle now, and I'll follow up with a more concrete illustration later. Imagine that we have a defective product, and that a consumer who buys that that product is injured. The seller of the product is liable under Danish law. Why is the seller liable? Because the Danish judges who make (judge-made) private law decided that he should be liable. Is that a contractual principle? No, because the legislators who wrote the Danish Sales Act[29] more than 100 years ago were of the opinion that contractual rules were not well-suited for product liability cases. So even the immediate seller's liability is based on a tort principle, but it's a (near) strict liability principle: you can sue the

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27. Ronald J. Scalise, Jr., *Why No Efficient Breach in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 721 (2007).

28. *See* Aftalelov, 1986-96, § 36 (Den.) *translated in* http://www.sprog.asb.dk/sn /Danish%20 Contracts%20Act.pdf [hereinafter *Aftalelov*].

29. Købeloven, (1906), as subsequently amended, *translated in* http://www.sprog.asb.dk/sn/ Danish%20Sale%20of%20Goods%20Act.pdf.

seller with whom you have a contractual relationship –or even if you don't, a member of your family can sue him – and the seller will be held liable unless he can prove that the producer is (without fault and therefore) not liable. This was at least the law made by our judges. I'll return to a more concrete example, which illustrates how EU law has changed our law in this area, in a minute.[30]

I realize that I'm presenting a rather abrupt list of rules, but I do want to mention another private law rule now, one that applies to both contract and tort, and that rule says: *no unreasonable compensation*. Not only are unreasonable contract terms not binding in Denmark, but even when a binding promise is broken, the party injured is not necessarily entitled to full-blown "expectation protection." There's a regulatory mechanism, codified by statute actually, which limits compensation (in both contract and tort) to what a Danish judge would consider to be a "reasonable" amount.[31]

So, you see, the reasonableness-principle pervades Danish private law. I have one nice illustration of the fact that unreasonable contract terms do not bind. Our daughter Sarah is living in New York now. She's going to be married in the Kingdom of Denmark this summer, and she was in the process of contracting with a Danish provider of services for her wedding. When she found the standard terms of one prospective provider on line, she sent me an e-mail with a link to them, asking: "Dad, can I click yes to this?". I answered her without even looking: "Don't worry about that," I said, "because even if there are any unreasonable terms in there, they're not binding." So she clicked yes, and that was that.

I looked at those terms later, by the way, and they were quite reasonable, from a Danish point of view. There was, for one thing, no arbitration clause among them. Such a clause might not be unreasonable *per se* in Denmark, but we simply don't have any Danish merchants who include arbitration clauses in their consumer contracts, probably because the merchants would not expect them to bind. I think our general prohibition against unreasonable contract terms reflects a more paternalistic attitude than the corresponding, yet "milder" rule in the United States, i.e., the rule that "unconscionable" promises are not binding. I think that

30. *See infra* notes 55-58 and accompanying text.

31. *See Erstatningsansvarsloven* [Liability for Damages Act], No. 885 (2005) (Den.) § 24, *translated in* http://uk.patientforsikringen.dk/legislation/erstatningsansvarsloven.html [herein after *Erstatningsansvarsloven*].

"unreasonable" is, as it sounds, a more flexible and more intrusive term than unconscionable. I wouldn't say that the difference is enormous, but it certainly is a difference in spirit.

I think it's time to move on now and say something about the *sources* of Danish private law - where do all these rules that I'm talking about come from? These flexible and open-ended legal rules, the sources of what I've been calling "home-made"(i.e.) Danish-made private law.

First, I'd like to highlight the word for "law" in the Scandinavian legal systems. The Scandinavian languages are very close on this point: the word for law is "*ret*" in Danish, "*rett*" in Norwegian, and "*rät*" in Swedish (we have a Swede here in the audience today: am I doing this well?). Interestingly, all these versions of the word mean more than just "law," they also mean *right*. The Scandinavian word for law is the same as the Scandinavian word for right. There's something nice about that. Maybe I'm being a bit sentimental, but I think there's something nice about that.

What about statutes and legislative codifications? The word for "law" can also be used to mean (a) "formal law" in the sense of a legislative enactment, a statute. That helps explain why my heading on this point is: *Make love, not codes*. I took a copyright on that phrase (by tagging a © to it in my Power Point), because I thought it was quite cute. (I used to be a copyright lawyer at United Artists Corporation, you know.) Well, the fact is that the plural of the Danish word for law happens to be "*love,*" but this plural form is pronounced – not like you pronounce "love" in English, but rather – as a two-syllable word: *low – vuh*. Say the word for law in the singular, and it's pronounced "low." Say the plural, however, and you can hear the "v" (in *vuh*).

But my main point here is that Danes *make laws*; *they don't make Codes*. Danish legislators have been enacting statutes on private law subjects for centuries, but they have never enacted a comprehensive Civil Code. As I said earlier, the Roman Empire (and Roman law) stopped at the Eider River,[32] and that helps explain why we never got a general Civil Code, as in France and Germany and other Civil law systems. These days, when the European Union is moving, step by step, towards a European Civil Code,[33] we Danish jurists are nervous

32. *See supra* note 13 and accompanying text.

33. *See generally* TOWARDS A EUROPEAN CIVIL CODE (Arthur Hartkamp et al. eds., 3d ed. 2004). The seemingly innocuous "Common Frame of Reference" is, in my view, just the first

about that. We have never had a Code; we don't have the tradition for it; and we are worried about it.

What we do have at the "home-made" level are a few basic pieces of legislation within the private law area, the most notable being the Danish Sales Act.[34] It's quite similar in its coverage to Article 2 of the American UCC.[35] Another key Danish statute is the Contracts Act, which has a broader field of application: it applies not just to sales transactions; it also covers other contractual topics (which the UCC covers with respect to sales), such as contract formation. The prohibition against unreasonable contract terms, which I mentioned previously,[36] is in the Contracts Act.[37] And then there's the Liability for Damages Act,[38] which tells judges how to measure liability, particularly in tort cases. The Liability Act also contains the general liability-limitation I told you about,[39] so that plaintiffs don't get unreasonable compensation (in contract or tort).

These, I think, are our main private law statutes. But we also have judge-made law in Denmark. Indeed, since we have relatively little (detailed) statutory regulation, we have to rely quite on a lot of judge-made law. That probably doesn't surprise the American audience here. But our judge-made law might well surprise a Civilian jurist. We Danish jurists don't regard our judges as do the French, for example, as the "*bouche de la loi*" – the mouthpiece of the (French) legislature. Our Danish judges really *make* law, and everyone recognizes it. But they make it in a way that is different from the way it's made here in the States. It's made in a way that is less obvious.

For one thing, our judges write very brief decisions. The longest part of a Danish judgment simply accounts for the facts of the case and the arguments of the opposing lawyers. The decision itself and the rationale underlying that decision – the *ratio*, sometimes also referred to as the premises (*præmisserne*) - are very briefly stated, usually fitting within a single paragraph. The premises need only send a brief "signal" as regards the main factors that have gone into the

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slice of the coming, fully codified pie. For recent developments, *see, e.g.*, Study Group on a European Civil Code, http://www.sgecc.net/pages/en/home/index.welcome.htm (last visited Oct. 5, 2008). *See also infra* notes 50, 69 and accompanying text.

34. *See supra* note 29 and accompanying text.
35. U.C.C. art. 2 (2004).
36. *See supra* note 28 and accompanying text.
37. *See Aftalelov*, *supra* note 28.
38. *See Erstatningsansvarsloven*, *supra* note 31.
39. *See supra* note 31 and accompanying text.

judge's decision, because the judge is not trying to "set a precedent," he's trying to decide the concrete case.

I know a fair amount about this aspect of Danish law, because I often work with judges. I work with them not only because Danish judges also sometimes serve as arbitrators (and so I sometimes get to sit on arbitration tribunals with them), but also because Danish judges also serve as external examiners (*censors*), helping us grade Danish law school exams. When we talk about the solutions to a complicated problem on an essay exam in the law of contracts, for example, or in the law of tort, the judges often have the *outcome* in mind. These judges are, of course, not ignoring the applicable rules, but it's not necessarily the rules that push them towards the outcome. It's rather as if they first sense the outcome – what they feel is just and right (which goes back to the fact that they too went to law school) – and then they *test that result* by looking at the premises (the *ratio* – which in an exam situation is set forth in the "model answer") to see if the premises do indeed "lead" to that just result. Is that putting the horse before the cart or the cart before the horse? I'm not sure. It's something which Patrick Attiyah from England (I think he's been at this law school as well), has called *reasoning backwards*. It's not a concept to which we claim copyright, but it's something which we adhere to in practice.[40]

I think the result of all of this is that Danish private law is made up of two main components, statutory law and judge-made law, each in a special Danish variation, what you might call "legislation light" and "precedent light." For these reasons, among others, the Danish system is an unusual system.

I can see that I have to move along now if I want to get to some concrete examples, so that I can illustrate how Danish law is characterized by pragmatism as well as realism.

My first example, inspired by a real Danish case,[41] concerns a guy named Mr. Skov. He's a farmer who runs an egg business, producing eggs. He sells the eggs to "Bilka", a large Danish supermarket (a bit like Wal-Mart), and two consumers (named Jette and Michael) who buy those eggs from Bilka make what Danes call an "egg cake." As it

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40. *See* Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT 'Restatement' and Danish Law*, 46 AM. J. COMP. L. 485, 490 & n.33 (1998).

41. The facts here are inspired by Danish (City and High Court) decisions which led to the preliminary ruling issued on 10 Jan. 2006 by the European Court of Justice. Case C-402/03, *Skov Æg v Bilka Lavprisvarehus*, 2006 E.C.R. I-00199.

turns out the eggs are tainted with salmonella, and the consumers become seriously ill. Who can they sue?

Well, if we apply traditional (pre EC/EU) Danish judge-made (pro-consumer) rules to decide this one,[42] the consumers don't need to locate the egg-producer (Mr. Skov, whose name isn't on the box anyway). They just go right to the supermarket (Bilka) and let that middleman-seller worry about who ultimately might be left holding the bag (i.e., Bilka or Mr. Skov). This product liability action against the supermarket is not a contractual action under Danish law.[43] It's a tort action based on Danish judge-made rules of law. I suspect the nature of the judge-made law underlying this action was later misunderstood by the European Court of Justice,[44] but please excuse me if I'm wrong about that.

Another example, also based on a real Danish case:[45] Two Danes prepare to go on a hunting trip. They find each other by way of a hunting journal in Denmark. They rent a car in Scotland and buy insurance there in accordance with Scottish law. They have an accident, and the passenger dies due to the driver's negligence (no question about that). The widow then tries to sue the Danish driver in Denmark, but the defendant argues that the action is time-barred under *Scottish* law, because the lawyer hired by the widow waited more than *three* years before commencing legal action against the driver. But the action is not time-barred under *Danish* law, because here we have a *five* year statute of limitations. How should the judges in the Danish Court of Appeal decide?

If we translate the essence of the decision – it fills no more than a small paragraph – we see that the judges quickly list the main factors which they found relevant, and then briefly add their conclusion (the outcome) to that. It goes something like this: the accident occurred in Scotland in a car registered there, and the driver was covered by

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42. As did the lower (City) court judge. *Id.* para. 16.

43. *See supra* note 29 and accompanying text.

44. *See Skov*, 2006 E.C.R. I-00199. Although a detailed explanation of the basis for my disagreement with the ECJ ruling lies outside the scope of the present (lecture) discussion, my main point is that a better understanding of the nature of the Danish judge-made rules of (tort) liability by the ECJ might well have led to an interpretation of Article 13 of the Product Liability Directive which preserved the viability of the Danish (middleman-liability) rule. *See infra* note 56 and accompanying text.

45. Based on the decision of the Danish High Court, *reported in* [B] UGESKRIFT FOR RETSVÆSEN 886 (1982).

compulsory Scottish insurance. For these reasons, the dispute should be governed by Scottish law, and so the action is time-barred.[46]

Now you might not like the reasoning or the result, but you have to think about it. In the well-considered view of one Danish professor (who later became a Danish Supreme Court judge), the outcome (time-bar) in this case was hardly "dictated" by the formalistic application of choice-of-law rules. Quite the contrary: the outcome was quite likely rather the result of pragmatic considerations and the principle of reasonableness.[47]

In other words, it was not so much a question of how to make the (formal) choice of law between Scottish and Danish law (and their respective time-bars), but rather a question of how to reach the "best" result, i.e., the most reasonable result, or the "least unfair" result. Should the court let the widow suffer because of the negligence of the driver? Or should it let the driver suffer because the widow chose a lawyer who took no action against that driver until the insurance protecting him had expired?[48] Tough decision. The judges in the Danish High Court of Appeal made what they thought was the "right call," and they could do it that way because the applicable (Danish) judge-made rule of private international law was flexible, so as not to "dictate" an unreasonable result in a difficult situation. I can't give you all the details of this, I haven't got the time. Too many of you will leave if I did it.

This was, at any rate, the (pre-EU) way Danish judges used to handle many cases like these. If we imagine a time-line depicting the development of Danish private law, we would see how Denmark

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46. For a more accurate translation, *see* JOSEPH LOOKOFSKY & KETILBJORN HERTZ, EU-PIL. EUROPEAN UNION PRIVATE INTERNATIONAL LAW IN CONTRACT AND TORT (forthcoming 2009), which reads as follows:

> The accident occurred in Scotland while [defendant] and [plaintiff] used a car registered in that country, which was covered by compulsory liability insurance according to Scots law. Therefore, the dispute should be governed by Scots law. The [plaintiffs] are debarred from starting legal proceedings in Scotland pursuant to section 17 of the Prescription and Limitation (Scotland) Act 1973, as the statutory 3-year period has elapsed. The High Court finds that this provision cannot be disregarded in proceedings commenced in a Danish court even though it is [or at least was, when this decision was rendered] a procedural rule under Scots law. Consequently, the High Court finds for [the defendant].

47. *See* Jørgen Nørregard in [B] UGESKRIFT FOR RETSVÆSEN 47 (1985). "Should the fact that the lawyer chosen by the plaintiff (herself) did nothing (for more than 3 years) affect the outcome of the plaintiff's case, especially considering that this same failure removed the defendant from the shelter of Scottish insurance coverage?"

48. *Id.*

moved from a period where we made all our own laws to the year when Denmark joined the EC. That was in 1972. Twenty years later, the concept of subsidiarity was introduced in response to the Danish "no" to the European Union (in 1992). Later, Denmark joined that Union (with 4 notable "reservations" or "opt-outs"),[49] and the Union subsequently moved Denmark and the other Member States further in the direction of private law federalization. Ultimately, I fear we may get "total" private law harmonization: a European Civil Code. We are certainly moving in that direction.[50]

I'm in the minority on this, one of the relatively few academics resisting the creeping federalization of Danish private law. And since we in the minority can hardly withstand the "full-court press" being exerted by our European opponents, I know we can't win the game.

Where is this process of federalization taking us? We're moving away from the Danish rule which simply says that contracts are unenforceable if the enforcement would be unreasonable, taking into account all the circumstances. That's our Contracts Act rule from 1976.[51] Here's where we're going: to a list of 17 presumptively unfair terms from Directive 93/13/EEC on Unfair Terms in Consumer Contracts.[52]

That's the way the EU does things like that, by listing detailed examples. They tell you, "this is unfair, this is unfair, this unfair" and so on. To be sure, we in Denmark don't necessarily disagree with these EU details. We'd agree, for example, that arbitration clauses in consumer contracts are presumptively unfair.[53] But we don't want to clutter our Contracts Act and "pollute" its legislative simplicity with all these details. So Denmark and Sweden decided to implement the Directive of Unfair Contract Terms *without* including all these details, by simply continuing to ban (all) unreasonable contract terms. We got sued by the EC for not including the "Grey List" of seventeen (17) unreasonable terms from the Directive in our legislative text, and

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49. The recent Irish "no" to the *Lisbon Treaty*, *supra* note 8, has had the effect of cementing the Danish opt-outs, at least for the time-being. *See* Bruno Waterfield, *Denmark Calls Off Vote on EU Opt-outs,* TELEGRAPH (U.K.), Aug. 8, 2008, *available at* http://www.telegraph.co.uk/news/worldnews/ europe/denmark/2522903/Denmark-calls-off-vote-on-EU-opt-outs.html.

50. *See generally* Joseph Lookofsky, *The Harmonization of Private and Commercial Law: "Towards a European Civil Code*," 39 SCANDINAVIAN STUD. L. 111 (2000), *available at* http://cisgw3.law.pace.edu/cisg/biblio/lookofsky14.html.

51. *See supra* note 28 and accompanying text.

52. *See* Council Directive 93/13, art. 3(3), 1993 O.J. (L 095) (EC).

53. *Id.* at Annex (q).

luckily we won, since the European Court of Justice agreed that our non-inclusion of the grey list in the black letter of our statute did not provide proof that we planned to ignore the list.[54]

Now, how would our example about the salmonella-tainted eggs turn out now that the EC court has issued a preliminary ruling on that? Not the same result as before.[55] These poor consumers cannot sue the supermarket on the basis of our traditional judge-made rules, because we now know, having been brought into the EC court twenty years after our implementation of the Product Liability Directive,[56] that Article 13 of the Directive does not leave room for the Danish judge-made rules which would allow the consumers to sue the supermarket. This is the way that the EC court interpreted the Directive, and I think that they may have interpreted it in this way because they didn't fully understand the nature of tort liability under Danish judge-made law. They said we could make a supplementary fault-based rule.[57] We could also make a contractual rule, as England has, and I think we're going to have to do it now because we need to reinstate an action against sellers, but I doubt whether we'll get back to our previous pro-consumer state.[58]

What about the decision reached by the Danish court in the case of the accident in Scotland?[59] We would not be able to make that kind of decision anymore, at least not under Rome II.[60] The judges can't make their call as to what they think is the right decision in this kind

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54. *See* Case C-478/99, Comm'n v. Sweden, 2002 E.C.R. I-4147, para. 24.

55. *See* Case C-402/03, *Skov Æg v Bilka Lavprisvarehus*, 2006 E.C.R. I-00199, para. 45.

56. Council Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1999 O.J. (L141/20) (EC).

57. Denmark has now done so (in a recent revision of the Danish Product Liability Act) by basing the seller's liability on fault, although with a "reversed burden of proof" on the fault issue – thus creating a (pro-consumer) rule which might not be able to withstand scrutiny in the ECJ.

58. *See supra* note 57.

59. *See supra* notes 45-46 and accompanying text.

60. *See* Commission Regulation 864/2007, art. 4(2), 2007 O.J. (L 199) 40, 44 [hereinafter Rome II]. The purpose of the Rome II Regulation, adopted in 2007, is to harmonize (and thus replace) the national conflict-of-laws rules previously applied by the courts of the individual EU Member States. The Rome II Regulation will enter into force in all EU Member States *except Denmark* on 11 January 2009, and the Regulation will remain inapplicable in Denmark, unless and until Denmark withdraws its reservation to the EU treaty as regards legal and home affairs. The Danish situation as regards the Rome II Regulation is thus the same as regards Denmark's position vis-à-vis the Rome I Regulation. Regarding Rome I and Rome II, *see generally* LOOKOFSKY AND HERTZ, *supra* note 46.

of case, because the EU wants to have more "certainty" when it comes to choice of law. They want every judge in the European Union to make the same decision – it doesn't matter whether it's a good decision or a good result. They want all judges in a situation like this to base their decision on *lex communis*. Since the two parties concerned come from Denmark, it should be Danish law which applies, so the action would *not* be time-barred today.[61]

I'm overdramatizing to be sure. But, I don't like the idea that we cannot continue to decide a case like this on the basis of what is right: on the basis of the result, by putting the result before the more technical premises. In fact, I have even complained to the Ministry of Justice, arguing that the Rome I Regulation (on the law applicable in contractual matters)[62] would put us into a "straight jacket." And the same certainly goes for Rome II (on the law applicable in tort).[63] Unfortunately, I don't have time to tell you more about that.

The global situation, at least, is better. The global situation is better because it's more flexible. Denmark ratified the New York Convention,[64] as did the United States, and the Convention requires that each Contracting State recognize an arbitration agreement "in writing."[65] There's a big debate about this rule these days (those of you who do arbitration know about this): what's "in writing," and what's not? We in Denmark don't much care, since under Danish law, *no agreement* (of any kind) needs to be in writing. And luckily most people interpret the New York Convention to allow for that. You must at least respect arbitration agreements in writing, but you can also respect arbitration agreements which are not in writing.[66]

At the global level of commercial harmonization we also have the CISG— the Convention on Contracts for the International Sale of Goods. I'll just mention Article 16 (in CISG Part II) which says until

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61. *See* Rome II, *supra* note 60, art. 4(2). There is a narrow safety valve in Article 4(3) of the Rome II Regulation, *id.* art. 4(3), which would hardly affect the outcome in a case like this. *See* LOOKOFSKY & HERTZ, *supra* note 46.

62. *See* Europa, Convention on the law applicable to contractual obligations (Rome Convention), http://europa.eu/scadplus/leg/en/lvb/l33109.htm (last visited Oct. 5, 2008).

63. *See* Europa, The law applicable to non-contractual obligations – The Rome II Regulation, http://europa.eu/scadplus/leg/en/lvb/l16027.htm (last visited Oct. 5, 2008).

64. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21, U.S.T. 2517, 330 U.N.T.S. 38.

65. *Id.* art. II.

66. *See* U.N. Comm'n on Int'l Law, *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session*, Annex II, U.N. Doc. A/61/17 (June 19-July 7, 2006).

a contract is concluded an offer may be revoked. And you know about this rule - it's similar to the American (Common law) rule which permits the offeror to revoke until an acceptance has been dispatched. Well, since an offer is a kind of promise, the CISG rule means that (some) promises are not binding. And since that runs counter to the general Danish rule,[67] Article 16 might have stood in the way of Denmark's ratification. But the CISG allowed Denmark to ratify subject to a reservation under Article 92, a declaration saying we would not be bound by CISG Part II.

I myself have argued that we should retract that CISG reservation, since I think it causes more harm than it's worth.[68] But the reservation does show that it's possible to create a system of minimum harmonization which allows Contracting States to breathe freely, to take account of local traditions, even as we join forces with the larger legal world.

Where do we go from here? Should we continue to seek subsidiary, perhaps even *Desperately* (with a capital D)? Well, I've written a bit about private law harmonization with one of my Danish colleagues,[69] and we've tried to emphasize that there is, as yet, no real subsidiary in Europe – nor has any cost-benefit analysis been undertaken, so as to determine whether these harmonizations are "profitable" or otherwise necessary.

But, as I've said, we skeptics are in the minority. Most jurists in Europe are seeking (or at least content with) more harmonization; some are even seeking a European Civil Code.[70] The jurists who prefer to emphasize the virtues of harmonization are numerous and well-organized,[71] and so I think the skeptical minority is quite likely to lose.

Fortunately, I've got an alternative to my desperate (and probably futile) search for subsidiarity. It's what you might call my

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67. *See supra* note 28 and accompanying text.

68. *See generally* Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 J.L. & COM. 289 (1999).

69. *See* Mads Bryde Andersen & Joseph Lookofsky, *Nationale Aftaleregler og EU-Integration: Problemer & Løsningsmodeller*, UGESKRIFT FOR RETSVÆSEN, Dept. B., p. 211 (2002).

70. *See supra* note 33 and accompanying text. *But see generally* Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

71. *See, e.g.*, Study Group on a European Civil Code, *supra* note 33.

Danish "Plan B," and it's simply this: *Don't worry, be happy!* As I said earlier in this lecture, we Danes are Number One in that.[72]

I'm going to stop here and just tell you this: I have wonderful memories of my five visits at Duke and of the great times that I spent with Herbert Bernstein and with his wife Waltraud and my wife Vibeke. We were a nice foursome. And we were together in many places: in Hamburg, New York, Athens, Bristol, and – last but not least – here at Duke Law.

Thank you very much.

72. *See supra* note 23 and accompanying text.