

## EU Case Law

Uglješa Grušić\*

# Long-Term Business Relationships and Implicit Contracts in European Private Law

Judgment of the Court of Justice (Second Chamber) of 14 July 2016, *Granarolo SpA v Ambrosi Emmi France SA*, Case C-196/15

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**Abstract:** In *Granarolo*, the European Court of Justice held that a dispute between a distributor and its supplier concerning an action for damages for the abrupt termination of a long-term business relationship, which was not expressed in a framework, umbrella contract, was a matter relating to a contract for the purposes of European private international law. This note explores the wider significance of *Granarolo* for the meaning of ‘contract’ in European contract law.

## I Introduction

Every system of contract law has to address the relevance of context for the formation, interpretation, performance and termination of contracts. Long-term business relationships, in the course of which individual exchanges regularly take place, pose particular challenges in this respect. Domestic contract laws take different approaches to the significance of context, although all to an extent recognise implicit assumptions, understandings and expectations of parties to a contract. The emerging system of European contract law also has to deal with this issue.

In *Granarolo*, the Court of Justice held that a dispute between a distributor and its supplier concerning an action for damages for the abrupt termination of a long-term business relationship, which was not expressed in a framework, umbrella contract, was a matter relating to a contract for the purposes of the European rules of adjudicatory jurisdiction.<sup>1</sup> Although rendered in the context of

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<sup>1</sup> The European rules of adjudicatory jurisdiction are contained in the Brussels I Regulation, the current version of which applies from 10 January 2015: Regulation 1215/2012 on jurisdiction and

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\*Corresponding author: Uglješa Grušić, University College London, E-Mail: u.grusic@ucl.ac.uk

European private international law, this case is potentially of a wider significance for the meaning of ‘contract’ in European contract law.

## II Facts and the judgment of the Court of Justice

The facts of *Granarolo* fit a well-known pattern. One party distributes the products of another. The parties have not entered an express framework, umbrella contract or an express exclusivity agreement. After many years of mutually beneficial business relationship, the supplier terminates the relationship abruptly and either appoints another distributor or takes over itself the marketing of the products. The distributor then either argues that there is an implicit contract between the parties imposing some limitations on unilateral termination of the relationship (eg sufficient notice and/or damages) or relies on legislation containing such limitations.

A cross-border context adds another layer of complexity. In *Granarolo*, the distributor was from France. The Italian supplier terminated a 25 year-long business relationship with a three-week notice. The distributor brought an action for damages in France founded on Article L 442-6 of the French *Code Commerce* concerning abrupt termination of an established business relationship. The main question was whether the action was a matter ‘relating to a contract’ or ‘relating to tort, delict or quasi-delict’ for the purposes of what is now Article 7 of the Brussels I Regulation. If it were the former, the jurisdiction of the court seised would depend on what is now Article 7(1), which provides that a person domiciled in a Member State may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question. Article 7(1)(b) contains special jurisdictional rules for contracts for the sale of goods and provision of services, which confer jurisdiction on the courts for the place of delivery of the goods and for the place of provision of the services. The Italian supplier argued that the French courts did not have jurisdiction because the action was a matter relating to a contract and the goods under successive contracts concluded for each delivery were delivered on INCOTERMS ‘Ex works’ basis in Italy. The French distributor’s main argument was that the action was a matter relating to tort and that what is now Article 7(2) of the Regulation gave jurisdiction to the French courts within whose territory the products were distrib-

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the recognition and enforcement of judgments in civil and commercial matters, *OJEC* 2012 L 351. The previous version of the Regulation, which was applicable in *Granarolo*, was Regulation 44/2001, *OJEC* 2001 L 12.

uted. Article 7(2) provides that a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. In its observations to the Court of Justice, the referring court stated that in French law the action is of a tortious nature.

The Court of Justice stressed that an autonomous interpretation must be given to the concepts of ‘contract’ and ‘tort, delict or quasi-delict’ in order to ensure that the Brussels I Regulation is applied uniformly across the Member States. The classification of the action under French law was, therefore, disregarded.<sup>2</sup> The Court has consistently held that, whilst Article 7(1) does not require the conclusion of a contract, it presupposes the establishment of a legal obligation freely consented to by one party towards another.<sup>3</sup> Where the defendant’s conduct complained of may be considered a breach of a contractual obligation, which may be established by taking into account the purpose of the contract, it is Article 7(1) and not Article 7(2) that is engaged.<sup>4</sup> This is where the Court disagreed with Advocate General Kokott, who stated that, since the basis of the action for damages was tortious under French law and grounded in a statutory provision, it was ‘irrelevant’ ‘[w]hether contracts [between the parties] had already been concluded or whether the business relationship was still at an embryonic state of pre-contractual negotiations’.<sup>5</sup>

The Court then stated, without much circumspection or any supporting evidence, that: ‘In a significant proportion of the Member States long-standing business relationships which have formed without a contract in writing may, in principle, be regarded as falling within a tacit contractual relationship, breach of which is liable to give rise to contractual liability.’<sup>6</sup> Since Article 7(1) of the Brussels I Regulation does not require a contract to be concluded in writing, the Court instructed the referring court to consider, as a requirement for the application of this provision, whether a contractual obligation had arisen tacitly between the parties.<sup>7</sup> The existence of a tacit contractual relationship must be demonstrated on the basis of ‘a body of consistent evidence’ such as ‘the existence of a long-standing business relationship, the good faith between the parties, the regularity of the transactions and their development over time expressed in terms

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<sup>2</sup> *Granarolo*, [19]-[22].

<sup>3</sup> Case C-375/13 *Kolassa* 28 January 2015, [38]-[39].

<sup>4</sup> Case C-548/12 *Brogstetter* 13 March 2014.

<sup>5</sup> AG Opinion, [16]-[20] and n 8.

<sup>6</sup> *Granarolo*, [23].

<sup>7</sup> *Ibid*, [24]. See also [25] and [27].

of quantity and value, any agreements as to prices charged and/or discounts granted, and the correspondence exchanged'.<sup>8</sup>

The Court then continued to explain that, if Article 7(1) were engaged, the referring court would have to determine the nature of the characteristic obligation of the contract between the parties in order to classify it as either a contract for the sale of goods or one for the provision of services, which would ultimately determine the jurisdictional question.<sup>9</sup> The Court seems to have given an indication of the likely outcome of this particular exercise by stating that the relationship in question would be classified as a sale of goods only if that relationship were limited to successive contracts each having the object of the delivery and collection of goods.<sup>10</sup> However, this classification 'does not correspond to the general scheme of a typical distribution agreement, characterised by a framework agreement the subject matter of which is an undertaking for supply and provision concluded for the future'.<sup>11</sup>

### III The significance of Granarolo for European contract law

In its characteristic Delphic fashion, the Court of Justice failed to give a clear answer to the questions posed. For the purposes of the Brussels I Regulation, the relationship between the parties may or may not have been a contractual one; were it to be regarded as contractual, it may or may not have been one for the provision of services. Everything depends on the determination and interpretation of the facts by the referring court.

Nevertheless, it appears that the Court's judgment lends a strong support to a contractual classification. First, the Court did not follow the Opinion of Advocate General Kokott. The Court was right to do this because of the principle of autonomous interpretation and because there are many contractual relationships where the action for damages or another remedy is based on a statutory provision that supplements, overrides or qualifies the parties' agreement.<sup>12</sup> Second, the Court held

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<sup>8</sup> *Ibid.*, [26].

<sup>9</sup> *Ibid.*, [44].

<sup>10</sup> *Ibid.*, [35].

<sup>11</sup> *Ibid.* See also [37]–[42] for further factors that indicate that a distribution agreement is to be classified as a contract for the provision of services for the purposes of art 7(1) of the Regulation.

<sup>12</sup> For an example under the Brussels I Regulation, see Case 9/87 *Arcado v Haviland* [1988] ECR 1539 (action for damages for the wrongful repudiation of a commercial agency agreement).

that, for the purposes of the Brussels I Regulation, a contract need not be concluded in writing and can be tacit. The list of factors that the Court said the referring court should take into account as evidence of a tacit contractual relationship include factors that are either certain or almost certain to have been present in the relationship between the parties in *Granarolo*. Finally, a contractual classification seems to have been particularly encouraged by the Court's statement that 'in a significant proportion of the Member States' long-term business relationships of the kind as in *Granarolo* may be regarded as giving rise to contractual liability.

The question that arises is whether *Granarolo* is of a wider significance for the meaning of 'contract' in European contract law. In order to answer this question, the following text will first look at the meaning of 'contract' in European contract law. It is shown that European contract law does not deal expressly with the kind of relationship that has arisen in *Granarolo* and in analogous cases in many domestic contract laws. Next, the relevance of case-law under the European private international law instruments for European contract law will be assessed. Since both European private international law and European contract law have an instrumental character and are primarily aimed at establishing and achieving the proper operation of the internal market, case-law under one field of law is potentially relevant under the other. This is even more so in light of the fact that, in contrast to the fragmentary nature of European contract law, European private international law has a potential to contribute to the formulation of general definitions and principles. In order to answer the question of the wider significance of *Granarolo*, the regulatory goals and objectives of European contract law and contract law in general will then be look at. It is argued that the approach in *Granarolo* is necessary to unlock the regulatory potential of European contract law with regard to long-term business relationships.

## 1 The meaning of 'contract' in European contract law

The Europeanisation of contract law has been occurring in a piecemeal fashion, by either positive measures (through the adoption by the European Union of directives dealing predominantly with particular aspects of consumer law) or negative measures (through striking out of domestic contract laws that conflict with the free movement provisions).<sup>13</sup> This is primarily done for the purpose of

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<sup>13</sup> See L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization* (Oxford: Oxford University Press, 2011) and C. Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2<sup>nd</sup> ed, London: Routledge, 2013).

establishing and achieving the proper operation of the internal market. A consequence of this approach is that general legal principles, rules and definitions are largely lacking in the area of European contract law, and this gap is most visible in the area of non-consumer contract law. For the purposes of this case note, it is noteworthy that there is no general definition of contract or principles and rules concerning formation of contracts.<sup>14</sup>

The development of such general principles, rules and definitions has been attempted in academic (re)statements of European contract law and the proposal for a Common European Sales Law.<sup>15</sup> The Draft Common Frame of Reference (DCFR), for example, contains a definition of contract (and, more broadly, of juridical act) and sets out its basic elements. '(1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.'<sup>16</sup> The legal requirements for the formation of contracts are that there should be an intention to enter into a binding legal relationship or bring about some other legal effect produced by a sufficient agreement.<sup>17</sup> The agreement can be either express or implied. There are no further requirements such as consideration or cause. This definition of contract (and of juridical act) is very wide, wider than in many domestic contract laws, and thus eschews the questions of whether unilateral promises or undertakings and gifts *inter vivos* are contracts or otherwise bring about some legal effect.

A question that is not addressed, at least not openly in either the academic projects or the proposal for a Common European Sales Law, is whether, and to what extent, conventions and implicit assumptions, understandings and expectations of parties, and in particular implicit aspects of long-term business relationships, should be taken into account in the formation of contracts. This is not to say that context is disregarded. It is stated, for example, that an agreement can be implied from conduct, that parties to a contract are bound by any practice they have established between themselves and by any generally applicable usages,<sup>18</sup>

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**14** Twigg-Flesner, n 13 above, ch 3, in particular 80–91.

**15** Commission Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final.

**16** Art II-1:101(1) DCFR; para 2 defines juridical acts. The Principles of European Contract Law (PECL) and the proposed Regulation on a Common European Sales Law do not contain a definition of contract.

**17** Art II-4:101-4:103 DCFR; art 2:101-2:103 PECL; art 30 of the proposed Regulation on a Common European Sales Law.

**18** Art II-1:104 DCFR; art 1:105 PECL; art 67 of the proposed Regulation on a Common European Sales Law.

and that a term may be implied in a contract.<sup>19</sup> But even the mentioned wide definition of contract is not particularly suited for cases like *Granarolo*. Where individual exchanges based on express contracts regularly take place in the context of a long-term business relationship, it is clear that the parties have entered into a number of individual contracts. But are they also bound by a tacit framework or umbrella contract? Such possibility clearly exists. But often there will be no relevant practices or usages which can be taken into account. For such cases, no particular further guidance is given.

Useful illustrations of the importance of, and of the kind of problems created by, cases like *Granarolo* is offered by domestic contract laws. English courts, for example, have had to deal with a case that fits the same pattern as *Granarolo*. In *Baird Textile Holdings Ltd v Marks & Spencer plc*,<sup>20</sup> the claimant had for some 30 years been a principal clothing supplier to the defendant, a major UK retailer. The defendant terminated without warning all supply arrangements with effect from the end of the then current production season. The claimant sought damages arguing that the defendant was precluded by both contract and estoppel from terminating those arrangements without reasonable notice. As there was no express contract between the parties, the claimant argued that there were implied contractual obligations on the defendant to acquire clothing from the claimant in quantities and at prices which in all the circumstances were reasonable and not to terminate the relationship except on reasonable notice of three years. The Court of Appeal held that there was no implied contract between the parties. This was because the alleged agreement was too vague and uncertain as there were no objective criteria by which the court could assess what would be reasonable either as to quantity or price and because the fact that the defendant deliberately abstained from entering into a long-term contract with the claimant in order to maintain the flexibility of the business relationship demonstrated the absence of any intention to create legal relations.

*Baird* was not the last word of English courts on the inclusion of implicit aspects of long-term business relationships into legal reasoning. A recent judgment of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*,<sup>21</sup> which concerned a distribution agreement, shows a greater sensibility to the relevance of context for the interpretation, performance and termination of con-

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<sup>19</sup> Art II-9:101 DCFR; art 6:102 PECL; art 68 of the proposed Regulation on a Common European Sales Law.

<sup>20</sup> [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737. For an analogous case concerning casual workers and umbrella contracts of employment, see *Carmichael v National Power plc* [1999] 1 WLR 2042, HL.

<sup>21</sup> [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

tracts. The action in this case concerned an implied term that the parties would deal with each other in good faith, which the defendant had allegedly breached. Leggatt J made a distinction between contracts that involve ‘a simple exchange’ and contracts that involve ‘a longer term relationship between the parties to which they make a substantial commitment’: ‘Such “relational” contracts, as they are sometimes called, may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements.’<sup>22</sup> On the basis of this finding, the judge held that a duty of good faith was implied into the contract.

Whilst the use of good faith in this case is controversial,<sup>23</sup> it is clear that it served the purpose of fleshing out the real agreement between the parties to a long-term relationship which is by necessity incomplete by design and impregnated with unarticulated assumptions, understandings and expectations. Not surprisingly, domestic contract laws on the Continent which recognise a general duty of good faith seem better capable of dealing with the problems raised by long-term business relationships. In a book on *Good Faith in European Contract Law*,<sup>24</sup> Zimmermann and Whittaker discuss, among other things, two case studies<sup>25</sup> concerning abrupt termination of long-term business relationships. They demonstrate that the approach in the vast majority of Continental domestic contract laws is different to the English one and that a longer notice period and/or damages are often provided.

As European contract law gives a limited but increasing recognition to a duty of good faith,<sup>26</sup> it seems to have a potential to deal with implicit aspects of long

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**22** *Ibid*, [142].

**23** See notes of this case in J.W. Carter and W. Courtney (2016) 75 *Cambridge Law Journal* (accessed online through FirstView); E. Granger [2013] *Lloyd’s Maritime and Commercial Law Quarterly* 418; S. Whittaker (2013) 129 *Law Quarterly Review* 463; cf D. Campbell (2014) 77 *Modern Law Review* 460.

**24** R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).

**25** *Ibid*, 532 and 546; see also 404.

**26** See art 3(1) and 4(1) of Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents, *OJEC* 1986 L 382; Article 3(1) of Directive 93/13 on unfair terms in consumer contracts, *OJEC* 1993 L 95; art I-1:103 and III-1:103 DCFR; art 1:201 PECL; art 2 of the proposed Regulation on a Common European Sales Law. See also Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, *OJEC* 2005 L 149; M. Djurovic, *European Law on Unfair Commercial Practices and Contract Law* (Oxford: Hart, 2016).



term business relationships. But this potential can only be realised in respect to those relationships which meet the definition of contract and other requirements of European contract law. This is the context in which the significance of *Granarolo* is to be assessed.

## 2 The relevance of case-law under the European private international law instruments for European contract law

*Granarolo* is not the only case under the European private international law instruments that is of potential relevance for European contract law. The Court of Justice and domestic courts have dealt with questions concerning the formation of contracts that have long troubled domestic contract laws.<sup>27</sup> For example, the Court has held that unilateral promises or undertakings are matters ‘relating to a contract’ for the purposes of Article 7(1) of the Brussels I Regulation.<sup>28</sup> Although the Court of Justice has not yet had the opportunity to deal with the (non) contractual nature of gifts *inter vivos*, domestic courts have held that actions concerning such juridical acts are contractual matters for the purposes of the Regulation.<sup>29</sup>

Some European contract lawyers have, however, rejected expressly the relevance of the case-law under the European private international law instruments on the basis that the goals and objectives pursued by the two fields of law are too different.<sup>30</sup> Others have simply refrained from mentioning and discussing this case-law.

It is true that the Brussels I Regulation, for example, concerns adjudicatory jurisdiction of the courts of the European Union Member States and that it creates a relatively closed system. Some of the idiosyncratic features of the Regulation came out in *Granarolo* itself. The Court of Justice has stressed that the Regulation

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<sup>27</sup> For the complicated case-law under art 7(1) of the Brussels I Regulation see, for example, L. Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (15<sup>th</sup> ed, London: Sweet & Maxwell, 2012) 471–474.

<sup>28</sup> Case C–27/02 *Engler* [2005] ECR I-481, [51]–[60]; case C-180/06 *Ilsinger* [2009] ECR I-3961, [57] (offer of a prize). See also case C-419/11 *Feichter* 14 March 2013 (the relationship between the payee of a promissory note and the giver of an aval is contractual in nature).

<sup>29</sup> See Tribunale Venezia (Italy), 28 February 2003, LG v AP – unalex IT-266.

<sup>30</sup> See W. van Gerven, ‘The ECJ Case-Law as a Means of Unification of Private Law?’, in A. Hartkamp *et al* (eds), *Towards a European Civil Code* (3<sup>rd</sup> ed, Nijmegen: Kluwer, 2004) 101, n 58. Cf S. Whittaker, ‘Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract’ (2000) 166 *Law Quarterly Review* 95.

pursues the goals of uniformity, foreseeability and legal certainty in the law of adjudicatory jurisdiction in civil and commercial matters.<sup>31</sup> The rules of special jurisdiction, being a derogation from the rule of general jurisdiction that is based on the defendant's domicile, are to be interpreted strictly.<sup>32</sup> But ultimately, the whole system established by the Regulation aims to achieve the proper operation of the internal market.<sup>33</sup> Similar points could be made in relation to the other key instruments of European private international law, namely the Rome I Regulation<sup>34</sup> and the Rome II Regulation.<sup>35</sup>

Having in mind that the ultimate aim of the European private international law instruments is the achievement of the proper operation of the internal market, the argument that the case-law under these instruments is irrelevant for European contract law because of the wide disparity in the goals and objectives pursued by these two fields of law fails to convince. Unlike the classical contract law, European contract law has an instrumental character and 'itself comprises a modern hybrid of law and regulation in its logic and mode of governance'.<sup>36</sup> It, therefore, seems wrong to deny, as a matter of principle, relevance to the case-law under the European private international law instruments for European contract law. This is more so in light of the fact that the Court of Justice, when dealing with one area of European private law, often refers to, and follows, cases and principles from other areas of European private law and that, in contrast to the fragmentary nature of European contract law, European private international law has a potential to contribute to the formulation of general definitions and principles. Whether *Granarolo* is in fact of significance for the meaning of 'contract' in European contract law should be assessed in light of its capacity to contribute to the achievement of the regulatory goals and objectives of European contract law and contract law in general.

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31 *Granarolo*, [16].

32 *Ibid*, [17]-[18].

33 Recital 4 to the Brussels I Regulation.

34 Regulation 593/2008 on the law applicable to contractual obligations, *OJEC* 2008 L 177.

35 Regulation 864/2007 on the law applicable to non-contractual obligations, *OJEC* 2007 L 199.

36 H. Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone' (2006) 2 *European Review of Contract Law* 213.

### 3 Granarolo and the meaning of ‘contract’ in European contract law

To paraphrase a saying of Lord Diplock, contracts are incapable of existing in a vacuum, be it legal or socio-economic.<sup>37</sup> They are embedded in conventions, unarticulated assumptions, understandings and expectations of parties. There is, however, a disagreement in legal scholarship on whether, and to what extent, such ‘implicit dimensions of contracts’ should be included into legal reasoning.<sup>38</sup>

As demonstrated by *Granarolo*, express contracts are often incapable of capturing the entirety of the business relationship between the parties. On the one hand, there are contracts that lay down a set of determinate obligations that are performed more or less instantaneously. Such contracts are not infrequently entered into in the course of a long-term business relationship. In a long-term distribution relationship, for example, there are a number of successive contracts for the sale of goods from the supplier to the distributor. It is clear that the successive sales contracts serve to isolate, specify and delimit some particular, discrete aspects of the relationship between the parties. But the successive sales contracts do not disclose the whole picture, because the relationship between the supplier and the distributor is of a much more open-ended and long-term nature. The flexible nature of a typical distribution relationship was acknowledged in *Granarolo* by the Court of Justice, which observed that a distribution relationship creates a number of benefits for both the supplier, the distributor and, ultimately, the customer that go beyond mere sale and purchase of goods:

‘As a result of the guarantee of supply which it may enjoy under such a [distribution] contract and, as the case may be, its involvement in the supplier’s commercial strategy, in particular with respect to promotional activity..., the distributor may be able to offer customers services and benefits that a mere reseller cannot and thereby acquire for the supplier’s products a larger share of the local market.’<sup>39</sup>

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<sup>37</sup> See *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65, HL.

<sup>38</sup> For recent scholarship arguing for a contextualised approach to contract law see, for example, D. Campbell, L. Mulcahy and S. Wheeler (eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (London: Palgrave Macmillan, 2013); D. Campbell, H. Collins and J. Wightman, *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Oxford: Hart, 2003); H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999); S. Deakin and J. Mitche (eds), *Contracts, Co-operation, and Competition* (Oxford: Oxford University Press, 1997). Cf J. Morgan, ‘In Defence of *Baird Textiles*: A Sceptical View of Relational Contract Law’, in Campbell, Mulcahy and Wheeler (eds), this note above, 167.

<sup>39</sup> *Granarolo*, [39].

‘[A] distribution agreement is based, as a general rule, on a selection of the distributors by the supplier. That selection may confer a competitive advantage on the distributors in that they will have the sole right to sell the supplier’s products in a particular territory or, at the very least, a limited number of distributors will enjoy that right. Moreover, a distribution agreement often provides assistance to the distributors regarding access to forms of advertising, communication of know-how by means of training, or payment facilities.’<sup>40</sup>

These open-ended and long-term aspects of a long-term business relationship can be, and often are, set out in an express contract between the parties. Nevertheless, empirical research shows that parties to long-term business relationships often choose to not enter into express contracts and turn instead to ‘non-contractual relationships’.<sup>41</sup>

The question for the law is whether parties to such ‘non-contractual relationships in business’ should be left to operate in a legal vacuum or whether some sort of legal regulation should be introduced and, if so, what would be the justifications for, and the content of, such regulation. This question is of some importance in light of the ever increasing number of long-term business relations which follow the processes of decentralization of economic activity, vertical disintegration of firms, privatization, deregulation and globalization. Arguments in favour of a *laissez faire* approach are based on the principle of freedom of contract and its benefits of moral responsibility, economic efficiency and legal certainty and foreseeability. But many counter-arguments have been advanced against this view. First, freedom of contract requires the law to recognise the entire agreement between the parties, be it contained in an express and/or an implicit contract. Second, long-term business relationships often create relations of power and subordination, which can be abused by the dominant party. Legal regulation can be justified as a means of combating inequality. Third, unfettered and uncompensated abrupt terminations of long-term business relationships undermine trust and confidence, which are fundamental building blocks of every market. By introducing legal regulation which deals with the risk of opportunism and free-riding, and which protects sunk investments, trust between the parties to long-term relationships and, generally, in markets can be enhanced, thus leading to greater cooperation and loyalty and overall effectiveness and efficiency.

These arguments seem particularly pertinent for European contract law. European contract law is primarily aimed at establishing and achieving the

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<sup>40</sup> *Ibid*, [41].

<sup>41</sup> S. Macaulay, ‘Non-contractual Relationships in Business: A Preliminary Study’ (1963) 28 *American Sociological Review* 55.

proper operation of the internal market. Legal regulation of long-term business relationships opens up the possibility of constructing greater trust and confidence. This is of particular importance for a transnational market such as the internal market. Of course, details and specific goals and objectives of any such regulation will have to be worked out carefully. But the point is that only an inclusive approach to the meaning of ‘contract’ as adopted in *Granarolo* guarantees to bring long-term business relationships within the regulatory fold of European contract law, which, in light of the fact that it gives an increasing recognition to a duty of good faith, could be an important mechanism of legal regulation of such relationships.

## IV Conclusion

*Granarolo* is a rich case that is of significance not just for the European rules of adjudicatory jurisdiction but also more widely for European contract law. European contract law has so far dealt with issues of concern for the internal market and the focus has been on particular aspects of consumer law. Because of its fragmentary nature, European contract law largely lacks general legal principles, rules and definitions, and this gap is most visible in the area of non-consumer contract law. Even the academic (re)statements of European contract law and the proposal for a Common European Sales Law lay down basic foundations which have to be fleshed out. The case-law of the European Court of Justice under European private international law can offer crucial guidance in this respect because it has for a long time grappled with defining and delimiting foundational concepts such as ‘contract’ and ‘tort, delict and quasi-delict’, usually in the context of non-consumer disputes. The cross-fertilisation between European private international law and European contract law should, in principle, be possible given that the two fields of law share an instrumental character and are primarily aimed at establishing and achieving the proper operation of the internal market.

With regard to the formation of contracts, but also more widely in respect of their interpretation, performance and termination, an issue that has long troubled domestic contract laws and legal scholarship is the inclusion of implied dimensions of long-term business relationships into legal reasoning. The Court of Justice has dealt in *Granarolo* with this precise issue and has held that a long-term business relationship such as distribution, which is not expressed in a framework, umbrella contract, but which is impregnated with unarticulated assumptions, understandings and expectations of parties, may be regarded as a contractual relationship for the purposes of European private international law. The signifi-

cance of this case for European contract law depends on whether it is capable of advancing the regulatory goals and objectives of this field of law. By treating long-term business relationships between the parties to a distribution and similar kinds of arrangement as contractual, *Granarolo* opens up the possibility of legal regulation of these relationships by European contract law. Given the fact that European contract law gives an increasing recognition to a duty of good faith, it could be an important mechanism of legal regulation of the open-ended and long-term aspects of such relationships, thus potentially contributing to the construction of trust and confidence in the internal market, which is of importance for its establishment and proper operation.

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