Common Frame of Reference and Existing EC Contract Law

Reiner Schulze (Ed.)

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Foreword

Over the past months the findings from two international projects have significantly changed the landscape of the research within the field of European private law: the "Acquis Principles" have widened the basis for a European Contract Law; the preliminary draft of a Common Frame of Reference (DCFR) contains concepts, principles and rules for a variety of areas within European private law and combines these in an overarching structure. This volume opens the discussion concerning the significance of the results from the research for the further development of European private law. The focus is placed upon the relationship between existing Community law and the future Common Frame of Reference (CFR).

At the same time this volume supplements the basis for the future CFR and the further academic discussion with an important element: the previous publication of the "Acquis Principles" with comments (in *Acquis Group* (ed.) "Principles of EC Contract Law – Contract I", Munich 2007) did not at that point cover the key areas of non-performance and remedies. This volume also contains the first publication of these particular "Acquis Principles" with comments.

The volume itself is a collection of lectures given at an international symposium hosted by the Centre for European Private Law (CEP) at the Westfälische Wilhelms-Universität Münster. I wish to particularly thank the respective authors for their cooperation in immediately submitting their papers, likewise the publisher for giving this project priority and thereby allowing for prompt publication. Finally, I wish to extend my thanks to my research assistants, in particular Jan Gudlick for efficiently organising the symposium, and Dr. André Janssen, Juliane Schrader, and Jonathon Watson for their editorial work.

Münster, January 2008 *Reiner Schulze*

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Reiner Schulze (Münster)

I. The Academic Draft

The draft of the Common Frame of Reference (DCFR)[1] has been available for discussion[2] since the beginning of the year 2008. Already before its publication the DCFR has been characterised by some of its authors as an "academic" draft.[3] On the one hand this designation may simply attribute the draft to the profession of its authors, these being researchers from numerous European universities – and in this sense academics who joined together to form an international network.[4] The label "academic" can, on the other hand, also characterise the content of the draft. In this sense it can possibly contrast the draft to sets of rules and concepts which exist in European legislative practice or are closely connected to the requirements of this practice. As an academic draft in this sense the DCFR would be the counterpart to a (still unavailable) "practical" or "political" Common Frame of Reference, which would still have to bridge the gap between academic visions and the actual requirements of the European legislature.

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1 Cf. *Christian von Bar et al.* (eds.), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Munich 2008; also available online at www.law-net.eu.

2 Recently inter alia *Hugh Beale*, The Future of the Common Frame of Reference, European Review of Contract Law (ERCL) 2007, 257-276; *Christian von Bar*, Coverage and Structure of the Academic Common Frame of Reference, ERCL 2007, 350-361; *Nils Jansen*, Traditionsbegründung im europäischen Privatrecht – Zum Projekt eines "Gemeinsamen Referenzrahmens", in Thomas Eger, Hans-Bernd Schäfer (eds.), Ökonomische Analyse der europäischen Zivilrechtsentwicklung, Tübingen 2007; *Ole Lando*, The Structure and the Legal Values of the Common Frame of Reference (CFR), ERCL 2007, 245-256.

3 Cf. *Christian von Bar*, Coverage and Structure of the Academic Common Frame of Reference (*cit.* fn. 2).

4 Cf. http://copecl.jura.uni-bielefeld.de/; *Christian von Bar, Hans Schulte-Nölke*, Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht, Zeitschrift für Rechtspolitik (ZRP) 2005, 165-168.

Especially as far as the drafters of the DCFR have followed the latter approach, the discussion concerning the academic DCFR can, however, not be restricted to the question of whether the proposed structures and rules are inherently worthy of improvement or preference with respect to one, or to the other conceivable solutions, or in respect of individual national models. This question is without doubt of particular significance in terms of promoting discourse amongst lawyers in Europe with the aid of the draft and to advance (in the long-term) the understanding of common concepts and structures of private law despite different national experiences. Ultimately however, it would be less fruitless for the specific challenges for the development of law within Europe if the discussion was solely focused upon the draft of an "ideal law" and the "best solutions" which have been abstractly considered. The discussion can only be productive for European contract law and furthermore for European private law if it bears in mind that an autonomous legal system has already been created within the European Community with specific functions and principles for matters also concerning private law, and if it takes into account the demands and possibilities of further development with particular reference to this specific existing legal system.

Above all, with respect to the DCFR, the question is presented as to how far it succeeds in combining academically justified perspectives with the guidance function for current tasks within a specific legal system. The DCFR is as such to be analysed above all under two points of consideration: is it based upon the European Community's particular state of legal affairs, in particular the functions of private law within the European internal market, the existing law of the European Community and the dualism of Community law and national law within the EU? And is it structured in a way that it can serve as a guideline for those urgent challenges of the European legislature regarding the law of contract and contiguous matters? As far as deficits of the DCFR are to be ascertained under these questions it still remains to be redetermined as to which improvements and additions come into consideration. Points of contemplation would be both changing the DCFR itself (with respect to a revised version which could be presented to the European Commission in 2009 together with the commentaries of suggested rules) as well as supplementary sets of rules which could form a bridge to the European legislature's practical challenges (such as a "practical" or "political" Common Frame of Reference) or an additional draft which contains specific European contract law rules; possibly also specific sets of rules merely for areas of contract law with legislative priority.

These questions are posed towards the entire structure of the DCFR as well as for numerous individual matters; they will be reviewed in this volume under different points of consideration. In the following – after a brief review of the developments in the previous years – they will be par-

ticularly considered with regards to the fact that the structure of the DCFR stretches far beyond the concept of a European contract law.

II. From the Action Plan to the DCFR

If one initially inquires about the starting point for the work on the DCFR then attention has to be paid to the Action Plan for a coherent contract law from March 2003. With this Action Plan[5] the European Commission took over the concept of contract law for Community law.[6] The European Commission regarded the provisions which touch upon contract law, not solely under the point of view of each individual policy area (such as consumer protection, the protection of small and mid-sized businesses etc.). Much more the European Commission set the objective of achieving a "coherent European contract law"[7] which overarches individual policy areas.[8] The most important means of reaching this goal is according to the Action Plan, the Common Frame of Reference with overarching principles, definitions and rules.[9]

From 2005 to 2007 an international network of academics (selected following a call for tenders) has created the draft of the Common Frame of Reference (DCFR). The preparations for this draft were substantially carried out by two international research groups: the "Study Group on a European Civil Code"[10] revised the "Principles of European Contract Law" (PECL)[11] which arose from the work carried out by the "Lando-

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[5] Cf. Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, COM(2003) 68 final (OJ C 63, 15.3.2003, 1-44).

[6] For more on this change of perspectives cf. *Reiner Schulze*, Gemeinsamer Referenzrahmen und *acquis communautaire*, Zeitschrift für Europäisches Privatrecht (ZEuP) 2007, 130-144.

[7] As the Action Plan is subtitled, cf. fn. 5.

[8] See Action Plan (*cit.* fn. 5), para. 3.1, nos. 16-24.

[9] See Action Plan (*cit.* fn. 5), para. 4.1.1, nos. 59-68; *Dirk Staudenmayer*, Weitere Schritte im Europäischen Vertragsrecht, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2005, 103-108.

[10] For more information on the "Study Group" see http://www.sgecc.net/; *Christian von Bar*, Le Groupe d'Études sur un Code Civil Européen, Revue Internationale de Droit Comparé (RIDC) 2001, 127-139; *idem*, Konturen des Deliktsrechtskonzepts der Study Group on a European Civil Code, ZEuP 2001, 515-532.

[11] Cf. *Ole Lando, Hugh Beale* (eds.), Principles of European Contract Law, The Hague 1999.

Commission",[12] and developed, on a comparative law basis, principles for further areas of law according to the scheme of these PECL. The "Acquis-Group"[13] prepared those parts of the DCFR which are based upon principles of existing Community law. The European Commission held workshops with experts from interested associations and institutions (so-called "stakeholders") for the discussion of these preparations[14] (however unfortunately only for some parts and hardly at all with regards to the overarching structure). The network's "Compilation and Redaction Team" (CRT) took over the compilation of the individual parts and the final edit of the entire draft. At this point in time insurance contract law had not yet been included in this draft; for this area the "Insurance Group"[15] has developed a draft which stands in discussion alongside the DCFR.

Accompanying these works on the DCFR the Study Group prepared separate publications in which sets of rules for a variety of areas of law are presented for discussion.[16] The Acquis Group has likewise presented a draft of principles of existing Community law in the field of contract

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[12] Cf. *Hugh Beale*, Towards a Law of Contract for Europe: the work of the Commission of European Contract Law, in Günther Weick (ed.), National and European Law on the Threshold to the Single Market, Frankfurt am Main 1993, 177-196; *Ole Lando*, My life as a lawyer, ZEuP 2002, 508-522.

[13] *European Research Group on Existing EC Private Law*, see http://www.acquis-group.org/.

[14] Cf. Second Progress Report on the Common Frame of Reference, COM(2007) 447 final.

[15] *Project Group "Restatement of European Insurance Contract Law"*, information available online at www.restatement.info; apart from that cf. *Helmut Heiss*, Europäischer Versicherungsvertrag, Versicherungsrecht 2005, 1-4; *idem*, The Common Frame of Reference (CFR) of European Insurance Contract Law, in this volume.

[16] *Study Group on a European Civil Code* (ed.), Principles of European Law – Service Contracts, Munich 2006; *idem*, Principles of European Law – Sales Contracts, Munich 2008 forthcoming; recently published on contractual subjects *idem*, Principles of European Law – Lease of Goods, Munich 2007; *idem*, Principles of European Law – Service Contracts, Munich 2006; *idem*, Principles of European Law – Personal Security Munich 2007; on other subjects *idem*, Principles of European Law – Benevolent Intervention in Another's Affairs, Munich 2006.

law.[17] The part on "Remedies" which has not yet been published with comments is contained in this volume.[18]

With the publication of these "Principles of the Existing EC Contract Law" (Acquis Principles; ACQP) a considerable deficit within earlier research regarding a European contract law was overcome: when the "Lando-Commission" started its work on the "Principles of European Contract Law"[19] in the 1980s it had to solely draw upon a comparison of national laws within Europe in order to draft a European contract law out of the common principles or the "best solutions". Not until the following decade did the European Community's legislation include more and more matters concerned with the law of contract. However, some more time passed until the research concerning the principles of Community law also intensely focused on the area of contract law.[20] The ACQP allow from now on an overarching evaluation of Community law within the field of contract law. Furthermore, the ACQP ease the comparison of legal principles and institutions created by Community law to sets of rules based upon national laws (such as the PECL) and to consider consistencies or differences between the *acquis communautaire* and the laws of contract within the Member States.

At the same time as this research carried out by international groups the European Commission promoted a further initiative within an important part of contract law, namely a number of legal acts in the field of consumer contract law should undergo revision and possibly be combined in a coherent single directive (initially named as a "horizontal direc-

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[17] Cf. *Research Group on the existing EC Private Law* (*Acquis Group*) (ed.), Contract I – Pre-contractual Obligations, Conclusions of Contract, Unfair Terms, Munich 2007. A German version without comments can be found in ZEuP 2000, 896-908 (chapter 1 to 7 of the Acquis Principles).

[18] See annex of this volume; initially in German without comments in ZEuP 2007, 1152-1155.

[19] *Ole Lando, Hugh Beale* (eds.), Principles of European Contract Law Parts I and II; prepared by the Commission on European Contract Law, The Hague 1999; *Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann* (eds.), Principles of European Contract Law Part III, The Hague, London and Boston 2003.

[20] Cf. for example *Reiner Schulze, Hans Schulte-Nölke*, Europäisches Vertragsrecht im Gemeinschaftsrecht, in Hans Schulte-Nölke, Reiner Schulze (eds.), together with Ludovic Bernardeau, Europäisches Vertragsrecht und Gemeinschaftsrecht, Köln 2002, 11-20; *Nicola Lipari* (ed.), Diritto Privato Europeo, Padova 2003; *Karl Riesenhuber*, System und Prinzipien des Europäischen Vertragsrechts, Berlin 2003; *Reiner Schulze, Martin Ebers, Hans Christoph Grigoleit* (eds.), Informationspflichten und Vertragsschluss im Acquis communautaire – Information Requirements and Formation of Contract in the Acquis Communautaire, Tübingen 2003.

tive").[21] This revision of the "Consumer Acquis" affects a section of the European contract law and therefore also the works on the Common Frame of Reference. Researchers from the Acquis Group also played a significant role in a preparatory study concerning consumer law in Europe.[22] Furthermore, the work undertaken on a "horizontal directive" for consumer contract law were combined, from the beginning, with the preparations for the DCFR by means of aforementioned workshops in which researchers from the CFR Networks met with experts from industrial, professional and consumer associations.[23] The drafts from the CFR Network researchers and the results of the workshops at the same time served for the preparation of the Common Frame of Reference and the considerations of the European Commission for the revision of consumer contract law (e.g. with respect to pre-contractual duties, rights of withdrawal and remedies for contracts of sale).

III. Combining Community Law with Comparative Law

In accordance with the growing significance of Community law for matters related to contract law and with the corresponding understanding of European contract law in the recent research, the European Commission's Action Plan above all considered two methods and groups of sources: on the one hand the comparative method following the Lando-Commission which exhibits the principles common to the Member States; and on the other hand the acquis approach which analyses existing Community law in order to determine principles within the field of contract law. The principles, definitions and rules from the Common Frame of Reference should emerge out of each of these "basic sources".[24]

Following the Action Plan the underlying concept of contract law which forms the basis of the DCFR as such differs from that used in the PECL. Whilst these were – according to the former state of development of European law – solely based upon the comparison of national laws, the works on the CFR can refer to a great extent to existing Community law. This Community law established a number of its own principles which can accord with principles of national law, but do not necessarily have to. It covers important matters of contract law (e.g. pre-contractual duties,

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[21] See Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final, paras. 2, 4.2-4.

[22] Cf. *Hans Schulte-Nölke, Christian Twigg-Flesner, Martin Ebers* (eds.), EG-Verbraucherrechtskompendium, available online at http://www.eu-consumer-law.org/consumerstudy_part1_DE.pdf.

[23] Cf. Second Progress Report on the Common Frame of Reference (*cit.* fn. 14).

[24] See Action Plan (*cit.* fn. 5), para. 4.1.1, no. 63.

unfair terms,[25] further questions of formation and content of contracts, right of withdrawal and remedies for non-performance). However, Community law does not cover by far all sections which make up the law of contract (e.g. precise mechanism of conclusion of contract or mistake). The draft of a European contract law which can be used in practice can therefore only arise from the interaction between the principles of Community law and principles common to the Member States.

This way the working programme for the Common Frame of Reference, upon the background of the European Commission's Action Plan, is based upon three basic assumptions (which are admittedly not precisely defined and are disputed within the academic discussion): firstly, that principles which are relevant for supranational law can be established out of the comparison of national laws;[26] secondly, that principles with relevance for contract law have already emerged in existing Community law[27] and finally that both kinds of principles can be joined to one another under the concept of "European Contract Law".[28]

The extent to which the DCFR corresponds to this concept of a European contract law is one of the crucial questions during its evaluation. In view of the short time frame in which the research for European contract law has been intensely concerned with Community law the inclusion of the principles of existing Community law and their combination with the results of the older comparative approach is to be viewed as a particular challenge. A variety of contributions to this volume, in respect of important areas of contract law and some contiguous areas of law, further pursue the question as to the extent of the success of this inclusion and combination. Despite criticism and suggestions for improvement in some points it can already be stated here that in this sense a great benefit of the DCFR is to be recognised: For the first time it combines the principles of

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[25] On this see more detailed *Thomas Pfeiffer*, Non-Negotiated Terms, in this volume.

[26] On this, cf. for example on the work of the "Lando-Commission" *Hugh Beale*, Towards a Law of Contract for Europe: the work of the Commission of European Contract Law (*cit.* fn. 12).

[27] Cf. inter alia *Reiner Schulze, Hans Schulte-Nölke,* Europäisches Vertragsrecht im Gemeinschaftsrecht, (*cit.* fn. 20); *Karl Riesenhuber*, System und Prinzipien des Europäischen Vertragsrechts, (*cit.* fn. 20); *Reiner Schulze*, European Private Law and Existing EC Law, European Review of Public Law (ERPL), 2005, 3-19.

[28] Cf. on this *Reiner Schulze*, Allgemeine Rechtsgrundsätze und Europäisches Privatrecht, ZEuP 1993, 442-474; Introduction in Reiner Schulze, Gianmaria Ajani (eds.), Gemeinsame Prinzipien des Europäischen Privatrechts – Studien eines Forschungsnetzwerks/Common Principles of European Private Law – Studies of a Research Network, Baden-Baden 2003, 11-21; recently *Nils Jansen, Reinhard Zimmermann*, Grundregeln des bestehenden Gemeinschaftsprivatrechts, Juristenzeitung (JZ) 2007, 1113-1126.

existing Community law within the field of European contract law and the principles ascertained through the comparative approach in a joint set of rules. In doing so it does not restrict itself to a mere compilation of both sources; in fact it develops a number of substantive links (for example between pre-contractual duties[29] or protection against discrimination[30] on the basis of the *acquis communautaire* on the one hand, and the remedies based upon the modified PECL on the other). In this respect the DCFR offers a basic scheme for the future development of European contract law.

IV. Structural Problems within the DCFR

In another respect there are however significant problems vis à vis this major step achieved by the DCFR as opposed to earlier sets of rules.[31] Above all there are two methodological weaknesses in terms of the overall structure: only particular parts of the DCFR are based upon the link between comparative law and Community law,[32] whilst in the majority of parts the reference to Community law is missing. The structure of the draft (for example the central role of the General Law of Obligations) is largely neither derived from existing Community law nor from a convincing comparative law basis. Both problems stand in conjunction with the wide expansion of the DCFR. In contrast to the PECL, and also to the Acquis Principles, this draft does not focus upon contract law as the main subject matter. Much more it includes various matters which belong within the civil law tradition to the traditional core areas of the law of obligations or which connect the law of obligations to the law of property.[33] Alongside contract law also belong the principles of Benevolent Intervention (Book V DCFR), Tort law (Book VI DCFR) and Unjustified Enrichment (Book VII DCFR), but also within those parts of the DCFR which are scheduled to be published at a later date: Transfer of Movables, Security Rights in Movables and Trusts (Books VIII to X DCFR).

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[29] Cf. *Christian Twigg-Flesner*, Pre-contractual duties – from the Acquis to the Common Frame of Reference, in this volume.

[30] Cf. *Stefan Leible*, Non-Discrimination, in this volume.

[31] Cf. *Paul Lagarde*, Cadre commun de réference et droit international privé, in this volume.

[32] On the issue of the comparative law and the CFR cf. *Konstantinos Kerameus*, Comparative Law and Common Frame of Reference, in this volume.

[33] On the subject of property law cf. *Sjef van Erp*, DCFR and Property Law: the need for consistency and coherence, in this volume.

Whilst the Common Frame of Reference should serve a "coherent European contract law"[34] following the European Commission's Action Plan (and for this purpose shall include some areas of law contiguous to contract law), the academic DCFR thus goes far beyond this objective and subject matter. It is somewhat doubtful, whether the DCFR should, and can, already form the framework for the complete European private law.[35] A variety of subjects which are not contained within the DCFR would belong to the core matters of European private law and are of greater importance for the internal market than "Benevolent intervention in another's Affairs"[36] (for example competition law and company law). But the expansion beyond contract law appears to follow principally the scheme of civil law and the concept of a Civil Code as developed in the 19th Century in the national traditions of some Member States (however excepting some areas such as family law or inheritance law). Within this wide spread framework contract law is just one subject alongside others.

With this expansion the DCFR stretches across areas for which the principles of the *acquis communautaire* still have to be researched in more detail, and moreover more extensively in matters for which no *acquis communautaire* exists (and in part where there is no recognisable interest in rules on the part of the European Community). This leads to a methodological break within the draft as some parts draw upon a combination of Acquis Principles and comparative studies, whereas the vast majority of the parts do not follow this approach but rather are restricted to comparative studies which are based on national law. Above all Book II DCFR is based upon this particular concept of combining Acquis Principles and principles resulting from the comparative studies. Certain parts of this book, such as pre-contractual duties and withdrawal,[37] are based principally upon existing Community law (and are at the same time closely connected to the rules which arose out of the PECL).[38] For the formation as well as the content and effects of contracts[39] Acquis Principles have been inserted into the respective chapters which are considerably based upon the PECL structure. Contrastingly, Book III DCFR appears to be almost exclusively based upon principles, which – with modifications[40] – were developed from the PECL.

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[34] Cf. Action Plan (*cit.* fn. 5).

[35] See title of the publication cited in fn. 1: "Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference".

[36] See title of Book V DCFR.

[37] On the right of withdrawal cf. *Evelyne Terryn*, The Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference, in this volume.

[38] See chapters II.–3, II.–5 DCFR.

[39] See chapter II.–9 DCFR.

[40] See *infra* in chapter V.

Furthermore it appears, that this book hardly refers to existing Community law for matters such as performance and remedies for non-performance[41] even though the Consumer Sales Directive and further directives contain extensive materials for this area.[42] To the extent that the PECL and the *acquis communautaire* in these areas conform to one another (especially because both follow the United Nations Convention on Contracts for the International Sales of Goods; CISG), this appears to be less problematic. The one-sided alignment to the PECL is questionable especially in cases where Community law has brought forward its own deviating rules and principles (for example with respect to the order of remedies and the requirements for termination of the contract[43]).[44] In the Books V et seq. DCFR which address the aforementioned subjects not contained within the law of contract, the DCFR almost exclusively contains principles which the Study Group developed based upon comparative studies; existing Community law plays almost no role. The price paid for the expansion of the DCFR into these areas which are outside of the sphere of contract law is, in this respect, the aforementioned methodological split of the overall draft: the combination of comparative law, and the acquis research as suggested by the Action Plan, is suitable for contract law, but not for some areas, which in some national legal systems belong to the law of obligations (however for which there is no apparent current requirement for Community rules – for example "Benevolent intervention in another's Affairs"[45]).

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[41] On remedies for non-performance see *Fryderyk Zoll*, The Remedies for Non-Performance in the System of the Acquis Group, in this volume; on damages see *Ulrich Magnus*, The damages rules in the *acquis communautaire*, in the Acquis Principles and in the DCFR, in this volume; *idem*, Der Acquis communautaire im Schadensrecht, in Helmut Kohl et al. (eds.), Zwischen Markt und Staat – Gedächtnisschrift für Rainer Walz, Köln 2008 forthcoming.

[42] Cf. Chapter 8 of the Acquis Principles on "remedies", initially in ZEuP 2007, 1152-1155 in German; English version with comments is to be found in the annex to this volume.

[43] See *Reiner Schulze*, Gemeinsamer Referenzrahmen und *acquis communautaire* (*cit.* fn. 6), 140 et seq.

[44] Book IV DCFR, which is concerned with individual types of contract, appears to try with some effort, to once again correct this neglect of Community law for a sales contract by basing it upon the Consumer Sales Directive; in doing so, however, a peculiar tension arises between the general provisions in Book III DCFR and the contract of sale in Book IV DCFR, especially with respect to remedies.

[45] Cf. *Nils Jansen*, Negotiorum gestio und Benevolent Intervention in Another's Affairs: Principles of European Law?, ZEuP 2007, 958-991.

V. The General Law of Obligations within the Structure of the DCFR

The structure of the DCFR fundamentally differs from the PECL and the Acquis Principles by renouncing the concept of contract law in favour of a model of a law of obligations with the General Law of Obligations being at the core. Due to this model the law of contract, and those areas of law which fall outside of the law of contract, are not merely in the style of a compilation of laws set alongside one another. The structure of the draft rather determines the rights and obligations for various areas of law as according to a particular pattern which has developed in some civil law jurisdictions and can be found, for example, in the German Civil Code (*Bürgerliches Gesetzbuch*; BGB). The rules concerning contractual and non-contractual legal relationships are, as far as possible, not specifically provided for each of the individual legal relationships; their formulation is rather somewhat general and abstract so as to be applicable to all different types of legal obligations.[46]

The central role for this concept of a General Law of Obligations is played by Book III of the DCFR which contains general provisions applicable to "obligations and corresponding rights"[47] which are accordingly abstractly and generally formulated. The General Law of Obligations is stretched out so as to include key matters such as: rules regarding performance and remedies for non-performance. The structure of the General Law of Obligations and numerous individual provisions regarding these matters in Book III DCFR follow the PECL. The decisive structural difference, however, is that the rules on these subjects in the PECL relate to contract law whereas in Book III DCFR these rules are generalised so as to be abstract for both contractual and non-contractual rights and obligations. The rules on several other matters in Book III are also designed as general provisions for contractual and non-contractual obligations (such as plurality of debtors and creditors; set-off and merger and prescription[48]).

Upon this basis the books thereafter address the Specific Law of Obligations in which they regulate the specific obligations and rights for the respective legal relationship beginning with "specific contracts"[49] fol-

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46 Cf. *Reiner Schulze, Thomas Wilhelmsson*, From the Draft Common Frame of Reference towards European contract law rules, ERCL, forthcoming.

47 As the Book III DCFR is titled.

48 For these matters the general wording of these rules had already been outlined by the PECL (in the more extensive second version in comparison to the publication by the "first Lando-Commission").

49 Book IV DCFR.

lowed by the aforementioned non-contractual legal relationships.[50] For the systematic of the DCFR the progression from "general" to "specific" is characteristic. The law of obligations' general rules are extracted from specific legal obligations and set out in Book III DFCR as a General Law of Obligations with the function of the books thereafter being to address the specific parts of the law of obligations (and afterwards, in part, the law of property). It is only Book II DCFR which has a special position within the principal structure of the DCFR: it focuses mainly upon the law of contract and legal relationships which are closely connected to the law of contract (such as pre-contractual duties). However, this General Law of Contract within the DCFR is greatly limited to matters which are concerned with the formation of contract; other important matters – such as performance and remedies for non-performance – are not covered within its framework (but are rather attributed to the General Law of Obligations in the book following thereafter).

The DCFR is thereby based upon a different structure than the previous drafts of the PECL and ACQP (although the provisions in Books II and III DCFR have been mostly extracted from these previous drafts). The DCFR's systematic and concepts stretch much beyond the legal relationships between contracting parties to particular elements which form part of the law of obligations within the civil law tradition and also certain elements of property law (which are dealt with after the law of obligations as in the German BGB). The core element of this system creates a General Law of Obligations, not however a separate General Law of Contract. The DCFR has, in this respect, become something else than a European contract law.[51]

VI. Advantages and Disadvantages of the expanded DCFR

1. The DCFR as a challenge for discussion

The question is therefore posed as to the advantages and disadvantages of this structure as opposed to a law of contract. Advantages of this are presented to a particular extent if one wishes to prepare a Civil Code at European level according to the pattern used by some states of continental Europe. To a certain extent it broadens the concept of a Common Frame of Reference from a framework for a (coherent) European contract law to a framework for core areas of a codification of this kind. Within

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[50] Book V et seq. DCFR.

[51] Cf. *Reiner Schulze, Thomas Wilhelmsson*, From the Draft Common Frame of Reference (*cit.* fn. 46).

this framework the DCFR allows for the discussion of individual parts of a possible Civil Code.

However, as has already been mentioned,[52] it is highly doubtful as to whether it is at all worth aiming towards a European Civil Code and as to whether the time is right for a wide spread codification at European level.[53] Questionable are not only the legal competence and the political willingness of the European legislative bodies; much more the views of lawyers from the different legal traditions in Europe currently differ far too much with regards to the sources, system and style of private law.[54] Furthermore, it will require further academic efforts in order to apply the wide national experiences of private law to the specific requirements of a supranational community and the European internal market (and to avoid that national models are simply reformulated as European private law). For the law of contract this appears to have succeeded most likely with the draft of the PECL, the ACQP and further research projects. For other areas of private law, and more than ever for their overarching structures, there however still remains much to do.

If one does not consider the DCFR as a preparatory draft for a European Civil Code, then its structure as compared to a specific draft for the law of contract (and possibly individual drafts applicable to other areas of law) above all offers two advantages: for the upcoming development of a law of contract of the European Community it allows for further expansion which clarifies the links between rules pertaining to contractual and non-contractual matters. For future research and academic discussion the DCFR diverts the attention to the basic concepts and structural questions regarding private law. It offers a wide frame of reference (a "Common Frame of Reference" in another sense as originally intended) in order to consider differences and similarities within the legal traditions in Europe, not just with regards to individual matters, but also regarding the system and the general principles of private law at European level. For this purpose it may be of secondary importance as to whether the structure of the DCFR finds wide spread acceptance if it promotes just this exchange of

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[52] Already from the 1990's see for example *Oliver Remien*, Illusion und Realität eines europäischen Privatrechts, JZ 1992, 277-284, 281; *Reiner Schulze*, Gemeineuropäisches Privatrecht und Rechtsgeschichte, in Peter-Christian Müller-Graff (ed.), Gemeinsames Privatrecht in der Europäischen Gemeinschaft, 2nd ed., Baden-Baden 1999, 127-149, 130 et seq.

[53] Concerning the Member States perspective on the CFR cf. *Georg Kathrein*, Europäisches Vertragsrecht – Österreichische Haltung, in this volume; *Judit Lévayné Fazekas*, Connection between the CFR and a possible horizontal instrument of consumer law, in this volume.

[54] On the problem of multilingualism, cf. *Gianmaria Ajani*, "A Better Coherence of EU Private Law" and Multilingualism: Two Opposing Principles?, in this volume.

ideas regarding the foundations of European private law. This would however complicate the discussion if one fails to recognise that the discussion is still in its very early stages. The DCFR is one of the first steps on the long path towards reaching an agreement on the outlines which European private law could have in the future.

This path will therefore not just be lengthy because the current interests of the European Community may be limited concerning most matters which are outside the scope of contract law, and with regards to a structure which stretches far beyond contract law. For the most part there exists no, or very little, Community law in these areas and no substantial European legislation is planned. As far as an *acquis communautaire* has already emerged in some of the areas (for example partly in tort law) – and more still in areas which were hardly considered by the DCFR (from competition law to intellectual property) – the principles of the acquis have been even less subject to scrutiny than in contract law. Only in the long-term will further research in these areas be able to assist in the sufficient consideration of existing Community law in the width of its matters for future drafts for European private law.

The comparative research concerning the majority of matters of European private law outside the scope of contract law and its overarching principles and structures is also not as developed as those principles in the field of contract law. In terms of its coverage and its structure, the DCFR will hardly be able to claim to be based to an equal extent upon extensive comparative studies and a broad discussion (such as the PECL) and to be accepted to the same degree as a "common denominator" of different legal traditions. Its structure, with the sequence of law of obligations and property law and the General Law of Obligations at its centre, does not generally correspond, for example, to the national experiences of the common law countries or of the Nordic states. It is even alien to lawyers from a number of states of continental Europe which have a Civil Code. If, for example, Book III DCFR did not assign remedies to contract law, but rather to the General Law of Obligations, this may therefore appear to some (in the logic of their legal thinking) simply as a further development of the PECL. The others will regard it as complete reversal of the Lando-Commission's original approach. For the former it is an advantageous simplification, if the General Law of Obligations uses one more abstract rule instead of multiple specific rules which are similar to one another for individual (contractual and non-contractual) legal relationships. From the second perspective this leads to a more complicated structure (with different levels of abstraction) and to less comprehensibility, relevance to the practice and possibly political transparency in comparison to the legal style which they favour and are accustomed to.

Numerous questions of this kind will have to be discussed upon the background of different national legal experiences, without the DCFR

being able to claim to comprise "the" European answer. In order to name one further example: it will also have to be argued whether the DCFR does not too strongly follow the schemes of some national Civil Codes drafted in the 19th Century and neglects the changing role of business law in modern private law. In these and numerous other questions the last word regarding the DCFR has certainly not been spoken, however an important frame of reference for the further discussion of fundamental principles and structures of European private law has been created. Due to the importance of the discussion for research and for the understanding of European lawyers, it is likely to remain controversial in the long-term. Accordingly the DCFR maintains its significance, above all upon an academic level and in a long-term outlook. Contrastingly, its short term academic and political acceptance and its immediate use for current tasks of the European legislature are doubtful.

2. A European Contract Law as the predominant challenge

In contrast to this there exists an extensive *acquis communautaire* in the field of contract law. The Action Plan determined the specific objective of a coherent contract law and there is a current requirement and specific plans for revision, particularly of consumer contract law.[55] The law of contract has as such already drawn the attention of, and particular efforts from, the European Community; because as law of the internal market it has central significance for businesses and consumers in that they can make the best use of the internal market. A guideline for legislation and possibly the creation of "optional instruments"[56] are current requirements, particularly in this field.[57]

Politically and academically speaking, in the field of European contract law the ground for acceptance and the practical realisation of a reference framework with principles and rules is far better prepared than for any other area. Since the beginning of the work on the PECL the research on European private law has particularly focused upon this field, and the ACQP have made it possible to include the principles of existing Community law in this area in the preparation of a frame of reference. In doing so the foundations exist for a set of rules which could combine the

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[55] On consumer projection, cf. *Giuditta Cordero Moss*, Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law, in this volume.

[56] See Action Plan (*cit.* fn. 5), para. 4.3, nos. 89-97; *Dirk Staudenmayer*, Ein optionelles Instrument im Europäischen Vertragsrecht?, ZEuP 2003, 828-846.

[57] Cf. *Reiner Schulze, Thomas Wilhelmsson*, From the Draft Common Frame of Reference (*cit.* fn. 46).

results from comparative and Community law research in a specific guideline for European contract law as "Common Principles of European Contract Law".

The academic draft of the CFR has however not pursued this path (at least in its current preliminary version). It proposes a European law of obligations and property law including a General Law of Obligations to an impressive extent over hundreds of pages. This way it does not focus upon the specific principles and rules for contract law, which could have directly served to the European legislature as a guideline for this area. The DCFR can as such only provide an indirect contribution to the preparations of a European contract law (especially with reference to its combination of comparative law and Community law). Without doubt it belongs – alongside the PECL and the ACQP – to the equipment which can be useful for the preparation of sets of rules which have practical significance for the law of contract – even though it is not the ideal toolbox for this purpose due to its extent and its construction. The decisive step is still missing with regard to the current developments and requirements: the draft of a "practical frame of reference" which can be directly used as a guideline for the legislature in the field of contract law. In this respect a European contract law remains a desideratum.

VII. The Next Challenges

There are two overriding challenges which are posed in the near future: on the one hand the critical evaluation of the academic DCFR mainly with respect to the long-term academic discussion of European private law with the perspective of developing a common legal science, and, on the other hand the draft of specific rules of European contract law with respect to current European legislation.

1. DCFR and European Private Law

In the former respect it is necessary to critically examine and improve the entire academic draft for the CFR and all its parts. The exchange of views in respect of this draft thereby opens the long-term perspective of a progressive mutual comprehension of structures and principles of European private law (with the consequence that in the future for example textbooks and manuals may be published which could hopefully be used in many European countries by both students and practitioners alike). It is to be hoped that, under this outlook, individual improvements can already be accepted at short notice in a revised edition of the DCFR over

the course of this year.[58] Most of the questions will however require research and discussion over a longer period of time as far as the DCFR does not only refer to European contract law, but should also contain basic concepts, principles and structures of European private law as a whole. This research will have to emanate from both approaches, which can already form the basis for a coherent European contract law: comparative studies and analysis of existing Community law. Over the coming years the research itself will have to be greatly occupied with further individual areas of law and, above all, with structural questions regarding European private law.

Comparative law studies (including historically comparative analyses), for example, will be able to review the extent to which the DCFR makes the best use of the potential of national experiences within the European private law tradition. It will also have to be reconsidered, for example, whether the draft partly clings too much to the scheme of individual Civil Codes within continental Europe for particular matters, and which alternatives and supplements are suitable after consideration of further national experiences. This perhaps concerns the question of a stronger link between civil law and commercial law, as set out in some national Civil Codes from the 20th Century, and how they also possibly correspond more to legal traditions which structure their private law completely without large, dominating codifications of this kind.

In this respect further comparative studies would probably lead to results which accord more with the – still necessary – broadened and in depth analysis of the *acquis communautaire* rather than with the DCFR which is now available. Further research of existing Community law (beyond the law of contract) would have to particularly address not only traditional elements of the law of obligations as tort law,[59] but primarily areas of business law such as competition law or company and capital market law. In doing so they would have to deal with the extent to which these areas for the European Community's specific legal order have – for reason of internal market requirements and the development since the 1950's – become integral components of the structure of EC private law.

The more in depth research and greater inclusion of the *acquis communautaire* could give additional stimuli to the discussion concerning the

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[58] For example some of the ideas concerning the social deficits of the DCFR in contrast to the PECL, see also *Ole Lando*, The Structure and the Legal Values of the Common Frame of Reference (*cit.* fn. 2), 247.

[59] On the *acquis communautaire* in the field of Tort Law cf. *Wolfgang Wurmnest*, Grundzüge eines europäischen Haftungsrechts – Eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts unter Einbeziehung der Rechte Deutschlands, Englands und Frankreichs, Tübingen 2003; *Helmut Koziol, Reiner Schulze* (eds.), Tort Law of the European Community,Vienna 2008 forthcoming.

principles and the structures of European private law. Only some subjects from core areas of European private law shall be mentioned as examples (with reference to the central concepts of private law as formed by Gaius). As such, it will have to be considered, whether special attention must be paid to the law of natural and legal *persons* in two respects when researching principles and structures of European private law on the basis of existing Community law: with reference to the principle of the protection of the individual's human dignity and privacy and regarding the analysis of the widening *acquis communautaire* in the field of the legal persons (inter alia European Company, European Cooperative Society and, as is expected in the near future, a European Private Company). If the "*res corporalis et incorporalis*" were to be included in the efforts towards a European private law (in spite of the deeply rooted differences within national systems in the core area regarding the transfer of property, and also in spite of the corresponding "outsourcing" in this field in sets of rules such as the CISG and the PECL and therefore only with the hope of convergence in the long-term), the developments of Community law should be particularly considered in two regards: the new approaches in the field of security rights are to be included, and intellectual property should also not be neglected. In existing Community law it is especially patent- and trademark law which plays an important role. In terms of *actions* and obligations, for example, it can hardly remain unconsidered, how far the current development of Community law in respect of collective redress machanism[60] affects the traditional individualistic approach to obligations and the relationship between substantive and procedural law.

These examples hint at the fact that the acquis research has to still be pursued and intensified in many areas so that the outlines of the overarching draft of the principles and structures of European private law can become clear. Above all there are two advantages offered by an extensive inclusion of the principles of the *acquis communautaire* in the research on European private law: the principles of the *acquis communautaire* are based upon the individual legal system of the European Community and accommodate their specific functions (especially with reference to the basic freedoms, the requirements of the internal market and individual protective aims). At the same time these references to Community law frequently offer a wider opportunity of academic and political acceptance than solely the comparison of national laws competing for the best solutions based upon their different national experiences.

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[60] See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – EU Consumer Strategy Policy 2007-2013, COM(2007) 99 final, para. 5.3.

2. DCFR and European Contract Law

The other, but by no means less significant challenge exists of drafting a "practical" frame of reference for the law of contract as soon as possible which satisfies two requirements: it must correspond to the current legislative challenges and political possibilities in the European Community, and it must be coherent with the wider spread "academic" frame of reference. A practical frame of reference of this kind can accordingly for the most part stretch beyond those matters which have been outlined by the PECL and the ACQP, and which are dealt with in the first three books of the DCFR (possibly extended to the law of sales from Book IV DCFR). However, a part of the "academic" draft of the CFR can not simply be "cut-out" and used as a European contract law, but rather vital topics within Book III DCFR would have to be considerably amended in order to return back from a General Law of Obligations to a General Contract Law. For the most part these provisions have been changed with regards to the original PECL wording in order to apply these provisions to non-contractual obligations and rights. A "recontractualisation" of the provisions is necessary for a European contract law. Upon the foundation of previous research and of the drafts which are available one can however say that this task should be able to be carried out relatively easily and quickly.

Alongside the further discussion and improvement of the DCFR there is therefore the opportunity to draft rules of European contract law in a "narrower" set of rules which, based upon previous research, combine the comparative and acquis approaches and which are consistent with the academic DCFR, but rather reflect the practical requirements of European Community law. A guideline specifically for the law of contract could be directly used by the European Community for the issuing of a directive and for the revision of the *acquis communautaire* within the area of contract law. Additionally, it could form the basis for a European codification of contract law which the parties can opt for instead of national laws of contract in the event that the European Community wants to create an "optional instrument"[61] in a legislative act. It is also conceivable that a specific draft can serve for the preparation of "optional instruments" with a narrower field of application – for example for consumer contracts in e-commerce[62] or for particular types of services.

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[61] See fn. 56.

[62] On this *Hans Schulte-Nölke*, Contract Law or Law of Obligation? The Draft Common Frame of Reference as a multifunctional tool, in this volume.

VIII. Conclusions

(1) The approach followed in the DCFR can be described as being generally convincing – as far as it is based upon the combination of the comparative studies and the acquis research.

(2) As an academic draft the DCFR is therefore of considerable importance for further research and discussion because it clarifies the interrelationship between contract law and non-contractual matters for the future development of Community law and moreover offers a wide spread frame of reference for the exchange of views concerning possible structures, basic concepts and principles of private law in Europe.

(3) However, with regard to these functions the academic DCFR should still be improved. In particular it should pay greater attention to existing Community law (e.g. in remedies for non-performance) and dispense with matters for which no legislative requirement is foreseeable at European level.

(4) In a long-term perspective the further deficits in the structure of the DCFR will have to be overcome by means of future research in the fields of comparative law and Community law. In respect of the further outlook of European private law it will have to be particularly considered whether the DCFR is not too heavily based upon the schemes of some national Civil Codes from the 19th Century. Particularly, a stronger integration of matters from business law that are of central significance for the internal market (such as competition law, capital market law and company law) appears to be necessary.

(5) The presented version of the DCFR is not yet suitable as a direct guideline for EC legislation regarding a coherent contract law. The draft particularly extends to a large extent to non-contractual matters, for which there is almost no Community law in existence and no legislation is being considered by the Community. The draft does not determine in Book III – which is central to the DCFR – the rights and obligations not specific to contractual relationships (but rather generally for contractual and non-contractual relationships).

(6) The legislation for a coherent contract law and a revision of consumer contract law therefore requires a guideline alongside the DCFR which specifically relates to the law of contract. As a result of this there is the desideratum to create a "practical" draft which conforms to the

academic DCFR but relates more to the current legislative tasks and political possibilities in the European Community within the field of contract law.

(7) Such a "practical" Common Frame of Reference especially requires a "recontractualisation" of concepts and matters which are dealt with in Book III DCFR as a General Law of Obligations instead of a General Contract Law. With the background of the DCFR and with recourse to the PECL and Acquis Principles – both being designed as a General Contract Law – such provisions of a European contract law could, however, be drafted relatively easily as a frame of reference for legislation. The same also applies to an "optional instrument" for contract law as a whole, or for specific areas within the law of contract.

Comparative Law and Common Frame of Reference

Konstantinos D. Kerameus (Athens)

I. Introduction

1. Geometrical Connotation of Reference

About 30 years ago, no one addressing the expression "Common Frame of Reference" would reasonably understand either the use or the functional meaning of that expression. Indeed, it might cover or protect some mystical geometric relationship by alluding to notions such as "reference" or "frame". While the geometrical connotation of "reference" cannot be denied, its legal connection slowly starts to emerge in order to come to the same level as "frame", and to restore its balance with the first part of the title, referring to the concept of comparative law.[1] Thus, the Common Frame of Reference clearly rises against the older notion of comparative law. Methods and patterns of comparative law are contemplated as against the modern trend of Community law in a search for mutual understanding and correspondence.

2. The Contract as a First Point of Reference

With regard to the presentation and function of legal issues in a legally coordinated environment, we might say that the first point of reference would be the contract.[2] Should one look over one's fence, the qualification of contract will cover the particular contracts and the entire legal system which might be applied in order to certify the law under which the parties created the contractual arrangement. Systematically, the first

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[1] Such modern points of reference include, among other works, *K. Zweigert, H. Kötz,* Einführung in die Rechtsvergleichung, 3. ed., Tübingen 1996; *idem*, An Introduction to Comparative Law, 2nd ed., Oxford, 1994.

[2] The freedom of contract covers a variety of issues pertaining to both, whether to conclude a contract in the first place, and under what contents. See *H. Kötz,* Europäisches Vertragsrecht, Band I: Abschluss, Gültigkeit und Inhalt des Vertrages, Beteiligung Dritter am Vertrag, Tübingen 1996.

point of reference here would be the particular contracts. On an overall assessment, international texts, such as the General Agreement on Tariffs and Trade (GATT, 1947), or the World Trade Organization (WTO, 1994) brought about, as correctly pointed at by *Reiner Schulze*, the first globalization of contract law.[3] It was followed by great changes in the topography of contract law and, above all, in technological change – again in the evocative formulation invented and applied by *Reiner Schulze*.[4] In such constellations, the instrument of contract is not any longer a focal point but rather, or also, a vehicle contemplating the freedom of contract but also addressing the needs of protection. Active supporters of contractual freedom strongly underline these new facets and, consequently, support such multilateral function of the contractual nature. In several respects, the contract does also have additional parameters, and looks for other forms of approximation between procedural equality and actual minimum common understanding.[5]

3. Legal Rules and Corresponding Facts

It goes without saying that the closer the contract between the applicable law and a set of facts which ask for their appropriate adjudication is, the more meaningful the test pertaining to the Common Frame of Reference has to be. In an ideal – from this point of view – situation, such relevant fact would be the existence of a matched legal rule. We would be faced then with a perfect analogy between the relevant facts (already classified) and a set of legal rules standing vis-à-vis the corresponding facts. But such harmonical eventuality might be available only in rare situations. Match cases would only be created if tautological rules of law would have been rarely identical and, for the rest, if the constitutional requirement of equality would be, in a given situation, unexpectedly low and bearing the mark of unconstitutionality.

4. Identification and Interpretation of the Relative Normative Text

In most other situations, both the identification and interpretation of a norm would move, to the right or to the left on the horizontal scale, in

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[3] With regard to the multiple functions of comparative law see e.g. *Schulze* in his introductory text on "The New Challenges in Contract Law" in *Schulze* (ed.), New Features in Contract Law, Munich, 2007, 3-21, 3 et seq.

[4] "New, complex combinations of numerous bilateral contracts and in many kinds of multilateral 'network contracts'" in *Schulze* (cit. fn. 3), 4.

[5] *Lex mercatoria*.

search for the appropriate position which would best match the particular event or fact, *i.e.* the specific interests and expectations of people involved therein. Within such an environment it will, in most cases, be difficult to trace the objectively correct lines in respect of identification and interpretation of the relevant normative text. In other words, the Common Frame of Reference might indicate some correct solutions here.

5. International and Commercial Procedural Customs

We have seen so far how rich and deviating numerous sources of law have become in international business and law, not to forget the independent design of the parties and the self-regulation of business. Already here the Common Frame of Reference may qualify as part of the same movement in favour of international uniform law and the self-made "transnational" law of business, which is frequently termed "*lex mercatoria*". Even recent and large scale legislative creations of a new Commercial Code in a given state may not hinder the reference of the parties and the courts to existing customs and commercial rules. Here, such commercial customs also constitute part of the commercial Common Frame of Reference. Since such customs are *per definitionem* international and commercial, some elements for the frame of reference are already here. And the charge on a merchant because of anti-professional behaviour may well weigh more than state adjudication. The Common Frame of Reference will develop the most relevant and most accountable approval, that is to say of substantive approximation between varying legal rules among provisions similar in both geographic vicinity and material content.

II. Comparative Argument and Suppletive Function

1. EU-Law, Contract Law and EC-Law of Obligations

The subject-matter of this introductory contribution was phrased by the organizers of the Academic Symposium ("Common Frame of Reference and Existing EC Contract Law") as "Comparative Law and Common Frame of Reference". Three remarks are appropriate in order to delineate the legal space or topography[6] under consideration:

a) First, the second constant term of both the title of the Symposium and the title of the introductory presentation points at *EC Contract Law* rather than *e.g. EC Law of Obligations*. We are not then talking about law of obligations as the second pillar of comparison, still less about EU-

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[6] See *supra*, in I 2.

Private Law, or commercial and consumer contracts, but about the Common "Frame of Reference" so long as this frame has been, half officially and half unofficially, adopted in the relevant standards, plans and drafts as the essential part of *acquis communautaire*.[7]

b) Second, our first term of comparison is the centripetal rather than centrifugal force which tries to remove externalities, in order to identify the main course of events as opposed to marginal exceptions.

c) Comparative law and its solidification to the Common Frame of Reference is contemplated as a bridge connecting civil and common law. The terminology employed here implies such comparison and takes it for granted that the bulk of rights and obligations as between man and man rely on either contract or tort and nothing else.

2. Distinction between Contract and Tort as a Starting Point in Private Law

The classical and categorical understanding of the distinction between contract and tort as the starting point of any comparative dealing in private law is taken here for granted. Accordingly, the main interest of our subject matter addresses the juxtaposition of comparative law against the methods available between today's need for comparative law and the assistance promised by the experience connected to the application of the Common Frame of Reference.

3. Less Detailed Rules and Less Judicial Elaboration

Under a conflicts of laws system which would not feel bound to recognize connecting factors in an attempt to identify the most appropriate law, the relevance of a developed substantive private international law would be limited. As a matter of planning, the number of conflict rules would probably be limited. In principle, they would be few and large, provided that they would be large and scarce, so that the choice among them would be easier and not so elaborate. After all, one consequence of globalization is expected to be less detailed rules and less judicial elaboration.

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[7] *N. Jansen/R. Zimmermann*, Grundregeln des bestehenden Gemeinschaftsprivatrechts?, Juristenzeitung (JZ) 62/2007, 1113-1164, 1114; *Schulze* (*cit.* fn. 3), 11-12.

4. Relevant Parameters

My modest contribution bears in the programme the title "Comparative Law and Common Frame of Reference". Again, two parameters are relevant here.

a) Dogmatic, Not-so-dogmatic, Not-at-all-dogmatic Texts

First, there is a distinction with regard to the dogmatic level. While other similar notions refer to a text comprising intended norms and, consequently, aspiring to direct or indirect applications, by contrast here, for the first time, one sees "Comparative Law" as the first ankle of differentiation among dogmatic, not-so-dogmatic and not-at-all dogmatic texts. I am not against such functions – quite appropriate here. In contrast, I salute such enlargement which widens the scope of application of our exercise. I would also add that, if I am not mistaken, it is the first time where comparative law, while not at all a dogmatic text, aspires to a general position quite similar, next to the Common Frame of Reference.

b) Juxtaposition between CFR and Comparative Law

My last remark in this respect directly capitalizes on the legal position of comparative law as such. Certainly, it is not part of any legislative enactment in the respective country. But at the same time, comparative law permeates the totality of the legal system and invites it to take cognizance of other legal systems on the same topic. Today's world is a world of law for many reasons, including equal and similar approaches. In order to get advantage thereof it has to know the whereabouts of any other legal system faced by similar questions. This is the first and paramount system of comparative law. Insofar, it reviews the totality of recent changes of the law of other countries. It reviews and compares. Such intellectual table tennis is both needed and useful. It then depends only on availability of materials and legal activity of the legislators.

5. Terms of Comparison

The comparison between, on the one hand, the Common Frame of Reference and, on the other hand, the comparative observations and remarks is characteristically expressive. As a Common Frame of Reference, comparative law is aware of its limited function and its reduced influence to various and diverging systems of law. But comparative law invites to its

intellectual inventory the totality or quasi totality of legal systems and observations, and looks forward. All this maximum of human creation and painful evaluation is accumulated as part of the human heritage, still able to be cultivated as the most notorious human endeavour in matters of law. In fact, law is a matter conducive to the exercise of both, a common sense of welcome rules and a special sense of human equality. In this regard and out of respect vis-à-vis some fundamental rules, the filling-in of human rules to some basic parts of human activity confirms and certifies the relevance of legal parameters for canonical contemplations in a normal legal system.

Finally, some spare reflections on some defaults of Common Frame of Reference in some topics or vis-à-vis related substantive norms may help. It is clearly understood that legal systems cannot survive and perform without this connecting element which is required for confirmation and perfect function. Several of them exclusively assume an operation of orderliness. In this respect, contents as such are often irrelevant. What some rules are apt to is a feeling of strict order. But the required order of behaviour is necessary, albeit any formal element would do, unless it changes too often and, therefore, destroys one of the purposes of norms of order. In this respect, one should lose much time on necessity, consequences, and results of activity, mainly aspiring to order – to public order, as such. If the Common Frame of Reference springs up in matters of (public) order, the problem may easily be overcome.

In substance, divisions are normally and frequently used by legislators and, more infrequently, by judges and counsel in order to make clear the frontiers, directions, and perspectives under which similar "divisions", "formalities" and "calls to order" may be invited to perform a substantial, although boring but necessary call to activity. Every human activity has its own spare parts. Inexistence of, and reprisal of human activities, is always necessary, but must indicate its function and result. The Common Frame of Reference comes close to the common vehicle of police activity in order to establish the boundaries of human activity. Ruling thereon may seem boring. In fact, it is a necessarily required element of progress.[8]

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[8] See both recently and growing in substance and density, *R. Zimmermann*, Le droit comparé et l'européanisation du droit privé, Révue Trimestrielle de Droit Civil (RTDciv) 2007, 451-483; articles by *O. Lando, H. Beale, Ewa Letwiska/Aneta Wiewiorowska-Domogalska, G. Monti, M. Odorkerk, H. Schulte-Nölke* and *Chr. von Bar*; also *K.-H. Lehne, M.B.M. Loos, J.F. Stagl, E. Gottschalk, S. Brenler*; *R. Zimmermann, A. Flessner, U. Blaurock, R. Schulze, V. Tritenjak, N. Reich, G. Wagner, D. Martiny, F. Zoll, E. A. Kramer, U. Magnus, J. Basedow, W. Tilemann, J. Kleinschmidt*, and *E. Brödermann*. Cf. also *Chr. von Bar et al.*, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Interim Outline Edition, Munich 2008.

III. Conclusion

1. Comparative Law and Common Frame of Reference

Previous parts of this essay have shortly indicated a couple of factors which may exercise some influence on the applicability of comparative law as a matter of control within the Common Frame of Reference. Two remarks may deserve some attention bearing on the notion of comparative law (under a) and the operation of a Common Frame of Reference (under b).

a) Attempt to Identify the Most Appropriate Law

As things now stand, legal comparison will usually provide, if anything, a comparative argument having a suppletive function and confirming a result already obtained thanks to the assistance of some classical methods. The regular scheme would be, e.g., to get persuasion on the basis of more conservative interpretation, and supporting a result already obtained and rounding up the reasons for one party which would then receive an approval of a position already fast established. Comparative law research may provide the tools here for rounding up an otherwise fulfilled picture.

b) Common Frame of Reference and General Position

A more audacious interference by comparative law would then arise when no solution seems to appear on the horizon, and some light will apparently shine in order to trace the relevant provision and speak up the final result against inexistent opponents. Comparison would illuminate us against a picture of missing other considerations.

"A Better Coherence of EU Private Law" and Multilingualism: Two Opposing Principles?

Gianmaria Ajani (Turin)

I. Legal Harmonization and Multilingualism in the Field of Private Law

The process of integration of EU private law has arrived at a crucial step, namely the search for internal coherence.

With an extensive recourse to the instrument of the *Communication*,[1] the Commission, with the support of the EU Parliament,[2] has started a

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[1] See Communication from the Commission to the Council and the European Parliament. on European Contract Law COM(2001) 398 final; Communication From the Commission to the European Parliament and the Council – A More Coherent European Contract Law – An Action Plan COM(2003) 68 final. See also *G. Ajani, H. Schulte-Nölke*, The Action Plan on a More Coherent European Contract Law: Response on Behalf of the Acquis Group, in http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-1.pdf. The Acquis Group (www.acquis-group.org), founded in 2002, currently consists of more than 50 legal scholars from nearly all EU Member States. The Acquis Group targets a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law. For this purpose, the Group primarily concentrates upon the existing EC private law which can be discovered within the *acquis communautaire*. A first volume devoted to Principles of the Existing EC Contract Law, Contract I has appeared in 2007 (Sellier, Munich). Since May 2005, the Acquis Group is part of the Joint Network on European Private Law. By the end of 2008 this network will deliver a proposal for the so-called "Common Frame of Reference" containing the "Common Principles of European Contract Law" (CoPECL).

[2] It seems useful to report here the text of the European Parliament Resolution B6-0464/2006:

"The European Parliament,

having regard to its resolution of 23 March 2006 on European Contract Law and the revision of the *acquis*: the way forward (P6_TA(2006)0109),

having regard to its resolutions of 26 May 1989, 6 May 1994, 15 November 2001 and 2 September 2003,

having regard to the Commission's First Annual Progress Report of 23 September 2005 on European contract law and the acquis review (COM(2005) 456 final), in which the Commission states that the review of the consumer acquis 'will in turn feed into the development of the broader CFR',
having regard to the Communication of 11 October 2004 from the Commission to the European Parliament and the Council on European contract law and the revision of the acquis: the way forward (COM(2004) 651 final), in which the Commission states that it 'will use the CFR as a toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing acquis and future legal instruments in the area of contract law',
having regard to Rule 108(5) of its Rules of Procedure,
whereas its resolution of 23 March 2006 pointed out that it is not clear what the European contract law initiative will lead to in terms of practical outcomes or on what legal basis any binding instrument will be adopted,
whereas its resolution of 23 March 2006 required, among other information, a statement by the Commission on the way in which it proposes to take account of the results of the CFR Workshops and the research groups in its subsequent work,
1. Reiterates its conviction that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law;
2. Recalls that the initiative on European contract law is the most important initiative under way in the field of civil law;
3. Strongly supports an approach for a wider CFR on general contract law issues going beyond the consumer protection field;
4. Underlines the fact that, besides the work on revision of the consumer acquis, the work on a wider CFR should go on; calls on the Commission to proceed, in parallel with the work on revision of the consumer acquis, with the project for a wider CFR;
5. Underlines the fact that – even though the final purpose and legal form of the CFR is not yet clear – the work on the project should be done well, taking into account that the final long-term outcome could be a binding instrument; all the various possible options for the purpose and legal form of a future instrument should be kept open;
6. Calls on the Commission not to submit any further legislative proposals on contract law issues until the work on a wider CFR has been completed;
7. Calls on the Commission continuously to involve Parliament in the work on the CFR
8. Instructs its President to forward this resolution to the Council and the Commission.

For a critical assessment of the EP position see *D. Mazeaud*, Faut il avoir peur d'un droit européens des contrats?, in G. Canivet et al., De tous horizons. Mélanges en l'honneur de Xavier Blanc-Jouvan, Société de Législation comparée, Paris 2006, p. 309 et seq.; *J. Huet*, Nous faut-il un « euro » droit civil? Propos sur la communication de la Commission concernant le « droit européen des contrats » et, plus géné-

dialogue with the economic actors, with the so called *stakeholders*, with the scholarly community and with the other institutions of the EU, on the modalities of revision of the *acquis*; particular attention has been paid to the law of contract. While remaining within the limits of a language which is respectful of national sensibilities and which eludes the temptations of setting a "European codification" of the law of contract as the ultimate goal, the proactive position taken by the Commission between 2001 and 2003 has favoured the conception of a vast network, extending from the academic community to professionals and representatives of the economic actors. Such a network has confronted itself with the purpose of arriving at a "more coherent" EU private law.

This paper deals with a peculiar aspect of the search for a better harmonization of European private law, namely the relationship between multilingualism and the search for "greater coherence" in European private law.

It is now settled case law[3] that one language version of a Community legal text cannot *per se* be considered superior to other versions in other languages, because the uniform application of Community law requires that its interpretation takes account of other language versions. Beyond this case law, which reinforces multilingualism at a moment (the enlargement to 27 members) of weakness of the principle itself, due to the increase in the number of official languages, the decisions of the Court pose a problem which is difficult to manage in practical terms; in that it requires the interpreter to have mastery of a vast number of official languages.

Today Community law is expressed in 23 official languages: consequently, the issue of its translation and interpretation in the various legal and cultural contexts of the Member States can with good reason be considered as a difficulty in achieving the principle of supremacy of Community law. In fact, the national legal systems are directly involved in European law and individual citizens have the right to confront this set of laws using their own native language.[4] In other words, the legal context of

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ralement, sur l'uniformisation du droit civil au niveau des contrats, Recueil Le Dalloz, 34/2002, pp. 2611-2614.

[3] Case 02.04.1998, C-296/95; Case 20.11.2003, C-152/01.

[4] Art. 21(3) of the EC Treaty provides that every citizen of the Union may write to any of the institutions or bodies in one of the official languages and have an answer in the same language. See *A. Ortolani*, Lingua e Politica linguistica nell'Unione Europea, Rivista critica di diritto privato 1/2002, pp. 127-158, 150; *A. Caviedes*, The Role of Language in Nation-Building within the European Union, Dialectical Anthropology 27/2002, pp. 249-268.

See also Council Resolution 2002/C 50/01 of 14 February 2002 concerning the promotion of linguistic diversity which sets out that "all European languages are

the European Union involves a plurality of legal systems, with the result that the traditional lines of demarcation between translation and interpretation are becoming blurred.

In this context there is a further aspect to be considered, namely the concurrent emphasis laid on multilingualism and the underestimation of the relationship between law and language. The fact that laws are expressed in different languages has not received the attention which might have been expected; this derives from the widespread conviction that every law, in the final analysis, is capable of being translated from one language into another.[5]

The fact that Community law is formulated in different languages has never, so it is generally thought, been an obstacle to the transposition of European legislation. The perception of the slow but steady achievement of the plan for a common market has stimulated research into the functional aspects of European law, and has at the same time neglected the recognition of the impact of multilingualism on national legal languages.

This attitude seems inadequate in relation to the European situation and probably should now be reconsidered, bearing in mind the importance placed on multilingualism by the Community institutions.

The illusion that it is always possible to translate law from one language to another is a further appearance of "legislative optimism", or a variation of a formalistic approach, which grounds the strategy of harmonization on a top-down process of law-making, that has to be followed by an obedient action of implementation at the local level.

The loss of faith in uniformization, due to the temptation to deconstruct meaning and policies which dictate the exaltation of localism (local government, local languages), has shifted the focus of the debate from multi-juridical to multicultural issues.[6]

As a consequence of the spread of a limited number of languages (primarily English) as vehicles of global communication, the policy of defending multilingualism has been taken up in a noticeable way by some

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equal in value and dignity from the cultural point of view and form an integral part of European culture and civilisation." (OJ C 050, 23.02.2002, pp. 1 -2).
In general, see *N. Yasue*, Le multilinguisme dans l'Union européenne et la politique linguistique des Etats membres, Revue du Marché commun et de l'Union européenne 427/1999, pp. 277-283.

5 This conviction has inspired much of the academic writing on the subject of the codification of European law. See *J. Basedow*, Codification of Private Law in the European Union: the Making of a Hybrid, European Review of Private Law (ERPL) 1/2001, pp. 35-49.

6 From the viewpoint of Community cultural policy, see *C. Shore*, Inventing the 'People's Europe': Critical Approaches to European Community 'Cultural Policy', Man 28/1993, pp. 779-800, 787.

national governments, and invoked in action to safeguard nationality; a policy to which some states are more committed than others.[7]

The situation briefly set out here leads to a divergence, on the one hand between European legislative (and juridicial) languages, and on the other hand, the language used by the community of academic writers/legal scholars. This highlights a further separation between two cultural worlds: one which gathers the disciples of European private law, who express themselves in a few common languages (essentially English and French, followed by German); a different epistemic community is the one made of national lawyers, who continue to use their respective national languages. This dichotomy makes the development of an academic common discourse on the important issues of European law quite difficult to be achieved.

II. Multilingualism: a Principle or a Problem?

Community law in force in each of the 27 States of the European Union has the particular characteristic of being the multilingual expression of a single message, which is intended to be uniformly comprehensible as regards its effects on the national systems. As a result, two different legal languages co-exist in each individual legal system – one national and one of the Community – and the affirmation of the superiority of Community law should, in effect, take account of the existence of non-homogeneous national taxonomies.

It is, therefore, necessary to understand how the "search for a better coherence" of the effects of Community law and "vertical multilingualism" can coexist in practice (between, for example, the Italian language as used in the Directives, and the Italian language employed in the context of national law).

Against this background, the new difficulties encountered by private European law appear quite clearly. If in the past private Community law was subject to segmented harmonisation, induced by individual policies pursued by the Union, today the Community action includes the core of national private laws.

While Community provisions regulating economic matters, or standards, or rules in technical areas (such as those relating to agriculture) have not created particular difficulties of interpretation in the national legal systems, a different story regards the private law rules which have been introduced by Community legislation in the field of contract law.

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[7] On this point see *P. Rossi*, The Language of Law between the European Union and the Member States, in G. Ajani, M. Ebers (eds.), Uniform Terminology for European Contract Law, Baden-Baden 2005, p. 23-48.

Such provisions have to be implemented on the basis of taxonomies and academic commentary which, for the sake of coherence of every legal system, cannot be ignored or set aside only in the name of an abstract principle of general consistency of European law.

Here is the impasse which has characterized 20 years of unsatisfactory implementation of Community law: a dilemma between the search for a better coherence *within* Community law and the respect of internal coherence of every national legal system. Needless to say, the first part of the dilemma has been, until now, the weakest between the two.

III. The Identification of a Common Terminology

The search for greater coherence of private European law requires European law-makers to speak in a way that is coherent with national systems of private law and which, to some extent, identifies a common European legal terminology.[8]

In general terms, the difficulty in organising uniform terminology in the legal field, unlike what occurs in relation to physics, economics or other sciences, is explained as the lack of equivalence between terms used in the differing local cultures and references to *external* objects. Law shapes reality through instruments of cultural communication: a *contract* is not an object which is part of the physical world, but something created by a specific legal culture, which may be different to every other one. In particular, despite the declarations and operational rules on multilingualism, a common language for law requires a shared basis of principles, concepts and rules which support the instruments of language in a coherent way.

Community law-makers have adopted the solution of translating the laws into the various national languages. For the sake of respecting the principle of equal authenticity of the official languages, secondary legislation is produced and is then regarded as if it had identical legal meaning in all the official languages. The outcome of this process, however, is not what is expected, in that the taxonomies differ; as already mentioned, there are no guarantees of consistent interpretation, nor the opportunity to forecast how the laws will be understood and interpreted at local level. So long as the Community confined itself to intervention in specific areas, the coherence of national systems was safeguarded, chiefly through

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[8] See G. *Ajani, M. Ebers* (eds.), Uniform Terminology (*cit.* fn. 7); *V. Heutger*, A More Coherent European wide Legal Language, European integration online papers, http://eiop.or.at/eiop/texte/2004-002a.htm, 2002; *B. Pozzo*, Harmonisation of European Contract Law and the Need of Creating a Common Terminology, ERPL 6/2003, pp. 754-767.

mechanisms of special and separate legislation with respect to common or Code-based law. With the spread in the areas of intervention, as it is widely acknowledged, interpreters have had to face the necessity of re-interpreting national law, even common law, in the light of Community policies as expressed in legislation and the case-law created by the *ECJ*.

This greater difficulty posed for national interpreters of law, in the context of the debate which has emerged concerning the impact of Community law on national law, has conferred apparent importance upon expressions such as "legal culture" or "legal tradition". It is what we call "legal culture" which determines how the laws are understood and applied; therefore, an inevitable condition for achieving greater uniformity in European law is the existence of a common legal culture, based on a shared legal terminology. Differing legal cultures, in fact, not only lead the interpreters to understand the rules in different ways, but also structure the interpretation according to the different local *taxonomies*.[9] Every technical language is inserted into a system of referents, which are recognisable, also in the case of a *legal language*, by the epistemic community of experts (judges, lawyers, scholars) served by the technical language. Individual variants on the theme, either synchronically (different meanings or qualifications for the same terms disputed among the legal operators) or diachronically set (changes over time in the meanings associated with the terms), are clearly possible. Such changes sometimes find expression in the letters of the law. At other times, lawmakers opt for general clauses or make no choice at all, leaving upon judges and scholars the burden of reforming the rule and harmonizing it with the changed interpretative direction. The imperative of a sudden adjustment of legal rules, however, has to come to terms with the laws of inertia which govern the movements of the various formants of the law: operative rules do not change as quickly as definitions do; lower judges do not at once follow a change in interpretation. Such a series of dramatic changes (that is to say, the sudden emergence of a new rule – or interpretation of a rule – in opposition to previous doctrine, and perhaps inconsistent with the system of positive law) usually evokes reactions of varying quickness within the several legal formants.

Moreover, the EU's law-making process imposes particular procedures of legal drafting, such as, for example, parallel corpora of texts, implying reciprocal inter-lingual influence.[10] Finally, there are many neologisms or

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[9] See G. *Ajani*, Legal Taxonomy and European Private Law, in G. Ajani, R. Schulze (eds.), Gemeinsame Prinzipien des europäischen Privatrechts, Baden Baden 2003, pp. 349-356, 350.

[10] For a criticism of language as a unitary structure see from a general perspective, C.F. *Voegelin*, Casual and Noncasual Utterances within Unified Structure, in T.A. Sebeok (ed.), Style in Language, London 1960, p. 57.

the semantic reassignment of terms in the national language to indicate innovations in the law (for example: "electronic signature" (*It*: "firma elettronica", a calque from English) and functional mechanisms of the institutions (for example "co-decision procedure", a calque from French).

As long as translators are concerned, such cases do not assist in making the choice between the following two options: whether the legal language used for Community legal acts should refer to features of the Community system's own legal culture or to the national one, although standardised translation methods and reliance on data-banks of terms steer the texts more towards the denotation as understood by the Community.

In either case, uncertainty among translators hinders their awareness of the role they play in bringing about coherence or otherwise in European law.

The choice of certain terms on the basis of their normal association with the legal culture of the State receiving the law changes, in fact, the nature of the Community action, since the Directives become "nationalised". A typical example can be found in the term "cooling-off period" in consumer protection legislation: this notion was brought into Italian national law in the Community directives in reference to a term such as "right of rescission/withdrawal" (It.: *diritto di recesso*), without considering that the term referred to a legal concept with a different scope of application ex Art. 1373 of the Italian Civil Code.[11]

On the other hand, when terms are chosen whose main connection is to the Community legal culture, such as "governance", the laws are more difficult to assimilate into national contexts, but the formal cohesion of Community law is preserved.

A perspective on "the language of law" implies the employment of a range of research techniques, assisted by experts in linguistics.[12] For the search of coherence of European private law, it might be helpful to briefly describe the outlines of the technique of terminological research. Terminology is useful to the study of the convergence of European private law, since it limits the complexity of linguistic data and the levels of discourse analysis to a study of specialised legal vocabulary, describing it not so much by means of definitions which are undetermined and accessible to

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[11] See *B. Pozzo*, Harmonisation (*cit.* fn. 8)

[12] For the value of semantic linguistic research in the analysis of polysemy see. *C. Durieux*, Traduction et linguistique textuelle, in Terminologie et traduction, 1/1997, pp. 48-62, 50; *P. Lerat*, Vocabulaire juridique et schémas d'arguments juridiques, Meta XLVII 2/2002, pp. 155-162.

ordinary usage,[13] but rather through conceptual relationships and usages.[14]

The issue of terminology has been underestimated among legal scholars in the academic debate on European law, with the exception of some useful critical excursions by comparative law specialists,[15] and is now being approached in an inexact way.

This imprecision is also, paradoxically, a feature of some positions adopted by the EU Commission in relation to the issue of the coherence of European private law.

In the well-known Communication of 2003,[16] devoted to the law of contract, the word "terminology" is improperly used. In some cases it is in fact used to refer to the search for common principles;[17] at other times it is used in relation to a set of concepts, or as a synonym for the expression "legal category".[18] In general, the use of the word "terminology" by the Commission implies a relationship to legal concepts and seems to refer to philosophical thought rather than to the practice of private law.

IV. Conclusions

To conclude, and to keep the focus on the relationship between multilingualism and the search for coherence in European private law, it seems evident that the construction of a "Common Framework of Reference" presupposes a re-assessment of what Community law is understood to

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[13] See *J.C. Gémar*, Le plus et le moins-disant culturel du texte juridique. Langue, culture et équivalence, Meta XLVII 2/2002, pp. 163-176.

[14] For an introduction to the subject see *P. Sandrini*, Terminologiearbeit im Recht. Deskriptiver begriffsorientierter Ansatz vom Standpunkt des Übersetzers, Vienna 1996.

[15] *B. Pozzo*, Harmonisation (*cit.* fn. 8).

[16] Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, COM(2003) 68 final.

[17] See COM(2003) 68 final, para. 4.1.1 no. 59. "A common frame of reference, establishing common principles and terminology in the area of European contract law is seen by the Commission as an important step towards the improvement of the contract law acquis."

[18] See COM(2003) 68 final, para. 4.1.1 no. 62 : "the Commission may use this common frame of reference in the area of contract law when the existing acquis is reviewed and new measures proposed. It should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms such as "contract" or "damage" and of the rules which apply, for example, in the case of the non-performance of contracts".

mean in the numerous national contexts. The attention drawn by the *ECJ* to the recognition of an exclusively Community connotation[19] to legal texts, probably derives immediately from its teleological approach.

However, this direction seems to miss a central point in the search for a "common framework".

A systematic analysis of the *acquis*, when undertaken by the Court, is capable of strengthening the coherence of European private law, in the same way as the identification of general principles by means of case-law, (such as proportionality and supremacy, to cite two well-known examples) can be useful in coordinating the *acquis* with new judicial solutions emerging from case-law. However, this cognitive task of recognising the significance of laws remains separate from the job of identifying categories and concepts in the national legal systems.

In fact, there is a distinction to be drawn between the *contextual* meaning of a term (or expression) and the *conceptual* meaning of the same term: while the first significance should be derived by studying the context, the second concerns the sort of information which can be conveyed leaving the linguistic context aside. For instance, the directives contain rules ("remedies for failure to conform)[20] and definitions ("producer")[21] which have to be understood in their context (in association with other terms present in the same texts) and in certain cases of systematic interpretation by the *ECJ*, in correlation to other texts (other directives in the field of consumer protection). Otherwise, judicial/legal concepts operate in an axiological way, as a paradigm evaluating the conformity of the meaning as ascertained in the context of European law with the national legal system.These paradigms are used as references for each individual system of national private law.

Taking up the example just given of failure to conform, the word "conformité" in the French legal system is linked to the category "conformité du produit vendu" and "vice caché". On the assumption that the meaning is the representation of a lexical item present in a given speech community, an analysis of the impact of Community law on national systems of private law makes it clear that there is a second meaning to be found alongside the primary one. The issue obviously becomes considerably more complex when the representation does not concern one individual

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[19] See *S. Weatherill*, Why Object to the Harmonization of Private Law by the EC?, ERPL 5/2004, pp. 633-660, in particular on p. 637.

[20] Directive 99/44/EC, Art. 3.

[21] Directive 85/374/EC, Art. 3.1.

term (for example, the notion of "consumer"), but a range of referents which sustain a whole complex of concepts and rules.[22]

If we want to focus our attention on the significance of referents, the perspective provided by a plain analysis of Community legal texts and case-law application must be recognised as inadequate; by the same token, the search for terminological coherence within the *acquis*, even if it is extremely useful, is insufficient in scope, in that it only promotes comprehension of the meaning of what the Community provisions lay down for the Member States. These provisions are viewed as partially incoherent, at national level, and searching only for their contextual meaning is therefore not of much use in reducing incoherence.

The national viewpoint, conversely, requires deconstruction and reconstruction according to cardinal points of reference. This can only be achieved with the cooperation of Community law-makers: the specialised language used by the Community should, in fact, take the conceptualisation by national end-users into greater consideration, with the aim of improving comprehensibility and the "systematic coherence" of principles, legal rules and European legal terminology.

Historically, the task of conferring "meaning" to the language of law was performed by a variety of actors in society. Today, identifying common concepts is chiefly the work of academic commentators; however, in this, they must be assisted by precise methodology, which does not concentrate exclusively on laws and which is free from the canons of the function-driven, teleological methodology used by the European Court of Justice.

In order to contribute in consolidating a common legal culture, such a method must favour the de-contextualised reading of legal texts, in the search for constituent concepts which permit coherent legal reasoning between the Community level and national levels. Moving from the first level, the analysis should lead to a comparison with the system of notions belonging to the national legal systems, by means of an extended description of the various uses of legal terms representing concepts.[23]

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[22] A meaningful example is provided, for instance, by the coordination between remedies under the EC Directive 99/44 and the different national contractual schemes for liability.

[23] An early, experimental attempt in this direction has been made with the *Legal Taxonomy Syllabus* project, a database developed by a research group coordinated by Dipartimento di Scienze Giuridiche (Law Dept.) at the University of Turin; the project (www.eulawtaxonomy.org) aims to present a more complete definition of the terms employed both at the level of the *acquis* and in the national legal systems of five legal systems in the EU (France, Germany, England, Italy and Spain), in the field of consumer law. The terms chosen for developing the *Syllabus* are those considered important in the context of European contract law, both from the

This approach is based on a recognition that language has a powerfully formative effect on law and that a multiplicity of interpretative communities exist within the unity of the EU environment, which communicate in a non-hierarchical way. Moreover, Community law imposes obligatory links between the supranational and the national levels, and this sets off a circulation of rules, within which language creates solutions which may also be independent of local meanings.

Finding such solutions, a survey of the definitions of terms used by the legal and interpretative formants, may encourage the resolution of incoherence and the destructive tensions within the field of European private law, a sector which is inclined to harmonisation, but it is still subject to pluralist tendencies under the banner of multilingualism.

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point of view of categorization (such as "damage", or "signing of the contract", or "misleading advertising", and the different interpretative points of view. See *P. Rossi, C. Vogel*, Terms and Concepts: Towards a Syllabus for European Private Law, in ERPL 2/2004, p. 293-300; *G. Ajani, M. Ebers* (eds.), Uniform Terminology (*cit.* fn. 7).

Part II
Structures of the DCFR

Contract Law or Law of Obligations? – The Draft Common Frame of Reference (DCFR) as a multifunction tool

Hans Schulte-Nölke (Bielefeld)

I. Under Discussion: Coverage and Structure of the DCFR

It is being discussed whether coverage and structure of the recently published Draft Common Frame of Reference (DCFR) prepared by the Study Group and the Acquis Group[1] are suited to the possible purposes these texts might have. With regard to the coverage, contradictory suggestions have become apparent, namely that the DCFR is too broad and should be restricted to contract law[2] or that it is too narrow and should even include matters such as transfer of and securities in immovables.[3] The structure of the DCFR has also been questioned, in particular the broad scope of Book III, which is, in principle, applicable not only to contractual obligations but to all obligations including those which arise from non-contractual relations under, e.g. tort or unjustified enrichment.[4]

The purpose of this short paper is to explain the reasons for the fairly broad coverage of the DCFR and its current structure. In particular, it needs to be stated that the coverage of the DCFR is very much in line with the Communications of the European Commission on the CFR exercise[5] and the contract, which the participating research institutions

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1 *Christian von Bar*, *Eric Clive*, *Hans Schulte-Nölke* et al. (eds.), Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference, Interim Outline Edition, Munich 2008.

2 This has been brought forward by many of the stakeholders consulted by the European Commission on early drafts of the CFR.

3 Cf. the contribution of *Sjef van Erp*, in this volume.

4 Most prominently by *Ole Lando*, The Structure and the Legal Values of the Common Frame of Reference, European Review of Contract Law (ERCL) 2007, pp. 245 et seq., 249 et seq.; cf. also the contribution of *Reiner Schulze* in this volume.

5 Cf. in particular the early communications of 2001 and 2003 which initiated the political process: Communication on European Contract Law, COM(2001) 398 final; A More Coherent European Contract Law, an Action Plan, COM(2003) 68 final.

have concluded with the Commission. With regard to the structure it is indeed true that choices had to be made and that other options would have been feasible. But the decisive criterion for the choice made was, in my view, not so much to opt for an "ideal" structure as a matter of principle, but for a structure which offers a maximum flexibility with regard to the somewhat different possible functions of the DCFR and the CFR. Hence, the structure, in particular the option for a Book III on general obligations, is not an irreversible fundamental choice. On the contrary, during the elaboration of the DCFR, it has been preconceived that, in case the decision is taken to restrict any possible political CFR to contract law, some of the issues which are currently placed in Book III might need to be "re-contractualised" and moved to Book II. The main reason for the choice made was, simply, that it is much easier to climb downhill than upwards. It is relatively easy to "re-contractualise" a general law of obligations, but rather difficult and time consuming to turn contract law provisions into rules applicable for all sorts of obligations. The current structure of the DCFR illustrates how model rules applicable to all obligations might look like. This allows an informed choice as to whether this way should be continued or not.

II. To be distinguished: "Academic" DCFR and possible "political" CFR

It has been proven useful for the discussion to clearly distinguish between, on the one hand, the academic endeavour to create, by means of fundamental research, a broad European restatement or set of model rules on a patrimonial law (i.e. the "academic" DCFR) and, on the other hand, the idea that a "political" CFR could be set up by the EU institutions. The academic work on the DCFR is something fundamentally different, much broader and deeper (and perhaps also much more important) than any possible output of a political process run by the EU institutions, which then could form a "political" CFR.

The academic work which led to the DCFR is just the continuation and broadening of the work undertaken by the Commission on European contract law, usually called the Lando-Commission.[6] This endeavour is much older than any political programme or schedule put up by the EU institutions in the course of the CFR exercise. The idea to broaden and enlarge the Principles of European Contract Law (hereinafter referred to

[6] *Ole Lando, Hugh Beale* (eds.), Principles of European Contract Law Parts I and II. Prepared by the Commission on European Contract Law, The Hague 1999; *Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann* (eds.), Principles of European Contract Law Part III, The Hague, London and Boston 2003.

as PECL) of the Lando- Commission and, in particular, to include also specific contracts, non-contractual obligations and the law of movables, has been established as the programme of the Study Group on a European Civil Code since 1998.[7] Also the plan to complement the Lando-Principles by "Acquis Principles" (hereinafter referred to as ACQP) drafted in a similar style but based on the existing EC private law (i.e. the approach of the Acquis Group) goes back to projects of the late 1990s.[8] These works were already ongoing, when the European Commission published its first Communication on Contract Law 2001 and later, on the Action Plan 2003.[9]

The Commission can take the credit for having invented the term "Common Frame of Reference", which was used first in the Action Plan of 2003. This term covered surprisingly well, what the ongoing academic works are aiming for.[10] The PECL and works following this model are aiming to provide Europe's lawyers with a common framework of annotated rules based on a comparison of all European legislations, to which they can refer when looking for a widely accepted solution for purposes of legislation, arbitration or contract drafting. This is the reason why the first interim outline edition of the academic work which is headed "Principles, Definitions and Model Rules of European Private Law", was given the subheading "Draft Common Frame of Reference".[11] This subheading expresses the hope that the work is a step towards a property, common to

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[7] As to the organisation and the approach of the Study Group see, e.g. *Christian von Bar, Ole Lando*, Communication on European Contract Law: Joint Response of the Commission of European Contract Law and the Study Group on a European Civil Code, in Hans Schulte-Nölke, Reiner Schulze (eds.), European Contract Law in Community Law, Cologne 2002, pp. 291 et seq., 297 et seq. (published also in European Review of Private Law (ERPL) 2002, pp. 183 et seq.); more information available on the homepage of the Study Group http://www.sgecc.net.

[8] Cf. the volume "Principles of the Existing EC Contract Law (Acquis Principles)", Volume Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms; prepared by the Research Group on the Existing EC Private Law (Acquis Group), Munich 2007; preceding projects were the Training and Mobility Networks on "Common Principles of European Private Law" (1997-2002) under the fourth EU Research Framework Programme (co-ordinator: Reiner Schulze, Münster) and on "Uniform Terminology for European Private Law" (2002-2006) under the fifth EU Research Framework Programme (co-ordinator: Gianmaria Ajani, Turin).

[9] Cf. Action Plan, fn. 5.

[10] *Christian von Bar*, Coverage and Structure of the Academic Common Frame of Reference, ERCL 2007, pp. 350 et seq., 351.

[11] Cf. DCFR, fn. 1.

Europe's lawyers, i.e. a "Common Frame of Reference" in the very sense of the word.

A "Common Frame of Reference" in this sense might emerge just by natural development, quasi by noncoercive discourse between lawyers, without any political act by political institutions. However, it is somewhat unrealistic and idealistic that a broad agreement of lawyers both in academia and in practice (including legislation) on a CFR will emerge just by the exchange of ideas and power of persuasion. Therefore it was very helpful that the Commission has supported the process by its Communications and some funds from its research programmes.

The very open question is, whether a CFR with this function should be created in the form of not just an academic, but political document. Readers will know that according to the statements issued by Commission, very few possibilities as to how such a "political" CFR could realistically be framed, are under discussion. These possibilities have been characterised by the Commission by the rather unclear metaphor of a "toolbox", as which the political CFR could function, in particular for those who are preparing or transposing EC legislation. The simplest option would be for the Commission to just publish a COM Document which embodies the CFR, perhaps also expressly committing itself to make use of the definitions and model rules contained therein when drafting Directives or Regulations. A more ambitious idea is to include a CFR into an Inter-Institutional Agreement of Commission, Council and Parliament, which would oblige all the three legislative EU institutions to make use of the CFR when working on legislation. Only on the remote horizon has the idea appeared that a possible "political" CFR in this sense could serve as a basis for further consideration whether an Optional Instrument, i.e. a European set of rules, which can be chosen as the applicable law by the parties to a contract, shall be prepared.

The difference between the academic DCFR and a possible political CFR could not be greater; nature, possible function(s) and very probably also coverage, structure and content will widely deviate. Whether there will ever be something like a political CFR is very uncertain. By contrast, the academic DCFR has already been under preparation for many years. It is 70% or 80% complete. Large parts have already been published in the interim outline edition and the volumes on individual subjects.[12] As any

[12] As to the Interim Outline Edition of the DCFR cf. fn.1; as to the Acquis Principles (ACQP) cf. fn. 8. From the Study Group series "Principles of European Law" (PEL) the following volumes have already been published: Benevolent Intervention in Another's Affairs (PEL Ben. Int.), prepared by *Christian von Bar*, Munich, Brussels, Bern, Oxford 2006; Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC), prepared by *Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann*, Munich, Brussels, Bern, Ox-

political development is totally open, it is pure speculation what might happen. It is just important to reiterate that the DCFR has been elaborated as a contribution of academics to the necessary process of Europeanisation and the development of a European area of legal research and practice. It is only one of the many purposes of the DCFR (and perhaps not the most important) to provide building material for a possible political CFR.

III. Coverage of the DCFR and the CFR

Any discussion on the right coverage of the DCFR and of a possible political CFR is only meaningful when the purposes and functions of these works are clear. Discussions on coverage are often in fact indirect contributions to the rather controversial question of what the purpose of the DCFR and CFR should be. At least the DCFR is, and possibly also the CFR will be, by definition, a multifunction tool. The different possible purposes of both texts are discernable, but it is rather open, which of them will be important in the end.[13] For instance, if the CFR is only to be used as a tool for reviewing some Directives regulating consumer contracts as described in the current green paper,[14] a narrow scope limited to contract law issues likely to be relevant might be appropriate. If the CFR is also intended to inform the legislator on how a specific regulation (e.g. on pre-contractual information duties) may interact with other fields of EC law and national law (e.g. rules on the content and the validity of contracts, on remedies and on tort), a rather broad coverage might be useful. Or, if the CFR is to be used as a source for the drafting of a possible Optional Instrument, its appropriate scope depends on the potential scope of such an Optional Instrument. If, for instance, the Optional Instrument, is to be limited to the sale of goods (and shall leave out any issue regarding the proprietary effects of sale including retention of title clauses), the CFR may look rather different than in the case where the Optional Instrument shall also cover other types of contracts (e.g. certain

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ford 2006; Service Contracts (PEL SC), prepared by *Maurits Barendrecht, Chris Jansen, Marco Loos, Andrea Pinna, Rui Cascão, Stéphanie van Gulijk*, Munich, Brussels, Bern, Oxford 2006; Personal Security (PEL Pers.Sec.), prepared by *Ulrich Drobnig*, Munich, Brussels, Bern, Oxford 2007; Lease of Goods (PEL LG), prepared by *Kåre Lilleholt, Anders Victorin†, Andreas Fötschl, Berte-Elen R. Konow, Andreas Meidell, Amund Bjøranger Tørum*, Munich, Brussels, Bern, Oxford 2007.

13 For a summary of the discussion on possible purposes cf. *Hugh Beale*, The Future of the Common Frame of Reference, ERCL 2007, pp. 257et seq., 259 et seq.

14 Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final of 8 February 2007.

services, in particular financial services such as loans or insurance) and also transfer of property or securities in movables. And even if the CFR shall only have very narrow coverage, it might be very useful to have a broader DCFR in order to take an informed decision on what to take on board and what to leave out. Moreover, in case an originally narrow CFR is later amended and enlarged, the broader DCFR would facilitate such discussion and decision enormously.

When preparing a draft in this situation of uncertainty, the way forward must be to take an approach which allows maximum flexibility with regard to the different functions. Thus, there was no other real option than to prepare a rather broad DCFR, which allows a choice depending on the concrete use made of it. The criteria of which issues to include into the DCFR work and which to exclude were rather pragmatic.[15] Firstly, there was no reason not to incorporate ongoing works in the area.[16] The DCFR is, despite any possible political use made from it, primarily an academic endeavour and a long term project of fundamental research, legitimately driven by the curiosity of researchers – and not just a short term job for limited purpose.[17] This is by no means a contradiction to the aim that the project could and should have some very important practical spin-offs or even may be of enormous use *in toto*. On the contrary, it is often characteristic for fundamental research that it, although not driven by mere utilitarian motifs, may deliver the more innovative results than limited projects of applied sciences targeting specific problems. In particular, as the project aims to improve the knowledge of communalities and differences of the laws in the Member States, it is highly probable that it will deliver many results of high practical importance – most certainly also for currently unforeseen uses.

The second criterion for shaping the coverage of the DCFR was similarly pragmatic: As many issues as possible from those mentioned in the Commission documents[18] and in the Resolutions of the European Parlia-

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15 Cf. also *Christian von Bar*, Coverage and Structure (*cit.* fn. 10).

16 In addition to the published volumes (*cit.* fn. 12) the following are in preparation: Sales, Unjustified Enrichment, Non-contractual Liability arising out of Damage caused to Another, Mandate, Loan Contracts, Contracts of Donation, Transfer of Movables, Security Rights in Movables.

17 Cf. *Christian von Bar and Hans Schulte-Nölke*, Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht, Zeitschrift für Rechtspolitik (ZRP) 2005, p. 165 et seq.

18 Cf. the Communications of 2001 and 2003 mentioned in fn. 5; readers will know that the later Communications of the Commission which were issued after the research contract had been concluded, are more restrictive with regard to the coverage of the exercise; cf. Commission of the European Communities. First Progress Report on The Common Frame of Reference, COM(2005), 456 final; Communi-

ment[19] should be taken on board in order to have something in stock in case of a political demand. Also this criterion led to a rather broad scope of the exercise. It seems necessary to refresh one's memory by re-reading these documents which were decisive when the scope of the DCFR was agreed between the Commission and the participating researchers for the purposes of funding by EC research money. For instance, the Commission listed in its Communication of 2001 many areas of law, which include several specific contracts (e.g. sale, services, building contracts, factoring, leasing, commercial agents, insurance) and which clearly went beyond contract law in a narrow sense by mentioning examples from tort law, unjustified enrichment or property law.[20] Consequently, the contract concluded between the academics and the Commission also explicitly lists all the issues which are (or will be) part of the DCFR.

The coverage of the DCFR can be seen from its overall structure:
Book I: General Provisions
Book II: Contracts and other juridical acts
Book III: Obligations and corresponding rights
Book IV: Specific contracts and the rights and
obligations arising from them
Part A. Sales
Part B. Lease of goods
Part C. Services
Part D. Mandate
Part E. Commercial agency, Franchise and distributorship

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cation from the Commission to the European Parliament and the Council, COM(2004) 651 final, 11 October 2004; Commission of the European Communities. Second Progress Report on the Common Frame of Reference, COM(2007) 447 final.

19 Cf. the Resolutions of the European Parliament of 26 May 1989 on action to bring into line the private law of the Member States (OJ C 158, 26.6.1989, p. 400); of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member States (OJ C 205, 25.7.1994, p. 518); of 15 November 2001 on the approximation of the civil and commercial law of the Member States (OJ C 140 E, 13.6.2002, p. 538); of 2 September 2003 on the Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan (OJ C 76 E, 25.3.2004, p. 95); of 23 March 2006 on European contract law and the revision of the acquis: the way forward (OJ C 292 E, 1.12.2006, p. 109); of 7 September 2006 on European contract law (OJ C 305 E, 14.12.2006 p. 247) and of 12 December 2007 on European contract law (P6_TA(2007)0615).

20 Communication on European Contract Law, COM(2001) 398 final, cf. e.g. paragraphs 8, 10, 12, 22 and Annex I.

Part F. Loans [in preparation]
Part G. Personal security
Part H. [placeholder for other contracts, e.g. donation, insurance]
Book V: Benevolent intervention into another's affairs
Book VI: Non-contractual liability arising out of damage
Book VII: Unjustified enrichment
Book VIII: Transfer of movables
Book IX: Security rights in movables
Book X: Trusts
Annex 1: Definitions
Annex 2: Computation of time

The current interim outline edition finalised at the end of 2007[21] includes Books I-VII. The full and final version due at the end of 2008 will also include Books VIII-X and some more specific contracts. It is true that this agenda and, in particular, the time schedule are ambitious. It is even truer that a political CFR, even if it should be fairly broad, will most likely have a much smaller scope and will hardly include areas such as benevolent intervention or contracts of donation. But apart from the few examples of a – perfectly legitimate – mainly academic interest, which form only a very small quantitative portion of the DCFR, the issues contained in the DCFR are fully in line with the issues listed in the Commission Communications as being potentially relevant for the internal market.

If the DCFR is to be used as a source and as building material for any political CFR, it might function as a menu offering choice. Political institutions, when deciding which areas are to be covered by any political CFR, may find it very useful to have such a broad DCFR, in order to have a sound basis of informed choice, what areas to include and which not. In respect to the possible functions of the draft CFR as a source for political use, the DCFR is meant to be and designed to function as a source from which politicians can and should cherry-pick.

IV. Criteria for Structuring the DCFR

Whereas the coverage of the DCFR was clear from the beginning, the issue of structuring the material proved to be rather difficult. For the purpose of understanding the way taken by the DCFR better, it is useful to remember that the starting point for the elaboration of the DCFR was the Principles of European Contract Law (PECL).[22] The DCFR is nothing more than an extension of the PECL. Besides the broadening of the com-

[21] Cf. DCFR, fn. 1.
[22] Cf. PECL, fn. 6.

parative basis to the laws of the current 27 Member States, the work is targeted towards two core aims:

- Enlargement of the scope with specific contracts, non-contractual obligations and property law of movables.
- Insertion of issues characteristic of EC law (e.g. non-discrimination, pre-contractual information duties, consumer protection).

Thus, the structure of the PECL had to be opened in order to find room for the new materials to be included into the DCFR. For a number of reasons related to the fact that the PECL are limited to general contract law, the task was a little bit trickier than just adding some rules onto specific contracts and other obligations at the end. Several issues stemming from EC law, for example, non-discrimination law and pre-contract information duties are not part of contract law in a narrow sense. Although these matters are clearly of relevance for contractual relations, they are also closely related to the law of unfair commercial practices and the law of torts. In particular, the DCFR had to spell out a clear set of remedies for infringements of pre-contractual duties or of the duty not to discriminate. The remedies provided by the PECL could not be used for this task, because they were applicable only for non-performance of an obligation under a contract (cf. Art. 8:101 PECL, as quoted below). It is obvious, that pre-contractual duties do not fall under these rules. Moreover, the inclusion of non-contractual obligations like tort law similarly required rules on the non-performance of such obligations, plus the adaptation of the rules on some other matters e.g. plurality of debtors, transfer of rights, set-off or prescription. Also the chapters on specific contracts needed to be linked and adapted to the general rules on content of contract, performance and remedies lifted from the PECL.Very often the question was to be decided, whether the rules on specific contracts such as sale, lease or services should repeat general rules or just refer to the relevant PECL rules.

The answer to this qestion can differ and, depending on the choice made, lead to different effects. Repetition of general rules on performance and remedies within the specific chapters on sales, leases or services has the advantage that all rules relevant for such questions are to be found in one place. The disadvantages are, on the one hand, a lot of redundancy and repetition, which makes the work unnecessarily voluminous and, on the other hand, a rather unclear demarcation between the rules on general contract law and those set out for specific contracts. A repetitive solution would lead to a devaluation of the general rules, which then would only be applicable to such contracts, for which no specific rules are provided in specific chapters. The alternative, creating a multi-layer system of general rules and specific rules for specific contracts avoids the disadvantages of the repetitive solution. But the consequence is that the gen-

eral rules are more abstract and that one has to look in several places in order to find the relevant rules.

This question can not be answered theoretically. The answer must depend on the main function of such a text. If it were clear from the outset, that only sales contracts are to be covered, a general contract law makes no sense. This would automatically lead to the solution taken by the CISG, which contains, e.g. rules on the conclusion of sales contracts. If, for example, it were probable, that the CFR should include rules on several specific contracts, a general part of contract law seems to be preferable. The works on the DCFR could benefit from the very thorough preceding works on general contract law in the PECL. It would have been not efficient, to start from scratch and spell out comprehensive individual rules on performance and remedies for all the specific contracts. Thus, with regard to the incorporation of specific contracts, it was clear from the beginning, that there should be general rules applicable to all contracts on performance and remedies, which should only be modified for specific contracts as far as necessary in order to grasp the peculiarities of the contracts covered.

It was less clear how to incorporate the pre-contractual and the non-contractual obligations. But with regard to these questions, the PECL have also delivered a starting point. In the Third Part of PECL, the drafters had anyway provided some rules which are rather neutral with regard to the question as to whether they are applicable just for contract law or also for non-contractual obligations. These are, in particular, the Chapters on Plurality of Parties, Assignment of Claims, Transfer of Contract, Set-off and Prescription. Within the DCFR, only a few changes were required to make these rules applicable to non-contractual obligations. The real innovation of the DCFR in comparison to the PECL is that the rules on performance and remedies for non-performance have been redrafted in order to make them applicable for pre-contractual and non-contractual obligations as well. Again, this was a very pragmatic choice, driven mainly by the intention to avoid repetition and redundancies.

V. How the DCFR is structured: Examples

The pre-contractual issues stemming from EC law and some general consumer law matters have been placed in Book II, which (besides very few provisions on unilateral juridical acts) mainly contains general contract law. Book II has the following Chapters:
Chapter 1 General Provisions
Chapter 2 Non-discrimination
Chapter 3 Marketing and pre-contractual duties
Chapter 4 Formation

Chapter 5 Right of withdrawal
Chapter 6 Representation
Chapter 7 Grounds of invalidity
Chapter 8 Interpretation
Chapter 9 Contents and effects of contracts

It may be interesting to note that, in particular, Chapters 2 and 3 contain the rules on pre-contractual duties and obligations. These Chapters enclose new material not contained in the PECL, which has been elaborated on the basis of the ACQP. Further new matters, also stemming from the ACQP, are Chapter 5 on Withdrawal and a rather broad section in Chapter 9 on Unfair Terms. Nearly all the other parts of Book II are lifted from the PECL and, if at all, have only been slightly redrafted.

Book III has the title "Obligations and corresponding rights" and contains the following Chapters:
Chapter 1 General
Chapter 2 Performance
Chapter 3 Remedies for non-performance
Chapter 4 Plurality of debtors and creditors
Chapter 5 Transfer of rights and obligations
Chapter 6 Set-off and merger
Chapter 7 Prescription

The provisions in these Chapters are also nearly all lifted from the PECL. The difference is, as already said, that they have been redrafted to make them applicable also for pre-contractual and non-contractual obligations. Some examples might illustrate what the changes are. The provision of the DCFR on the time of performance (Art. III.–2:102 DCFR) reads as follows; the italics (added by the author of this paper) indicate some of the points of specific interest:

> **Art. III.–2:102 DCFR: Time of performance**
> (1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from *the terms regulating the obligation* it must be performed within a reasonable time *after it arises*.
> (2) If a period of time within which the obligation is to be performed can be determined from *the terms regulating the obligation*, the obligation may be performed at any time within that period chosen by the *debtor* unless the circumstances of the case indicate that the *creditor* is to choose the time.

If one compares this wording with its predecessor in the PECL one can clearly see the differences:

Art. 7:102 PECL: Time of Performance
A party has to effect its performance:
(1) if a time is fixed by or determinable from the contract, at that time;
(2) if a period of time is fixed by or determinable from the contract, at any time within that period unless the circumstances of the case indicate that the other party is to choose the time;
(3) in any other case, within a reasonable time after the conclusion of the contract.

Most of the changes are mainly a consequence of the extension of scope from contracts to all obligations. The terms "party" and "other party" used in PECL have been replaced in the DCFR by "debtor" and "creditor". The expression "fixed by or determinable from the contract" in PECL currently reads in the DCFR "can be determined from the terms of the obligation". The phrase "a reasonable time after the conclusion of the contract" in paragraph (3) of Art. 7:102 PECL has been replaced in the DCFR by the more abstract but perhaps also more correct wording "a reasonable time after it [i.e. the obligation] arises". One can, of course, say that the DCFR wording is slightly more abstract. But it should nevertheless be not a problem to find out that "the terms of the obligation" in the DCFR means in the case of a contractual obligation just the "contract". But even in this case the wording of the DCFR might be preferable because the content of the contract is determined not only by the, e.g., written terms of the contract, but also by the applicable mandatory and default rules. The PECL term "contract" turns out to be rather misleading because it creates the wrong impression that only the contract itself needs to be consulted in order to find out about the time of performance. The ostensive clearness of the PECL provision might be too simplistic, in particular, if non-lawyers try to understand it. Also the terms "debtor" and "creditor" might be more easily understood than "party" and "other party". Moreover, the initial phrase of the PECL rule ("A party has to effect its performance") is a rather heavy noun-based construction and makes the reader wonder whether "to effect performance" is something different than just "to perform". Its counterpart in the DCFR ("an obligation is to be performed") seems to be – despite of being in passive voice – clearer. Thus, it will be difficult to argue that the DCFR version of the rule, although having a broader scope of application including non-contractual obligations, is a step backwards. It is quite the opposite. And it should be obvious that it is relatively easy to redraft the provision if it is to be made applicable just for contracts.

In order to see the advantages of the solution the DCFR has opted for, it might be useful to reflect on possible alternatives. One alternative would be for each type of a non-contractual obligation to draft a specific

rule on the time of performance. Such a specific rule would be needed, for instance, for pre-contractual obligations or obligations arising from tort law or unjustified enrichment law etc. The content of these rules would not differ very much, if at all, from Art. III.–2:102 DCFR (as quoted above). It is a policy decision, whether a set of rules such as the DCFR shall have a general rule on the time of performance applicable, in principle, on all obligations, or if such individual rules shall be inserted. But it must be borne in mind, that the article on the time of performance is only one example of the many rules needed in order to determine the content and the remedies for non-performance of non-contractual obligations. If one neither opts for a general rule like Art. III.–2:102 DCFR nor for specific rules, one can either leave the question open or add to a rule only applicable to contracts e.g. Art. 7:102 PECL, a last paragraph saying "This article applies to obligations other than contractual obligations with appropriate modifications."[23] It is at least disputable whether these alternatives are clearer and more vivid than the current solution in Art. III.–2:102 DCFR.

A further example might confirm these findings. The initial rule of the Chapter on Remedies in Book III of the DCFR reads (italics again added by the author):

> **Art. III.–3:101 DCFR: Remedies available**
> (1) If *an obligation is not performed by the debtor* and the non-performance is not excused, the *creditor* may resort to any of the remedies set out in this Chapter.
> (2) If the *debtor's* non-performance is excused, the *creditor* may resort to any of those remedies except *enforcing specific* performance and damages.
> (3) The *creditor* may not resort to any of those remedies to the extent that *the creditor* caused the *debtor's non-performance*.

The predecessor is Art. 8:101 PECL:

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[23] Cf. also the slightly different proposal of *Ole Lando*, The Structure and Legal Values of the Common Frame of Reference (*cit.* fn. 4), 251, who suggests "re-contractualising" the Chapters on Performance and Remedies and to put them into Book II, but to provide a general rule in Book III that the provisions on Performance and Remedies apply with appropriate modifications.

Art. 8:101: Remedies Available
(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Art. 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.
(2) Where a party's non-performance is excused under Art. 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.
(3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

Again, it would not be a big issue to "re-contractualise" the provision in case the CFR should be limited to contract law. But it is again also questionable whether one would simply want to go back to the old wording of Art. 8:101 PECL. The use of "debtor" and "creditor" makes it considerably clearer which party to the contract is meant. For instance, it might be confusing that the creditor of the obligation is called "the aggrieved party" in Art. 8:101 PECL paragraph (1) and (2), but just the "other party" in paragraph (3). It may require rather deep contemplation in order to understand that the same person is meant, but that in the case of paragraph (3) this person is not aggrieved, because it has caused the non-performance itself. In particular this example shows that the adjectival term "aggrieved party" (which is not a very beautiful term anyway) is part of a "language-game", as Ludwig Wittgenstein called it, that transports a rather specific valuation which is not very appropriate for a legal text (e.g. the term might create sympathy for the poor aggrieved party). Moreover, the use of the term "party" instead of debtor and creditor is cumbersome because there are at least two parties which need to be distinguished by vague adjectives e.g. in the phrases "the other party" or "the aggrieved party". Also the rather puzzling phrase "its own act" in Art. 8:101 PECL, paragraph (3) might have been chosen in order to avoid repetition of the unclear term "party". One immediately starts wondering whether only acts or also omissions are included and whether there are besides the party's "own acts" other acts which are also the party's acts but not its own (e.g. if another person has acted on behalf of the party). The phrase in paragraph (3) of Art. III.–3:101 DCFR ("to the extent that the creditor caused the debtor's non-performance") is much clearer.

In particular the insertion of the provisions on remedies into Book III on obligations has very much facilitated the incorporation of the materials stemming from the ACQP into the DCFR. Readers may know that the EC directives on non-discrimination or on pre-contract information duties only contain rather vague provisions on the sanctions for the in-

fringement of such duties.[24] Based on the ACQP, which already point in this direction,[25] the DCFR not only spells out a comprehensive set of remedies for these partially non-contractual areas, it also integrates these remedies into a general system of remedies, which is applicable both for the non-performance of contractual and non-contractual obligations.[26] Thus, the DCFR illustrates how EC law, with its interventionist character and its peculiar drafting style, can be embedded into a comprehensive system of contract and tort law remedies.

VI. Practical Perspectives: Turning the DCFR into a Political CFR

It is important to realise that now, after Chapters 1 to 8 of the the ACQP and the interim outline edition of the academic DCFR are available, the discussion on a possible political CFR has reached a new level. For the first time the DCFR and, already in part, the ACQP deliver a model of how the core elements of EC law could be integrated into a comprehensive set of rules on contract law and patrimonial law. The DCFR and the ACQP also contain rather homogeneous terminology which might help to improve the drafting of Community legislation. Although the work on the DCFR and the ACQP will have to continue until the full and final editions, there is now leeway for a much more concrete discussion on how a political CFR might contribute to the aims of improved regulation and integration of European and national private laws.

The question of the right coverage and structure might be answered rather differently for a political CFR than for the DCFR. The decisive criterion is again the purpose a political CFR could have. The DCFR is a precision instrument designed for experienced lawyers, for instance, officials in the Commission or in Ministries of Justice occupied with the preparation or transposition of EC legislation, or practising lawyers dealing with cross-border cases. It could be over-ambitious to get the political institutions of the EU involved in such a comprehensive set of model

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[24] Cf. the commentaries to Art. 2:207 and Art. 3:201 ACQP in the volume "Principles of the Existing EC Contract Law (Acquis Principles)" (*cit.* fn. 8), pp. 98 et seq., 118 et seq.

[25] Cf. in particular the rules in Chapter 8 of the ACQP on Remedies (included in the annex of this volume), which also use "creditor" and "debtor" instead of "party" and a general notion of "obligation", which is not limited to contracts (Art. 8:101 ACQP).

[26] As to the remedies for the non-performance of pre-contractual duties and of the obligation not to discriminate see the contributions of *Christian Twigg-Flesner* and *Stefan Leible* in part III of this volume.

rules and definitions on European Private Law plus commentary and comparative information. A step-by-step approach seems to be more promising. A possible scenario could be that Commission, Parliament and Council aim at the conclusion of a new Inter-Institutional Agreement on Better Lawmaking,[27] which refers in an annex to some core parts lifted from the DCFR, in particular, including the parts which incorporate the acquis communautaire. In a first step, this annex to the envisaged Inter-Institutional Agreement could contain the list of definitions plus a reviewed version of only the rules contained Books I, II and III (i.e. general contract law and law of obligations) and Book IV A. (Sales) of the DCFR. This would then be the "political CFR", which, if there is a political will, could be accomplished in 2010, after the next Commission and Parliament have been constituted. The political CFR would at least allow 99% of those cases likely to arise under a contract of sale (including e-commerce) to be solved and many other problems which the EC legislator might want to tackle for other contracts. Already such a narrow political CFR would provide the European and national legislators with an enormously rich source of building material, be it terminology, be it model rules. The Inter-Institutional Agreement could further refer to the full DCFR, and in particular to the comments and notes, as an additional source for those who want to pursue this further.

It goes without saying that the political CFR enshrined in the Inter-Institutional Agreement would by no means bind the EC legislator to adopt the material solutions suggested in the political CFR. As the DCFR, the political CFR provides just a model of how a rule of Community law could be drafted. At the very most, it is relatively easy to alter the material content of any rule contained in the DCFR without changing terminology and drafting style. The function of the political CFR would not be to anticipate political decisions. It is just a model, of how a political decision could be drafted.

What the next steps may be, would then be decided on the basis of the experience undergone with the narrow political CFR. Two different ways, which might both be followed, seem to be promising. One the one hand, the political CFR could be reviewed and amended periodically (e.g. every two or three years), and thereby also enlarged with further rules on specific contracts (in particular on services) or other areas, depending on the political needs for future legislation. On the other hand, the Commission could consider turning the political CFR into an Optional Instrument, beginning, for instance, with an Optional Instrument for e-commerce and

[27] Cf. the Commission Action Plan on Better Regulation, as revised in March 2005, COM(2005) 97 final, and the Inter-Institutional Agreement on Better Lawmaking signed by the European Parliament, the Council and the Commission in December 2003, OJ C 321, 31.12.2003, p.1.

sales contracts, but – following the development of the political CFR – later possibly also for other areas, in particular for services likely to be marketed via e-commerce. For the first time in the history of the EU, the comparative basis for a more coherent EC legislation in private law has been laid down. It would be very unwise, if the political institutions of the EU do not use it.

Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law

Giuditta Cordero Moss (Oslo)[*]

I. Introduction

One of the elements of the ongoing work towards a European contract law is the systematisation into a comprehensive body of law of the already existing European contract law, primarily consisting of European directives within consumer protection – the so-called *acquis communautaire*.

A question to be discussed is to what extent the *acquis* may be deemed to also extend to commercial contracts (so-called B2B contracts) and what restrictions are needed to reflect the different nature of the relationships and of the parties involved. One possible way of adapting the *acquis* to commercial relationships is to reserve for contrary commercial practice. This would give a picture where commercial contracts are governed by the consumer rules of the *acquis communautaire* save for where these rules are in contrast to commercial practice.

As a contribution to the discussion about the adequacy of consumer law to govern commercial contracts with the correction of commercial practice, this paper argues that under the law prevailing today commercial contracts are subject to more than mandatory rules protecting the weaker party (if at all they are subject to such rules) and commercial practice. Commercial contracts, irrespective of whether they are domestic or international, heavily depend, for their interpretation and proper performance, on the whole body of contract law belonging to the state law that governs them. Within Europe, this means that the same contract may have different effects according to whether it is governed, for example, by English or German law: as section II. 2. below will show, the con-

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[*] This paper is a systematization of the arguments that I have presented during various discussions at the plenary meetings of the Research Group on the Existing EC Private Law (the Acquis Group), of which I am a member. The argument referred to in section II.3 was developed jointly with Professor Lars Gorton, University of Lund, Sweden.

vergence between the common law and the civil law that has been highlighted in the recent decades in comparative studies does not seem to have significant relevance to the field of commercial contracts.

The aim of this paper is to draw attention to the prevailing framework for commercial contracts and contribute to the awareness that a harmonisation inspired by the consumer law or even based on the civilian approach would be, rather than a simple restatement of the status quo, an imposition of a regulation that is not known today in all European countries.

Whether a harmonisation of the law of commercial contracts is at all advisable or necessary is a question in respect of which there does not seem to be a consensus.

II. Commercial Contracts and Existing Contract Law on Consumer Protection

Traditionally, the law on commercial contracts and the law on consumer contracts have been dealt with separately.[1] The recent work on a European law has inspired to aim at a scope of application as wide as possible for the proposed regulations and consequently has lead to attempts to overcome this distinction, much following the footsteps of the Principles of European contract law by the Lando Commission.[2]

Thus, in the first volume on the Acquis Principles issued by the Research Group on the Existing EC Private Law (Acquis Group),[3] the scope of application of the *acquis* is defined generally as being "the field of contract law" (Art. 1:101 (1)), and is restricted only in respect of the areas of

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[1] *R. Schulze*, The New Challenges in Contract Law, in R. Schulze (ed.), New Features in Contract Law, Munich 2007, pp. 3-21, 9.

[2] For a criticism of the approach taken by the PECL see *T. Wilhelmsson*, International Lex Mercatoria and Local Consumer Law: an Impossible Combination?, Revue européenne de droit de la consommation, 2004, pp. 235-252, who convincingly argues at p. 247 that "the worst possible solution would be a body of rules claiming to be general but in fact focusing only on or mainly on commercial contracts". *Wilhelmsson* does not seem to consider the converse (generalizing consumer rules) as dangerous as the PECL approach (extending contract rules to commercial contracts). This paper argues that the question deserves an open and thorough discussion. G. *Howells*, Consumer Concepts for a European Code?, in R. Schulze (ed.), New Features in Contract Law, (*cit.* fn. 1), pp. 119-135, analyses another risk of generalizing consumer rules, i.e. that the consumer protection is diluted.

[3] *Acquis Group* (ed.), Principles of the Existing EC Contract Law (Acquis Principles), Munich 2007.

labour law, company law, family law or inheritance law, to which it does not apply (Art. 1:101).

In various articles of the Acquis Principles the scope of application of the relevant rule is clearly restricted to consumer contracts by defining one of the involved parties as the consumer (for example, Art. 2:202, on information duties towards consumers); in other articles the scope of application is extended to all kinds of contracts, including also commercial contracts between professionals (for example, Art. 2:103 on negotiations contrary to good faith, where the parties are simply referred to as "a party").

Thus, the Acquis Principles suggest that several European rules, based primarily on the EC sources on consumer protection, extend their scope of application to commercial contracts.

The sections immediately below point out that the approach taken by existing European contract law reflects principles and rules well known in the field of consumer protection and to a certain extent in the civil law of contracts; these principles and approaches, however, are not always compatible with the law prevailing today and applicable to commercial contracts, particularly, but not exclusively, in the common law family.

1. Consumer Law and Civil Law

Many of the rules introduced by European Directives to protect consumers correspond to norms that are not unfamiliar to systems belonging to the civil law. Duties to inform, to warn, to cooperate, to act in good faith, seem to be a codification of ancillary obligations that, for example in Germany, court practice developed out of the general clause of good faith contained in § 242 of the BGB.[4] This may induce observers belonging to the civil law tradition to deem that a generalisation of these rules is fully compatible with the legal status quo. As will be seen below, however, not all laws recognise such ancillary obligations in the context of commercial contracts; therefore, there is no basis for claiming that a generalisation reflects the legal status quo.

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[4] *P. Schlechtriem*, The Functions of General Clauses, Exemplified by Regarding Germanic Laws and Dutch Law, in S. Grundmann, D. Mazeaud (eds.), General Clauses and Standards in European Contract Law, The Hague 2006, pp. 41-55, 45 et seq., suggests that the ancillary obligations deriving from § 242 of the BGB have been codified by EC-directives.

2. Convergence between Civil Law and Common Law in Commercial Contract Law

Comparative law research has proven that many of the contradictions that traditionally are held to exist among the various legal systems and, notably, between the common law and the civil law, can be reduced to a common core that is shared by most legal systems.[5]

Traditionally, the common law is held to be concerned with preserving the parties' freedom to contract and to ensure that their contracts are performed accurately according to their precise wording. An English judge is less concerned with providing means for ensuring the fairness in the relationship between the parties. The English judge does not have the task of creating an equitable balance between the parties, but has to enforce the deal that the parties have voluntarily entered into. The parties are expected to take care of their own interests, and they expect from the system a predictable possibility to enforce their respective rights in accordance with the terms of the contract. A correction or integration of these terms would run counter to these expectations, and the English judge does not consequently assume that role (unless specific statutory rules requires him to do so, which happens mainly in the context of consumer contracts).

This is traditionally seen as one of the main features that distinguish the common law and civil law in respect of contracts: the civilian judge has a larger power to evaluate the fairness of the contract and intervene to reinstate the balance of interests between the parties; he or she is more concerned with creating justice in the specific case than with implementing the deal in the most predictable manner. In doing so, the civilian judge is guided by general clauses and principles of good faith and fair dealing. The English law of contract does not have a general principle of good faith.

As comparative studies have shown, however, the absence of a general rule on good faith does not mean that English law cannot reach, in particular contexts, the same results that can be reached in other systems applying the rule on good faith. Other legal techniques are applied to reach results that are, in part, similar to a general duty of good faith. An often quoted decision has expressed this clearly: "English law has, characteristically, committed itself to no such overriding principle [as the principle of

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[5] "The Common Core of European Private Law Project", under the general editorship of *M. Bussani* and *U. Mattei*, is perhaps the most systematic enterprise aiming at assessing the common core within European private law. Among the books published in the frame of this project is *R. Zimmermann, S. Whittaker* (eds.), Good Faith in European Contract Law, Cambridge 2000, that has particular relevance to the topic of this paper.

good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways."[6] These piecemeal solutions, however, do not necessarily always have the same scope of application as a general principle,[7] as will be seen in the sections immediately below.

a) Convergence of particular rules may not be generalized

Generalising particular rules, elevating them to the status of expressions of a principle underlying the whole system and considering them as symp-

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[6] Brimham LJ in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1988] 2 W.L.R. 615.

[7] That the English approach is not equivalent to a general clause as known in the civil law is shown by *S. Whittaker*, Theory and Practice of the "General Clause" in English Law: General Norms and the Structuring of Judicial Discretion, in S. Grundmann, D. Mazeaud (eds.), General Clauses and Standards in European Contract Law (*cit.* fn. 4), pp. 57-76, 64 et seq. and *H. Collins*, Social Rights, General Clauses, and the Acquis Communitaire, in S. Grundmann, D. Mazeaud (eds.), General Clauses and Standards in European Contract Law, (*cit.* fn. 4), pp. 111-140, 117 et seq. The same is affirmed also by Lord *J. Mance*, Is Europe Aiming to Civilise the Common Law?, European Business Law Review (EBLR) 2007, pp. 77-99, p. 94 and fn. 45. As was recently observed, under the influence of, particularly, European law, "good faith may have made its mark on the surface of the law of contract, but it has hardly captured the hearts and minds of English common layers" (*R. Brownsword*, Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law, in R. Brownsword, N. J. Hird and G. Howells, Good Faith in Contract, Burlington 1999, pp. 13-40, 15). The author supports a positive view of good faith, as it permits the judges to avoid what he defines as "contorsions or subterfuges in order to give effect to their sense of the justice of the case" (p. 25). However, the author points out that this view is "probably shared by no more than a minority of English contract lawyers" (*ibid.*). See, for example, *M. Bridge*, Good Faith in Commercial Contracts, in R. Brownsword, N. J. Hird and G. Howells, Good Faith in Contract, *cit.*, pp. 139-164, affirming that good faith gives too much power to the individual judges freed from the disciplined tradition of contract law, and pointing out that "visceral justice was, and remains in my view, an emotional spasm" (p. 140), and that "law is a discipline, not a reflex" (p. 150).

toms of a general convergence between the common law and the civil law, therefore, is not always justified. Admittedly, if the general principle of good faith does not exist in the English law on commercial contracts, it does not necessarily mean that other areas of English law do not operate with a principle of good faith.[8] That in a particular context a certain result may be achieved, however, does not necessarily mean that the principle applied in that context underlies the whole legal system. A principle might be not unknown in a certain area, but this does not automatically mean that it extends to other areas of the law within that system. This is true, for example, in respect of particular rules assuming good faith in English law and that do not necessarily extend their scope to have a general validity for commercial contracts.

Many situations that would be covered by a general principle are left out by the specific rules of English law and thus remain unregulated. As such, failure to give to the other party information relevant to that party's evaluation of the risk or the value of the transaction is not sanctioned under English law, since this conduct is not specifically regulated and does not violate a duty of loyalty between the parties that does not exist.[9] Even the doctrine of misrepresentation, which could at first sight be deemed to be equivalent to a duty to exercise good faith during negotiations, does not ensure the same results. False information given to the other party during negotiations gives rise to damages in tort; however, silence is not considered to be false information. Withholding relevant information during negotiations, therefore, does not constitute misrepre-

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[8] That relying on a monolithic view of legal systems may be misleading is convincingly argued by M. *Graziadei*, Variations on the Concept of Contract in a European Perspective: Some Unresolved Issues, in R. Schulze (ed.), New Features in Contract Law, (*cit.* fn. 1), pp. 311-324, who shows, on pp. 321 et seq., that notions of good faith are to be found in English law when looking beyond the narrow borders of Contract Law, notably in the field of fiduciary obligations. The author underlines thus that the absence of a general notion of good faith in the restricted context of contracts (defined as commercial contracts) does not exclude its presence in the wider picture of English law. However, as is argued in this paper, this shall not induce to assuming the converse, i.e. that the presence of the good faith notion in the context of fiduciary obligations entails that the principle is applicable also to commercial contracts.

[9] In some situations a duty of care arises between the parties; it does not seem, however, that negotiations of commercial contracts are within that number, see, for example, Denning LJ in *Chandler v. Crane, Christmas & Co*, [1951] 2 K.B. 164 and see Ackner LJ in *Walford* v *Miles*, [1992] 1 All ER 453, House of Lords.

sentation and the parties remain free to adopt such a conduct without consequences.[10]

Thus, civil law-inspired rules such as Art. 2:101 of the Acquis Principles ("In pre-contractual dealings, parties must act in accordance with good faith"), Art. 2:103 (imposing liability for having negotiated contrary to good faith) or Art. 2:201 (imposing a duty of information during the pre-contractual phase) are not fully compatible with the English law of commercial contracts. In the phase of negotiations prior to the conclusion of the contract, expecting that a party also takes into consideration the needs and expectations of the other party runs counter to the very essence of a negotiation, where each of the parties positions itself, opens alternative possibilities, and plays the various possibilities against each other to achieve the best economic result for itself. In an often quoted House of Lords decision, Lord Ackner states that "[…] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations."[11] Restrictions to the liberty to organise the negotiations as is most profitable for itself would have to be founded on an ideal of solidarity and loyalty between the parties which is unknown in a system that privileges the economic aspects of the transaction.[12]

The lack of a duty to act in good faith during the negotiations permits a party to conduct negotiations even without having the intention to conclude an agreement with the other party (for example, for the sole reason of preventing the other party from negotiating with a third party, or for obtaining business information, etc.). Even the doctrine of restitution, which could at first sight be deemed to be equivalent to a duty to enter into negotiations in good faith, does not ensure the same results. Restitution aims not at compensating the losses suffered by the other party, but at recovering a benefit gained by the party breaking off the negotiations.[13] If the unjustified break-off has caused losses for the other party, but has not resulted in a gain for the party breaking off, therefore, the party suffering losses is not necessarily entitled to compensation under the doctrine of restitution.[14]

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[10] *H. Beale* (ed.), Chitty on Contracts, Vol. I, General Principles, 29th ed., London 2004, pp. 436 et seq.

[11] Ackner LJ in *Walford* v *Miles* (*cit*. fn. 9).

[12] See, among others, *S. van Erp*, The Pre-contractual Stage, in A. Hartkamp et al. (eds.), Towards a European Civil Code, The Hague 1998, pp. 201-218, 215 et seq.

[13] *H. Beale* (ed.), Chitty on Contracts (*cit*. fn. 10), p. 1632.

[14] In some cases, however, restitution was given even if no benefit has been gained: *ibid*., pp. 1638, 1645. In these cases, the losses incurred by the other party consisted in services rendered at the request of the party breaking off the negotiations. It remains to be seen whether the lack of benefit can be disregarded as a prerequi-

Thus, the *acquis* rule on good faith in the pre-contractual phase may not be generalized as a matter of legal status quo, even if it is well known in many civilian systems and in spite of the convergence between legal families; a generalization of this rule to the whole contract law would require an open discussion that involves important policy evaluations.[15]

b) Convergent solutions may be avoided by clear contract language

The convergence between the two legal families, moreover, seems to be particularly dependant on a consideration of the common law in its totality, i.e. including both its body of law and of equity (as well as the statutory law). The effects of a contract under the common law in its strict meaning, its effects "at law", seem to differ quite dramatically from the legal conceptions of the civil law; the equitable rules and remedies moderate the harshest effects achievable at law. Thus, it is mainly equity that permits the convergence between the different legal traditions and therefore the compatibility of a common law inspired contract with a civilian governing law.

English law, however, permits in many instances to avoid the effects achievable in equity if sufficiently clear expressions of intention were made by the parties in the contract. Many of the contract clauses that are typical for commercial contracts are specifically written with the purpose of avoiding the remedies or other default mechanisms existing in the system. Therefore these clauses are responsible for annulling the convergence between the common law and the civil law systems. The original intention of the clauses, in other words, is to permit the harsh legal effects that mostly distinguish the common law in the strict sense from the civil law.

When the civil law-inspired *acquis* rule is mandatory, therefore, it is not fully compatible with the existing English law of commercial contracts. For example, Art. 7:101 of the Acquis Principles provides that performance of obligations shall be made in accordance with good faith; this entails that additional obligations may be introduced or even obligations expressly agreed to by the parties may be modified.[16] Art. 7:102 of the

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site for restitution, in cases where the losses were not incurred at the request of the party breaking of.

[15] That a generalization may raise political issues is admitted even in the comments to these articles made in the Acquis Principles, see part A, section 3 ("Political Issues") in the comments on each of Artt. 2:101 and 2:103. On the difficulty to see a general duty to disclose in European law see also G. *Howells*, Consumer Concepts for a European Code? (*cit.* fn. 2), pp. 122 et seq.

[16] See part B, section 3 ("Explanation") in the comments on Art. 7:101.

Acquis Principles says that a right or remedy shall be exercised in accordance with good faith; this means, amongst other things, that a party may not exercise a right or a remedy that it has according to the contract, if such exercise violates good faith. This would prevent the use that is being made today in commercial contracts governed by English law of the so-called "no-waiver clause". This is a typical boilerplate clause, i.e. a clause that is repeated in most types of contracts as a matter of contractual custom. According to this clause, failure by one party to exercise a remedy it is entitled to under the contract does not constitute waiver by that party of that remedy. This clause is originally meant to exclude the effects of the rule on acquiescence under English law. The rule on acquiescence would lead to a result that is similar to the requirement of exercising rights and remedies in good faith, present in many civilian laws and in the Acquis Principles: if the party entitled to a remedy behaves in such a clear and unequivocal way that the other party may understand it as a representation of the former to waive its remedy, then the former party loses its possibility to exercise its remedy. Inserting a no waiver clause in the contract prevents any passive behaviour of the former party to be interpreted as a clear and unequivocal representation, and therefore prevents the effects of the rule on acquiescence.[17]

Under normal circumstances such a clause is not incompatible with the main principles of civilian systems, and it would not be problematic to adopt a model contract with this clause and subject it to a civilian law or the Acquis Principles. This clause, however, may be used also to speculate and to reach results that are acceptable under English law but not necessarily achievable under all legal systems. A party entitled to a remedy (for example, to terminate the contract) may behave passively, give the other party the impression that it will not terminate the contract, wait until the other party has, for example, omitted to enter into other contracts with third parties in reliance on the continuation of this contract, or wait until, for example, prices have changed so much that it will gain in terminating this contract and entering into a corresponding contract with a third party, and then terminate the contract. In many civilian systems this behaviour would be considered against good faith, an abuse of contractual right; and this would violate the Acquis Principles.

Other examples may be given of a contractual mechanism that may be used literally under English law and lead to results that would be considered to be against good faith under some civilian laws and under the Acquis Principles. A contract, for example, may regulate that a party has a

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[17] For an analysis of this clause and its implications, with further references, see *F. Skribeland*, No-waiver-klausuler og bortfall av misligholdsbeføyelser, forthcoming in Anglo-American Contract Models, Publications Series of the Department of Private Law, University of Oslo, pp. 29 et seq., 38 et seq.

right to terminate in case of breach by the other party of specific obligations. It might be contrary to good faith to invoke this right if the breach has actually occurred, but only in an immaterial manner and so that it has no significant consequences. The terminating party might wish to take advantage of the right of termination for other reasons, for example because the market has changed and a new contract would be more profitable. This would be prohibited under the Acquis Principles. Under English law, on the contrary, the parties may regulate in their contract that certain terms are fundamental and that any breach thereof will be treated as a fundamental breach and entitle the other party to termination and reimbursement of the full value of the contract. This right of repudiation may be exercised even if the breach did not really have any material impact and is made only for speculative purposes,[18] and even if the particular terms of the contract permit to cumulate it with other remedies and the result is unfair.[19]

Also the *acquis* rules on good faith in performance, therefore, may not be generalized as a matter of legal status quo, notwithstanding that the rule is to be found in many civilian systems; the convergence between legal families does not seem to bridge the gap in respect of commercial contracts.

3. Are Rules on Consumer Protection Always Suitable for Commercial Contracts?

The foregoing shows examples where the central role given to the rule of good faith leads the observer to question whether there is a full correspondence between the Acquis Principles and the law applicable to commercial contracts, at least in respect of the common law.

Other *acquis* rules might justify similar doubts in respect of all legal systems, both of civil and of common law.

Art. 6:201 of the Acquis Principles, for example, says that the terms of a contract are not binding if they have not been individually negotiated and, amongst other things, if they have been incorporated by reference

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[18] *Moore & Co Ltd v Landauer Co* [1921] 2 K.B. 519, *Arcos Ltd v. Ronaasen* [1933] A.C. 470. See also the *Union Eagle* case [1997] 2 All ER 215, where an immaterial delay of 10 minutes was considered sufficient to rescind the contract. As Lord *Hoffmann* stated, "if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced." (pp. 218 et seq.), and "to build an argument on the basis that the purchaser was only 'slightly late' would be to encourage litigation about 'how late is too late'" (p. 222).

[19] *Lombard North Central plc v. Butterworth* [1987] 1 All ER 267, Court of Appeal.

made in the contract. This rule, when extended to commercial contracts, means that contracts that are entered into in accordance with the existing law of both Civil and common law countries are made unenforceable.

Not only would the rule run counter to the practice to enter into contracts that make reference to standard terms or other non-negotiated documents (such as the INCOTERMS or the UCP 500 or 600), a practice which is widely adopted in some branches of trade; it would even be in contrast with existing legislation in a large number of Member States. It may suffice here to refer to the UNCITRAL Model Law on International Commercial Arbitration. This Model Law, adopted in nearly 50 countries (many of which are in Europe) recognises the validity of an arbitration agreement even if it is incorporated by reference.[20] However, according to Art. 6:201 of the Acquis Principles, this arbitration agreement is not binding.

The *acquis* rules on acquaintance with terms not individually negotiated, therefore, may not be generalized as a matter of legal status quo. This rule seems to be not appropriate for commercial contracts, irrespective of whether the legal system of reference belongs to the Civil or the common law.[21]

III. Is a Reference to Commercial Practice Sufficient to adapt the acquis to Commercial Contracts?

The foregoing shows that there is a series of differences between the existing EC law, which is mainly aimed at consumer protection, and the law that today governs commercial contracts in the various Member States. Some of these discrepancies are general (see section II. 2. above), others are particularly visible in respect of the English system and are due to the English persistent approach to the principle of good faith and fair dealing in the context of commercial contracts.

A possible way to overcome the incompatibility between the *acquis communautaire* and the law governing commercial contracts is to make an exception for generally recognised commercial practice. Such an ap-

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[20] The Model Law, issued in 1985, was amended in 2006. As a consequence of the amendments, Art. 7 on the arbitration agreement is presented in two versions: the first option permits arbitration agreements incorporated by reference (Art. 7(6)), the second version does not have any form requirement at all and, therefore, a fortiori permits incorporations by reference.

[21] That the question is not uncontroversial is mentioned in the comments to Art. 6:201 of the Acquis Principles, part A, section 3 ("Political Issues").

proach is to be seen in some articles of the Acquis Principles[22] and intends to mitigate the protection given by the *acquis* rules that might be excessive in the context of commercial contracts.

This would mean that the *acquis communautaire* is applicable to commercial contracts only if it does not deviate from commercial practice. Seen from a different point of view, this would assume that commercial contracts are expected to be regulated by nothing more than the *acquis* and commercial practice.

The sections below question the correctness of this assumption, and argues that commercial contracts are regulated by more than European rules on consumer protection and commercial practice: it will be argued below that commercial contracts are heavily dependent, not the least for their interpretation, on the governing law, which for the moment is the state law of contracts. It takes more than an exception for commercial practice to adjust the consumer law to commercial contracts, if the legal status quo on commercial contracts is to be reflected.

Generalising the *acquis* and making a reservation for commercial practice, therefore, would mean that a new approach to commercial contracts is introduced; rather than doing this silently, by way of what appears to be the restatement of existing law, an open debate and clear policy decisions seem preferable.

1. What is Commercial Practice?

Reference to commercial practice as the only corrective to the applicability to commercial contracts of rules designed for consumer protection assumes that the interpreter is in a position to define commercial practice and to assess its content.

The sections below will analyse some of the main sources that seem to be relevant to commercial practice, for the purpose of verifying whether these sources actually are capable of replacing the national governing law and therefore representing a sufficient corrective to the rules tailored on consumer protection.

The analysis made below will show that these sources are useful additions to national laws, but cannot replace them.

The sources analysed below are among the main sources of a transnational law sometimes invoked as the most appropriate regulation for international commercial contracts, also known as *lex mercatoria*, new *lex mercatoria*, a-, non- or supranational law or, borrowing an expression that

[22] For example, Art. 6:301, limiting the effects of the definition of unfairness to the situations where "using that term amounts to a gross deviation from good commercial practice".

has a narrower, specific meaning in public international law, soft law. Section III. 2. below will comment on the adequacy of the transnational law to govern international contracts.

a) Contract practice

Contract practice generally adopts contract models prepared on the basis of English law or at least of common law systems, which, according to the traditional conception seen above, do not contemplate good faith and fair dealing as a standard and are therefore quite distant from the principles underlying the *acquis*. Even if, as seen above, the system of English law in its totality might contain features that mitigate this aspect, common law contract models are clearly drafted on the assumption that the contracts shall be interpreted literally and without influence from principles such as good faith. As a consequence of the broad adoption of this contractual practice, the regulations between the parties move more and more away from the assumption of a standard of good faith and fair dealing even in countries whose legal system does recognise an important role to good faith.

To what extent this contract practice may be taken as a clear intent by the parties to embrace the interpretation of contracts made by English courts, however, is highly uncertain:[23] contracts are interpreted according to the law that governs them, and this may lead to strongly differing legal effects for the same wording, depending on the principles of interpretation that have been used. This plurality is not necessarily an evil that deserves being overcome: informed parties do appreciate the interplay between the governing law and the wording of the contract, and count on the legal effects that follow from it. This assumes that the applicable rules of private international law (conflict of laws) are consulted to identify the governing law. Foreseeability of the governing law is the proper solution to the pluralism of laws that otherwise would create a confusing situation.

If a common law-inspired contract is governed by a law from a civil law jurisdiction, many of its clauses will not be interpreted literally and the exercise of rights and remedies regulated in the contract will be miti-

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[23] For a more extensive analysis of the matter see G. *Cordero Moss*, Tacit choice of law, partial choice and closest connection: the case of Common Law contract models governed by a civilian law, in J. Giertsen, T. Frantzen, G. Cordero Moss (eds.), Rett og toleranse – Festskrift Helge Johan Thue, Gyldendal 2007, pp. 367-378 and G. *Cordero Moss*, Harmonised contract clauses in different business cultures, in T. Wilhelmsson (ed.), Private Law and the many Cultures of Europe, The Hague 2007, pp. 221-239.

gated, supplemented or corrected by the principle of good faith and fair dealing present, in various degrees, in the legal family of civil law.[24] If the same contract is governed by English law, most of its clauses will be interpreted and applied literally. The examples made in section II. 2. above are quite illustrative of the impact that the governing law has on the interpretation and performance of, for example, contractual remedies (that are not considered to be waived under English law if there is a no-waiver clause, whereas they may be considered waived under a civil law jurisdiction due to considerations of good faith and fair dealing, even if there is a no-waiver clause[25]), termination clauses (that can be applied literally even for immaterial breaches under English law but not under civilian laws requiring performance in accordance with good faith)[26] and of clauses in pre-contractual documents excluding liability for break-off of negotiations (that do not violate any rule of English law even if the negotiations were not started in good faith and may therefore be applied literally, whereas they would not be able to exclude the existing duty to nego-

[24] Contract clauses of common law origin are widely adopted in commercial contracts even when the legal relationship has no connection with a common law system; the different legal effects they have when the contract is regulated by Norwegian law are examined in a research project that I run at the Oslo University, in cooperation with Professor *E. Peel* of Keble College, Oxford University, among others. Each clause is analyzed first from the point of view of English law, which is the clause's system of origin, and then from the point of view of Norwegian law, which is the assumed governing law. Due to the structural differences between English and Norwegian law of contracts, the clauses have different legal effects. The research papers will be published in the publication series of the Department of Private Law, Oslo University; for the moment the first paper has appeared, containing a description of the project and methodological considerations: *G. Cordero Moss*, Anglo-American contract models and Norwegian or other civilian governing law – Introduction and Method, Anglo-American Contract Models, Vol. I, in Publications Series of the Department of Private Law, 169/2007, University of Oslo. For further information on the project see http://www.jus.uio.no/ifp/anglo_project/index.html.

[25] See *F. Skribeland*, No-waiver-klausuler og bortfall av misligholdsbeføyelser (*cit.* fn. 17).

[26] The mechanism of repudiation of contract for breach of a condition and the impact that the principle of good faith has thereon are examined by *T. Sandsbraaten*, Begrepene "Conditions, Warranties, representations, Covenants", forthcoming in Anglo-American Contract Models, in Publications Series of the Department of Private Law, University of Oslo.

tiate in good faith and would therefore have a restricted application under many civilian laws[27]).

Further elements of the governing law's doctrine of interpretation may have an impact on the effects of a contract clause: a very widespread clause in commercial contracts, the so-called "entire agreement" or "merger" clause, provides that the contract signed by the parties constitutes the entire agreement between the parties. Under English law, this excludes any possibility to integrate the agreement with other circumstances, be it as implied terms or arguments for the interpretation. Under civilian laws, on the contrary, the merger clause would not have effects on the judge's ability to consider external circumstances to assess the meaning and the scope of the agreement, such as the purpose of the contract, the duty of good faith between the parties, as well as the parties' conduct after the contract was entered into.[28]

Even standard terms of contract, to the extent that they at all can be elevated to the status of some binding practice,[29] do not have an autonomous existence but must necessarily be interpreted in the light of the governing law. Clauses that have a clear linguistic meaning do not necessarily have the same legal effects once they are read on the background of the interpretation doctrine and the general principles of the governing law. In addition to the influence that can be exercised by the presence or absence of the principle of good faith, as seen immediately above, it suffices here to refer to another area of Contract law where legal systems may have different approaches: the question of liability for non-performance of a contractual obligation. According to the civilian tradition, liability is a consequence of lack of diligence; according to the common law tradition, it is a consequence of an objective allocation of

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[27] See, more extensively on the practice of using letters of intent and the different implications under English law or a civilian law, G. *Cordero Moss*, The function of letters of intent and their recognition in modern legal systems, in R. Schulze (ed.), New Features in Contract Law (*cit.* fn. 1), pp. 139-159. This topic is one of those examined in the framework of the research project on Anglo-American Contract Models referred to *supra*.

[28] On the effects of merger clauses in English law and in Norwegian law, with references also to the UNIDROIT Principles that take the civilian approach, see *H. W. Bjørnstad*, Entire Agreement, forthcoming in Publications Series of the Department of Private Law, Anglo-American Contract Models, University of Oslo.

[29] For a convincing criticism of the "rather extravangant claims" that standard contract terms represent a legal norm, in spite of the large variety of such terms, see *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law – Texts, Cases and Materials, Oxford 2007, p. 33 and *S. Symeonides*, Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't (19 November 2006). Available at SSRN: http://ssrn.com/abstract=946007.

risk between the parties and does not depend on diligence or negligence. Hence, a clause excluding liability for non-performance for impediments beyond the control of the non-performing party may be interpreted differently according to the legal tradition of the judge: a civilian judge may evaluate whether the impediment was under the actual control of the party, whereas an English judge may determine the sphere of control on the basis of objective allocation of risk without considering whether there was the actual possibility to influence the circumstances or not.[30]

Even if the language of the contract is the same, therefore, the effect of the contractual regulation varies as a consequence of the interplay between the contract and its governing law. Contract practice, consequently, does not represent a source of uniform regulation for commercial contracts.

b) General principles

General principles are traditionally listed as one of the important sources of transnational law, although there does not seem to be a consensus on the definition of these principles.[31] The most recognised criteria to identify what principles are generally recognised seem to be the reliance on a convergence among various legal systems, case-law and scholarly works.

A largely appreciated paper by Lord Mustill identified two decades ago twenty-five principles that in arbitration practice and literature were considered as generally recognised.[32] According to Lord Mustill's evaluation, these principles are "so general that they are useless",[33] and it is tempting to agree on this evaluation: principles such as *pacta sunt servanda* or *rebus sic stantibus* can hardly be of guidance when solving a dispute with specific questions of a technical legal character. Moreover, Lord Mustill finds that several of these principles cannot be deemed to be generally recognised because they are not known in the common law system; for example, the principle prohibiting the abuse of a right and that requesting

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[30] For an analysis of how differently the formulation "beyond the control" may be interpreted, in respect of the incorporation into Norwegian law of the formula of Art. 79 of the Vienna Convention on the Contract for International Sale of Goods, see G. *Cordero Moss*, Lectures on Comparative Law of Contracts, in Publications Series of the Department of Private Law, University of Oslo, 166/2004, pp. 142 et seq.

[31] For an overview of the various theories see *F. De Ly*, International Business Law and Lex Mercatoria, T.M.C. Asser Institute, 1992, pp. 193 et seq.

[32] Lord *J. Mustill*, The New Lex Mercatoria: the First Twenty-Five Years, Arbitration International 4/1988, pp. 86-119.

[33] *Ibid.*, p. 92.

good faith in the pre-contractual phase, both of which were touched upon in section II. 2. above because they are part of the Acquis Principles.[34] As seen above, there are few principles in respect of good faith and fair dealing that may be considered common to civil law and common law systems; even among civil law systems there are considerable differences.[35]

Since the compilation made by Lord Mustill, a number of initiatives have flourished to collect, systematise or restate generally acknowledged principles. The most known are probably the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law (PECL). However, rather than being restatements of existing rules and principles that actually enjoy general acknowledgement, these codifications are the result of a consensus in an international group of academics working towards a harmonisation of contract law. Thus, they cannot be used as evidence of the general acknowledgement of the principles contained therein; however, they could become it if they are used consistently and widely in practice.[36] It may be interesting to observe that both these collections of principles give a central role to the principle of good faith and fair dealing, in a manner similar to the approach taken by civil law. However, both specify that the principle of good faith has to be understood without reference to any national system of law, and only on the basis of the understanding of good faith in international trade. Neither of these codifications, in other words, is self-sufficient: because the principles are laid down in a quite general (and, according to Lord Mustill's evaluation, therefore useless) manner, they depend on other sources that permit to specify the particular legal effects.

Assistance in the specification of the general rules contained in the UNIDROIT Principles and the PECL might be sought in a highly recognised database on transnational law, organised by the University of Cologne under the direction of Professor Berger, the CENTRAL Transnational Law Database. The idea behind this database is to enhance the "creeping codification of the *lex mercatoria*"[37] by creating a comprehensive

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[34] *Ibid.*, p. 111, respectively fn. 85 and 87.

[35] Even *R. Zimmermann, S. Whittaker,* Good Faith in European Contract Law (*cit.* fn. 5), p. 678, despite the observation that the principle of good faith is relevant to all or most of the doctrines of modern laws of contract, conclude that each system draws a different line between certainty and justice.

[36] See *S. Symeonides,* Party Autonomy and Private-Law Making (*cit.* fn. 29); *S. Ferreri*, points out, in The Italian national report, XVII Congress of the International Academy of Comparative Law, Section II-B1, Private International Law, Utrecht, July 16th-26th, 2006, item 6a: "Paradoxically the success of such soft law instruments depends […] on their success […]".

[37] The idea was introduced in *K. P. Berger*, The creeping codification of the lex mercatoria, The Hague 1999.

digest of principles and rules of the transnational commercial law. At present the database contains over 80 principles, founded on the CENTRAL's examination of a variety of sources such as "international arbitral awards, domestic statutes, international conventions, standard contract forms, trade practices and usages, other sample clauses and academic sources".[38]

Without entering into the merits of the selection of these sources and their capability of representing a proper basis for transnational law, it may be interesting here to verify to what extent the use of the CENTRAL's database may succeed in specifying the general principles and thus offering a harmonised, transnational regulation that is capable of being operative and therefore replacing national governing laws. The substantiation of the principle of good faith seems to be a significant area for the CENTRAL database, given, as seen above, that it is one of the elements that have a significant influence on the interpretation and performance of a contract, and that may attach completely different legal effects to the same contract language.

The CENTRAL database lists the principle of good faith and fair dealing as one of the main principles of international contract practice, and refers to various sources upon which the principle relies: legal literature, arbitral awards, court decisions and international instruments.[39] A brief consideration of these sources follows below:

1) The CENTRAL list of legal literature dealing with the principle of good faith and fair dealing is long and impressive, and it reflects the large variety of positions in respect of the subject, including also those that deny the existence of an international legal standard for good faith and fair dealing.[40] No uniform opinion arises from the doctrine quoted in the CENTRAL. From this source, therefore, it is not possible to clarify and specify the content of the standard in international trade.

2) Among the eleven arbitral awards listed in the CENTRAL database in support of the principle,[41] four awards seem to have applied the standard of good faith of a state law,[42] and the remaining awards refer mainly

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[38] http://www.tldb.net/, last visited on November 27th, 2007.

[39] http://www.tldb.net/, last visited on November 27th, 2007.

[40] For example, *P. Schlechtriem*, Good Faith in German Law and in International Uniform Laws, Rome 1997.

[41] ICC award No. 2291 of 1976; ICC award No. 3131 of 1983; ICC award No. 4972 of 1989; ICC award No. 5721 of 1990; ICC award No. 5832 of 1988; ICC award No. 5953 of 1989; ICC award No. 6474 of 2000; ICC award No. 6673 of 1992; ICC award No. 8365 of 1997; ICC award No. 8908 of 1999; ICC award No. 9593 of 1999.

[42] ICC award No. 5832 of 1988 applies Austrian law, ICC award No. 6673 of 1992 applies French law, ICC award No. 8908 of 1999 applies Italian law (corroborated

to the principle in general terms, as a moral rule of behaviour. On the basis of these seven awards it seems difficult to conclude if the standard of good faith and fair dealing in international trade is to be interpreted as a moral rule that does not require an active duty of loyalty (such as the standard would be interpreted in common law); as a rule that must ensure that the contract is interpreted and performed accurately (as it would be interpreted in Italian law);[43] as a rule that permits to integrate the contract and balance the interests of the parties (as it would be interpreted in German law); as a rule that permits to correct the contract and requires each party to actively take into consideration and also protect the interest of the other party (as it would be interpreted in Norwegian law), or yet in another way, characteristic only of international trade.

3) The international conventions mentioned in the CENTRAL database are the Vienna Convention on the Contract for the International Sale of Goods (CISG), the UNIDROIT Convention on Factoring and the Vienna Convention on the Law of Treaties of 1969.

aa) The relevance of the CISG in respect of the principle of good faith and fair dealing as a source of duties between the parties or a correction to the terms of the contract is questionable. The CISG is silent on the question of good faith as a duty between the parties, in spite of repeated requests during the drafting phase to expressly mention that the parties have to perform the contract according to good faith. During the legislative works specific proposals were presented on good faith in the pre-contractual phase, as well as general proposals dealing with the requirement of good faith. The specific proposals relating to pre-contractual liability were rejected, and the generic proposals on good faith were incorporated in Art. 7 in such a way that the principle of good faith is not directed to regulating the parties conduct in the contract, but rather the contracting state's interpretation of the convention.[44] The main argu-

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by the UNIDROIT Principles), and ICC award No. 9593 of 1999 applies the law of the Ivory Coast.

[43] On the different function of the principle of good faith in German and in Italian law see *H.-J. Sonnenberger*, Treu und Glauben – ein supranationaler Grundsatz?, in Festschrift für Walter Odersky, Berlin 1996, pp. 703-721, 705 et seq.

[44] For an extensive evaluation of this matter, as well as references to literature and to the legislative history in this respect, see *A. Kritzer*, Pre-Contract Formation, editorial remark on the internet database of the Institute of International Commercial Law of the Pace University School of Law, www.cig.law.pace.edu/cisg/biblio/kritzer1.html, pp. 2 et seq., with extensive references also to the Minority Opinion of *M. Bonell*, who was representing Italy under the legislative works, *M. Bonell*, Formation of Contracts and Precontractual Liability Under the Vienna Convention on International Sale of Goods, in ICC (ed.), Formation of contracts and precontractual liability, Paris 1990, pp. 157-178. According to *Bonell*, an ex-

ments against the inclusion of good faith as a duty of the parties were that the concept is too vague to have specific legal effects, and that it would be redundant if mention thereof had only the character of a moral exhortation. The text and the drafting history of the CISG, therefore, do not seem to cast useful light on the question of specifying the legal effect of a general principle of good faith in international trade.

bb) The Factoring Convention contains, unlike the CISG, a rule prescribing good faith between the parties, in addition to the rule on interpretation of the convention present also in Art. 7 of the CISG – thus indirectly confirming that the rule contained in Art. 7 of the CISG is not sufficient to create a duty of good faith between the parties. The Factoring Convention regards a very specific kind of contract, and it can be questioned to what extent its provisions may be extended to all branches of international trade.[45] Even if such an extension was possible, however, the rule on good faith is written in a general way and does not give criteria that can be useful for clarifying its scope.

cc) The Vienna Convention on the Law of Treaties is a convention on how states are supposed to perform the treaties that they have ratified; it does not seem to have a direct relevance to the standard between private parties in international trade.

4) Of the three transnational instruments mentioned in the CENTRAL database (beyond the already mentioned UNIDROIT Principles and PECL), two are restatements of state law,[46] and can therefore not be used to support an autonomous interpretation of the standard in international trade, and one is of dubious relevance, namely the Cairo Regional Centre for International Commercial Arbitration.

5) The CENTRAL database mentions also various state laws and court decisions: however, as seen above these sources have been expressly excluded by the interpretation of the standard of good faith and fair dealing under the UNIDROIT Principles or the PECL, as it shall be assessed autonomously on the basis of sources within international trade. A selection of domestic acts and decisions of states that are in favour of an active rule on good faith, and a disregard of acts and decisions of state that restrict the rule, would, moreover, be arbitrary.

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tensive interpretation of the CISG would justify application of both concepts of pre-contractual liability and of good faith. See also *R. Goode*, *H. Kronke*, *E. McKendrick*, Transnational Commercial Law (*cit.* fn. 29), pp. 279 et seq.

[45] At the moment of writing this article, nearly 20 years after its conclusion, the convention has been ratified by seven countries (http://www.unidroit.org/english/conventions/ 1988factoring/main.htm). Therefore, it cannot be deemed to enjoy a significant scope of application.

[46] The Contract Code drawn by the English Law Commission and the Uniform Commercial Code of the United States.

6) The sources in the CENTRAL database that mostly seem able to furnish support in the interpretation of the standard of good faith and fair dealing in international trade are the UNIDROIT Principles and the PECL. However, as has been seen, these sources assume an autonomous interpretation that has to be based on the standard applied in international trade. Consequently, when the CENTRAL refers to the UNIDROIT Principles and the PECL to support a principle of good faith in international trade, it creates a vicious circle, because the UNIDROIT Principles and the PECL in turn make reference to international trade practice to substantiate this principle.

The foregoing shows that general principles as a source of transnational law may be difficult to assess; in particular, it seems quite arbitrary to include in the list principles that are typical of one legal family but not of another, such as the principle of good faith. Moreover, principles are expressed in quite a general manner, and need specification in order to become operative in the resolution of actual disputes.

The transnational compilations of principles give good faith and fair dealing a central role; however, they do not define their scope and meaning, but they emphasise that these must be understood on the basis of the practice of international trade and without reference to the meaning developed in the single systems of state law. Generally recognised definitions of these standards do not seem to exist; international contractual practice is mainly based on common law contract models, the very structure of which rejects the interference of good faith. In summary, this does not seem to represent a uniform basis for regulating commercial contracts autonomously and replacing national governing laws.

c) Trade usages

Trade usages are often referred to as an important source of the transnational commercial law. Without entering into the merits of the ability of usages to be independent sources of legal rules,[47] the assessment of a trade usage might be quite demanding. Even evidence that certain conduct is common in a certain branch of the trade does not necessarily mean that there is a binding usage to that effect.[48] In respect of the principle of good

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[47] *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law (*cit.* fn. 29), pp. 39 et seq., convincingly argue that trade usages are not self-validating and require an external validation, usually in the form of a reference contained in the governing law.

[48] See *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law (*cit.* fn. 29), pp. 39 et seq., referring to *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728. On the establishment of uncodified usage and the lex mercatoria see

faith, for example, that the above analysis showed is so important in the interpretation and performance of a contract, there does not seem to be evidence of a uniform usage that might be valid for all types of contracts on an international level or for one single type of contract.

Among the contract clauses typically adopted from common law contract models, and which can be incompatible with the civilian model based on good faith and fair dealing, are so-called boilerplate clauses such as no waiver, no oral amendments, entire agreement, no reliance, liquidated damages, sole remedy, assignment, representations and warranties, and several others. While each of these clauses is quite common in commercial contracts, there is no evidence that any of these clauses has specific legal effects that may be considered to be generally recognised on an international level. Even within English law, and even more so within the common law legal family in general, there is not necessarily one single generally acknowledged interpretation of the scope of each of these clauses.[49]

Contract terms or contract practices that, to a great extent, can be considered to be generally recognised, and therefore may provide the means for interpreting a contract, are sometimes contained in branch publications or publications of business organisations, such as the International Chamber of Commerce. These contract terms and practices, however, mainly have a specific and restricted scope of application and do not contribute to the interpretation of boilerplate clauses or of other questions of general Contract law. Thus, for example, the INCOTERMS, published by the ICC, provide the means for interpreting specific terms of delivery that the parties may have incorporated in their contract, such as FOB and CIF. These terms specify the allocation between the parties of various duties relating to customs clearance, payment of freight, etc. but do not touch on more general areas of Contract law. The UCP 500, yet another ICC publication, contain a codification of accepted business practice in relation to documentary credits, a practice for international payment that is widely adopted within international commerce (the UCP 500 was recently replaced by the UCP 600, and it remains to be seen whether this will gain the same degree of recognition as their predecessor). In spite of the undeniably wide recognition of these contract terms and contract practice, it must be noted that they do not seem to be

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R. Goode, Usage and its Reception in Transnational Commercial Law, International and Comparative Law Quarterly, 46/1997, 1-36.

[49] One clause that seems to have reached a uniform interpretation, at least in the field of maritime law, is the clause "time is of the essence", that thus transplants into civilian systems the English law formalistic power to repudiate a contract for a breach that might be immaterial: see *T. Sandsbraaten*, Begrepene "Conditions, Warranties, representations, Covenants (*cit.* fn. 26), p. 59.

unanimously considered as trade usages and thus as customary law that is applicable unless the parties have excluded it. In some countries, they are considered as standard terms of contract that become effective between the parties only if the parties have expressly incorporated them in their contract.[50] Furthermore, not all publications issued by the ICC enjoy the same degree of recognition as the INCOTERMS and the UCP 500; thus, the simple fact that there is an ICC publication is not sufficient evidence that there is a corresponding trade usage.

In addition to the publications by the ICC, there is a large variety of standard terms, codes of conducts and similar soft instruments prepared by a large number of organisations, branch associations such as ISDA, FIDIC or Orgalime, or even by commercial companies. Standard contracts prepared by FIDIC and Orgalime compete to regulate similar contractual relationships within the same branch of construction; the very fact of this competition speaks against their quality as trade usages that are binding without having being adopted by the parties.

In addition to these recognised standards, there is wealth of documents issued by a disparity of sources. This creates an additional uncertainty to the aforementioned difficulty in assessing whether a certain instrument corresponds to a trade usage, since it creates the risk of attaching normative value to terms written by organisations or institutions that do not act impartially.[51]

In summary, there may be significant difficulties in assessing whether a specific term or practice has a precise interpretation or legal effect that can be considered to be generally acknowledged and thus as a binding trade usage.

d) Summing up

The foregoing shows that there does not seem to be a readily identifiable uniform, systematic and exhaustive commercial practice capable of exercising all the functions of a governing law. The exception for commercial

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[50] See for references *H. van Houtte*, The Law of International Trade (2nd ed.), London 2002, section 8.15. On the challenges that courts may face in applying the UCP in spite of their general acknowledgement see *C. Twigg-Flesner*, Standard Terms in International Commercial Law – The Example of Documentary Credits, in R. Schulze (ed.), New Features in Contract Law (*cit.* fn. 1), pp. 325-339.

[51] See *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law (*cit.* fn. 29) and *S. Symeonides*, Party Autonomy and Private-Law Making (*cit.* fn. 29), p. 6, who wishes a "check to the unbounded euphoria that seems to permeate much of the literature on the subject" of non-state norms as a source of the new lex mercatoria.

practice, therefore, is not sufficient to adjust the consumer law to commercial contracts. In addition, the adjustment would be not exhaustive, if based only on commercial practice: this is because there may be conducts that are in compliance with the governing law as it is today, and yet they are not as uniform and generally acknowledged that they amount to a trade usage. Limiting the adjustment of consumer law to areas where commercial practice may be proven, would exclude these conducts.

For example, today the parties may validly enter into an arbitration agreement by a contract that incorporates by reference another document containing an arbitration clause. This conduct is a trade usage in some branches of trade (particularly in connection with transportation agreements), but it cannot be said to be a trade usage in other areas of trade, for example industrial cooperation. Yet it is a fully valid and enforceable commitment in most jurisdictions. Art. 6:201 in the Acquis Principles provides that this agreement is not enforceable. An exception for commercial practice would make the arbitration clause in the transportation agreement enforceable, but not the arbitration clause in the contract relating to the industrial cooperation. This would be an arbitrary and not satisfactory result.

In conclusion, a generalisation of consumer protection to all contracts, restricted only by what is contrary to commercial practice, would mean a regulation that does not correspond to the law governing commercial contracts today (in some systems more than others, as seen in section II. 3. above), with adjustments that are uncertain, not systematic and even arbitrary.

2. The Importance of State Contract Law for Commercial Contracts

The analysis made above may be used as a basis for some observations on the theory of the transnational law.

It was seen above that the legal effects of a contract do not arise simply out of the contract itself, but are a result of the combination between the contract and the governing law. Section II. 2. above showed some examples of the impact that principles of the governing law may have on the interpretation or performance of the contract. In addition, the governing law will play an important role in filling any gaps that the contract might have; moreover, mandatory rules of the governing law will override any regulation to the contrary that the contract might contain.

As already seen, this means that the same contract may have different effects depending on the governing law.

This is sometimes presented as an unfortunate feature that creates uncertainty and additional work for the parties who operate internationally.

To overcome this uncertainty, it is sometimes suggested to subject international contracts to a harmonised non-national law. Being the legal relationship that they regulate international, and not national, it is sometimes affirmed that international commercial contracts should not be subject to a domestic system of law; being the interests and requirements of international transactions in continuous development, international contracts should be subject to a system that is equally capable of developing in a flexible way. The transnational law, as a spontaneous system of law that arises outside of the boundaries of domestic law and derives from the practice of international business, is according to this approach affirmed to be the proper system to govern international commercial contracts.[52]

It is, however, legitimate to wonder whether the suggested cure is not worse than the disease. The theory of the transnational law has received convinced support in certain academic circles, but has been met with scepticism by legal practice.[53] The main reasons for this scepticism are that it is quite demanding to determine what the exact content of the transnational law is, that the principles that can be determined as being part of the transnational law are mainly quite vague and therefore cannot be used to decide specific disputes of legal-technical character, and that the content is quite fragmentary, leaving many areas of the law uncovered. Some of these negative aspects may be remedied to by the restatements, systematisations and standardisation that have been produced in the recent years, such as the UNIDROIT Principles or the PECL (which, together with the CISG, are sometimes referred to as the "Troika", a body of transnational law particularly apt to govern commercial contracts).[54]

Subjecting a contract to regulation by commercial practices or generally acknowledged principles or restatements thereof, however, would leave too much room for discretion, as was seen in section III. 1. above,

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[52] Literature on the subject-matter is very vast. Among the recent works most frequently referred to are *F. De Ly*, International Business Law and Lex Mercatoria (*cit.* fn. 30), *K. P. Berger*, The Creeping Codification of the Lex Mercatoria (*cit.* fn. 37), and *O. Lando*, The Lex Mercatoria in International Commercial Arbitration, International and Comparative Law Quarterly 34/1985, 747-768. For extensive references see *R. Goode, H. Kronke, E. McKendrick*, Transnational Commercial Law (*cit.* fn. 29), pp. 24 et seq.

[53] As Lord *J. Mustill* incisively put it twenty years ago: "the commercial man is a conspicuous absentee from the writings on the lex mercatoria", in Lord *J. Mustill*, The New Lex Mercatoria (*cit.* fn. 32), p. 86. The same may be affirmed today.

[54] See, for example, *O. Lando*, CISG and its followers: A proposal to Adopt Some International Principles of Contract Law, American Journal of Comparative Law 53/2005, 379-402.

thus representing an uncertain ground for the solution of potential disputes.

The theory of the transnational law seems to be based on the assumption that the parties desire a flexible system that the interpreter (judge or arbitrator) can adapt to their needs. On the contrary, practitioners emphasise that they desire a predictable legal system that can be objectively applied by the interpreter; the task of adapting the contract to the specific needs of the case is a task of the contract drafters, not of the interpreter.[55]

This difference in approaches is obviously of great significance to the evaluation of the theory of the transnational law.

The related notion of the "autonomous contract", i.e. of a contract that is detached from domestic law and has to be interpreted and applied autonomously in the light of its own language and non-state principles and rules of international trade, should therefore be reviewed in the light of the importance of the domestic governing law.[56] Even the European Commission abandoned[57] its intent to support the use of standard con-

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[55] For an interesting analysis of this aspect see *W. Grosheide*, The Duty to Deal Fairly in Commercial Contracts, in S. Grundmann, D. Mazeaud (eds.), General Clauses and Standards in European Contract Law (*cit.* fn. 4), pp. 197-204, 201. The practitioners' reluctance to agree on the assumption that international contracts are drafted and should be interpreted outside of a domestic system of law was recently confirmed in *M. Fontaine, F. De Ly*, Drafting International Contracts. An Analysis of Contract Clauses, New York 2006, pp. 629 et seq. The book is an analysis of contract terms based on the reports prepared by the Working Group on International Contracts, a group that has existed since 1975 and consists of practicing lawyers who specialise in drafting, interpreting or litigating international contracts, as well as of academics. Criticising the possibility of a contract that is independent from any governing law see also *S. Symeonides*, Party Autonomy and Private-Law Making (*cit.* fn. 29), pp. 6 et seq. See also *G. Cordero Moss*, Lectures on International Commercial Law, Oslo 2003 (see comment on fn. 42), pp. 59 et seq.

[56] For a recent suggestion to promote autonomous agreements that are not affected by the differences among the various Contract Laws, see *H. Collins*, The Freedom to Circulate Documents: Regulating Contracts in Europe, European Law Journal, 10/2004, pp. 787-803. For an incisive analysis of how standard contract terms would not be capable of being autonomous because they are subject to, among other things, the governing law's influence in respect of the normative context and the interpretation, see *S. Whittaker*, On the Development of European Standard Contract Terms, European Review of Contract Law 1/2006, pp. 51-76.

[57] *First Annual Progress Report on European Contract Law and the Acquis Review*, COM(2005) 456 final.

tracts, originally meant[58] as a possible tool for overcoming the differences between the various state Contract laws.

This does not mean, however, that the undeniable special characteristics of international contract drafting are, to a certain extent, not capable of rendering the contracts autonomous: within the scope of the freedom of contract that the parties enjoy under the relevant governing law, the parties develop their own contractual mechanisms that respond to the needs of international business and the requirements in the specific transaction.

Contract laws usually do not contain many mandatory rules, therefore the parties might not even notice that the contract is regulated by a certain governing law. In the absence of mandatory rules, i.e. within the scope of the freedom of contract granted by the governing law, the parties are free to use their contract to develop practical mechanisms to respond to the needs of the specific case. Within this scope, the autonomous contract thrives: commercial practice and transnational sources provide useful regulations and models, and the parties develop mechanisms for the regulation of their respective interests that do not depend on the governing law and may be used across the borders.[59]

IV. Conclusion: Need for Harmonisation?

The following temporary conclusions may be drawn from the analysis made above:

1) Commercial contracts are the result of their interaction with the governing law. The informed parties are aware of this circumstance and have the legitimate expectation that the contract language is interpreted and enforced in accordance with the governing law. This might lead to the same contract having different effects depending on the governing law.

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[58] See the *Action Plan on a More Coherent European Contract Law*, COM(2003) 68 final and *European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final.

[59] Numerous standard contracts, codifications of commercial practices, etc., are extremely well received in commercial practice, for example the INCOTERMS and the UCP 500 (recently updated and published as UCP 600) issued by the International Chamber of Commerce on, respectively, the allocation of risk and delivery obligations between the buyer and the seller and the payment mechanism of the documentary credit. On the challenges that nevertheless courts may face in applying the latter see *supra*, section III 1. c)

2) Recourse to a spontaneous transnational law is not a satisfactory measure to overcome the variety of legal effects that may arise out of the plurality of laws.

The next matter to evaluate, therefore, is whether it is desirable to overcome the variety of national laws on commercial contracts by harmonising them.

Leaving aside the question of whether harmonisation of the Contract law is within the scope of the European authority,[60] it cannot be overseen that the process relating to the harmonisation of European contract law is highly emotional[61] and runs the risk of being handled with less than the objectivity that such a significant development deserves.

The European Commission started a process of assessment of the desirability of harmonisation and its extent with the Communication on European Contract Law.[62] To this Communication came nearly 200 answers that represented so many different points of view to give a quite inconclusive result.[63] The answer that probably enjoyed most attention was the Joint Response by the Lando Commission, author of the PECL, and

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[60] See on this matter *L.J. Mance*, Is Europe Aiming to Civilise the Common Law? (*cit.* fn. 7), pp. 79 et seq., and *S. Vogenauer*, *S. Weatherill*, The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate, in S. Vogenauer, S. Weatherill (eds.), The Harmonisation of European Contract Law, Oxford 2006, pp. 107 et seq., 113 et seq.; *S. Weatherill*, Constitutional Issues – How Much is Best Left Unsaid?, *ibid.*, pp. 89-103.

[61] *S. Vogenauer*, The Spectre of European Contract Law, in S. Vogenauer, S. Weatherill (eds.), The Harmonisation of European Contract Law (*cit.* fn. 60), p. 2. Also outside Europe the matter seems to be surrounded by an euphoria against which warns *S. Symeonides*, Party Autonomy and Private-Law Making (*cit.* fn. 29), p. 24.

[62] COM(2001) 398 final.

[63] *S. Vogenauer, S. Weatherill*, The European Community's Competence to Pursue the Harmonisation of Contract Law (*cit.* fn. 60), p. 116. For a brief analysis of the main points of view expressed in the answers see *G. Cordero Moss*, Lectures on International Commercial Law, Publications Series of the Department of Private Law, University of Oslo, 162/2003, pp. 57 et seq. A more conclusive signal seems to come from a survey organised in 2005 by the highly recognised law firm Clifford Chance, according to which a majority European businesses seem to consider it desirable to harmonise Contract Law in Europe, see *S. Vogenauer, S. Weatherill*, The European Community's Competence to Pursue the Harmonisation of Contract Law (*cit.* fn. 60), pp. 117 et seq. See, however, for some criticism of the relevance of the questions, Lord *J. Mance*, Is Europe Aiming to Civilise the Common Law? (*cit.* fn. 7), p. 98 and fn. 58.

its successor, the Study Group, vehemently in favour of harmonisation;[64] but this was certainly not the only point of view that was presented.[65]

This paper tried to show that Member States' Contract law is still diverging in significant respects that are relevant to commercial contracts, and that Member States' Contract law is highly relevant to cross-border contracts and has not been displaced by commercial practice or transnational law. The eagerness to harmonise should, therefore, not lead to overestimating convergences between different legal families and, unless based on a conscious and open policy decision, generalising *acquis* rules that are tailored for consumer contracts and reflect at best principles of one legal family only.

An important lesson on the (limited) extent to which harmonisation may succeed in eliminating the differences among various systems comes from the example of the United States. Needless to say, the United States are significantly more integrated than Europe from the historical, political and legal points of view, not to mention the language. Even among states that (with one notable exception) all belong to the same legal family and share a Uniform Commercial Code, rules on conflict of laws are still used very often, because the necessity of identifying which of the States' law within the United State is the applicable law has not been eliminated by the harmonisation.[66] Transferred to the European arena, with its multifaceted historical, cultural and legal background, this experience seems to indicate that differences will continue to exist in the interpretation and application of harmonised rules, as well as in their interaction with other, non-harmonised parts of the various legal systems.

Too high expectations relating to harmonisation, therefore, might be disappointed; furthermore, it is advisable to devote considered thoughts to the question of the desirability of such a harmonisation (to the extent it is at all achievable). There does not seem to be an evident or unison need for harmonisation, and voices are raised to underline that it might be "better to celebrate our diversity rather than continue the quest for (a dull) uniformity",[67]as well as to warn against being lead "into accepting the view that all non-state norms are a panacea for all ills, or that State laws or borders are the enemy."[68]

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[64] Considered to be inspired by a "hopeful idealism" by Lord *J. Mance*, Is Europe Aiming to Civilise the Common Law? (*cit.* fn. 7), p. 95.

[65] For a systematisation of the main arguments that were presented against harmonisation see *E. McKendrick*, Harmonisation of European Contract Law: The State We Are In, in S. Vogenauer, S. Weatherhill, The Harmonisation of European Contract Law (*cit.* fn. 60), pp. 5-29, 15 et seq.

[66] *S. Symeonides*, Party Autonomy and Private-Law Making (*cit.* fn. 29), pp. 24 et seq.

[67] *E. McKendrick*, The State We Are In (*cit.* fn. 65), p. 28.

[68] *S. Symeonides*, Party Autonomy and Private-Law Making (*cit.* fn. 29), p. 24.

Part III
Conclusion and Content of the Contract

Pre-contractual duties – from the *acquis* to the Common Frame of Reference

Christian Twigg-Flesner (Hull)

I. Introduction

The purpose of this chapter is to concentrate on the development of the Acquis Principles (ACQP) on pre-contractual duties (particularly pre-contractual information duties) and their inclusion in the draft Common Frame of Reference (DCFR), which was presented earlier this year.[1] In doing so, there will first be a brief overview of the challenges involved in drafting the ACQP, as well as the potential problems associated with incorporating the ACQP into the DCFR. The main part of this chapter then examines the development of the Acquis Principles on pre-contractual duties, followed by an analysis of the corresponding DCFR provisions. It will be seen that with regard to this particular subject area, the provisions from the ACQP are clearly identifiable in the DCFR, albeit with some modifications, and that the ACQP have contributed significantly to the DCFR.

II. Drafting Acquis Principles: General Observations

The Acquis Group has set itself the objective of identifying the principles of the existing EC contract law. This is not an easy task[2] – it is well-known that the current *acquis* is fragmented and lacks coherence (hence the desire for a more coherent EU contract law). A preliminary challenge is to find agreement on what exactly the *acquis* is: it is certainly not re-

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1 C. von Bar et al. (eds.) *Principles, Definitions and Model Rules on European Private Law – Draft Common Frame of Reference* (Munich: Sellier, 2008).

2 On the methodology used, see G. Dannemann, "Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group" in Acquis Group (ed.) *Principles of the Existing EC Contract Law – Contract I* (Munich: Sellier, 2007), pp. XXVIII-XXXII.

stricted to a few directives and regulations which obviously fall within the sphere of contract law. It is also necessary to take into account relevant case-law of the European Court of Justice (*ECJ*). In addition, the United Nations Convention on the International Sale of Goods 1980 (CISG) has been considered, despite the fact that not all of the EU Member States have ratified it. So defining the field of enquiry for the work of the Acquis Group was an early hurdle to be overcome.

There were several other challenges. The *acquis* has hitherto had a very limited impact on general contract law, being concerned more with consumer contract law or financial services, both of which are *legis specialis*. This makes it very difficult to uncover and restate principles (i.e., model rules) on general contract law in the *acquis*, because this predominantly comprises exceptions from "hidden" general principles. Nevertheless, if the *acquis* constitutes an exception from a hidden general principle, then it may be possible to uncover the principle which has been derogated from and state this is a positive manner.[3] What the Acquis Group has undertaken is the task of analysing whether it is possible to identify implicit principles which are sufficiently well reflected in the derogations that constitute the *acquis* to permit generalisation.[4] Unsurprisingly, the objective of subjecting the piecemeal *acquis* to a process of generalisation is controversial.[5]

There are other problems: it is well-known that the bulk of the *acquis*, particularly in the consumer field, is of a minimum harmonisation standard. Whilst this reflects what might have been politically acceptable at the time of adoption, it also means that extra caution is required in extrapolating a general principle from a provision in the *acquis* that is only a minimum standard. Furthermore, the *acquis* depends for its effectiveness on a close interaction with the various national laws of the EU Member States.[6] Much of the *acquis* is in the form of directives, which have to be implemented into national law before they take effect. But even directly applicable regulations are part of, and interact with, national law. Indeed, this interaction with national law, and the fact that drafting teams for the ACQP will approach their analysis of the *acquis* against the backdrop of their "home" jurisdiction, creates further challenges.

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3 See, in particular, K. Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (Berlin: De Gruyter, 2003); also "System and Principles of EC Contract Law" (2005) 1 *European Review of Contract Law* 297-322.

4 See further, G. Dannemann, *op. cit.*

5 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* 213-226.

6 See C. Twigg-Flesner, *The Europeanisation of Contract Law* (London: Routledge-Cavendish, 2008), ch. 4.

The *acquis* is therefore too fragmented to provide immediate answers. Consequently, the development of the ACQP requires consideration of what is already in the *acquis*, as well as the manner in which the Member States have implemented these directives and their subsequent application by domestic courts, together with the jurisprudence of the *ECJ*.[7] However, all this could easily result in a restatement which does not have a firm foundation in the *acquis* for all its elements, with the only justification for some principles being that they are the principles from which positive *acquis* provisions appear to deviate. Alternatively, there might be a temptation to introduce a particular principle to ensure that there is a "complete system" for the ACQP, even though there are no *acquis* provisions which could form a sufficient basis for this (and whether recourse to the doctrine of *effet utile* would serve as a valid justification in such circumstances might also be debatable). Although this may be desirable, or even necessary, to provide the relevant context for those principles with a clear basis in the *acquis*, it also leaves the door open to the accusation that, far from simply restating the *acquis*, entirely new principles have been superimposed.

A preliminary and, as yet, incomplete version of the ACQP was published in mid-2007,[8] with the express invitation to legal scholars to contribute to a discussion prior to the completion of the final version.[9] This chapter refers to the relevant ACQP provisions in the version published in *Contract I* in 2007.

III. From the Acquis Principles to the CFR

The DCFR is intended to be an amalgam of best solutions taken from both national law and the *acquis*. Despite the difficulties associated with identifying such "best solutions" from the *acquis*, the reasons for including *acquis*-derived provisions in the DCFR are obvious.[10] From a political perspective, the *acquis* contains those rules which have generally[11] been ac-

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[7] See further H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers (eds.) *EC Consumer Compendium* (Munich: Sellier, 2008).

[8] Acquis Group (ed.), *Principles of the Existing EC Contract Law – Contract I* (Munich: Sellier, 2007).

[9] A critical commentary has been published by N. Jansen and R. Zimmermann, "Grundregeln des bestehenden Gemeinschaftsprivatrechts?" (2007) 62 *Juristenzeitung* 1113-1126.

[10] R. Schulze, "European Private Law and Existing EC Law" (2005) 13 *European Review of Private Law* 3-19.

[11] It must be borne in mind that measures are generally adopted on the basis of Art.95 EC, and that only a qualified majority is required for legislation to pass. Not

cepted by the Member States, and therefore form the core of European contract law, as well as having the benefit of democratic European legitimacy.[12] The incorporation of the ACQP into the DCFR is the task of the so-called Compilation and Redaction Team (CRT). The CRT ensures that there is consistency in the language and terminology of all the DCFR provisions.

In examining both the development of the ACQP, and their subsequent incorporation into the DCFR, the focus will, in particular, be on whether there are clear corresponding provisions taken from the ACQP in the DCFR. In the case of pre-contractual information duties, one can reasonably expect strong parallels between ACQP and DCFR texts, because this is an area predominantly shaped by the *acquis*. Nevertheless, a verbatim transposition is unlikely, because the DCFR aspires to its own coherent system, which will not be fully congruent with that of the ACQP. The differences in the source materials and methodology for developing the ACQP and the bulk of the DCFR provisions (based on comparative research of national laws)[13] might create additional problems of "transplanting" the ACQP into the DCFR.[14] There will therefore be some adjustments of a stylistic and linguistic nature, to ensure that all the principles are consistent both with regard to terminology and style. In comparing ACQP with corresponding DCFR provisions, such changes are therefore to be expected, but it is necessary to analyse whether these are purely linguistic, or if they constitute a substantive departure from the ACQP. In the latter case, it would need to be considered whether such substantive variations are ultimately an improvement of the relevant principle, or whether the original ACQP provision is to be preferred.

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all the Member States have supported all the contract *acquis* measures. Moreover, the new Member States have not had an opportunity for voting on most of the *acquis*, because it predates their accession.

[12] S. Grundmann, "The Optional European Code on the Basis of the Acquis Communautaire" (2004) 10 *European Law Journal* 678-711; T. Wilhelmsson and C. Twigg-Flesner, "Pre-contractual information duties in the *acquis communautaire*" (2006) 2 *European Review of Contract Law* 441-470, p. 444.

[13] See G. Dannemann, *op. cit.* p. XXIV.

[14] The combination of *acquis*-based principles with principles developed through comparative research of national laws might create a new dimension to the question of legal transplants. Cf. A. Watson, *Legal Transplants*, 2nd edition (London: University of Georgia Press, 1993).

IV. General Pre-contractual Duties

The Acquis Principles contain several pre-contractual duties. There are first three general pre-contractual duties, considered in this section, followed by the pre-contractual information duties, discussed in the following section. The general pre-contractual duties deal with good faith, legitimate expectations, and negotiations contrary to good faith.[15]

1. Good Faith (Art. 2:101 ACQP)

The concept of "good faith" can be found in many *acquis* provisions. This is not surprising, because it is a notion found in most EU jurisdictions, although the common law continues to resist the adoption of a broad general "good faith" principle.[16] In the *acquis*, it can be found e.g., in the directives on Distance Selling (Art. 4(2))[17] and Distance Selling of Financial Services (Art. 3(2)).[18] Moreover, the Unfair Commercial Practices Directive (UCPD),[19] whilst not directly concerned with contract law,[20] does regulate the behaviour of traders when dealing with consumers with reference to a good faith standard (Art. 2(h)). This has resulted in the development of the following general pre-contractual duty:

In pre-contractual dealings, parties must act in accordance with good faith.

There are further *acquis* rules which utilise "good faith" in the context of unfair terms and performance. The limitation of Art. 2:101 ACQP to the pre-contractual stage should not be understood as limiting the scope of application of the "good faith" notion to the pre-contractual stage.[21]

DCFR Version

It should first be observed that the DCFR tends to use the phrase "good faith and fair dealing" rather than simply "good faith". Whilst the ACQP

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15 For a critical discussion of these, see N. Jansen/R. Zimmermann, *op. cit.*, pp. 1121-1124.

16 See e.g., R. Brownsword, *Contract Law – Themes for the twenty-first century*, 2nd edition, (Oxford: OUP, 2006), ch. 6.

17 Directive 97/7/EC.

18 Directive 2002/65/EC.

19 Directive 2005/29/EC.

20 See the more detailed discussion of this issue *infra*, Art. 2:202 ACQP.

21 *Acquis Principles – Contract I*, p. 65.

do not contain a definition of this term, the following explanation of "good faith" is found in the DCFR:

> *"Good faith and fair dealing" refers to an objective standard of conduct. "Good faith" on its own may refer to a subjective mental attitude, often characterised by an absence of knowledge of something which, if known, would adversely affect the morality of what is done.*

Therefore, where the ACQP use the term "good faith", the DCFR tends to use the wider phrase "good faith and fair dealing", to indicate the objective nature of this particular standard.

In the DCFR, there is no immediate equivalent to this provision. However, in Art. II.–3:301 DCFR (on negotiations contrary to good faith and fair dealing), a similar provision can be found. This is limited to a person engaged in negotiations, and that person is under a duty to negotiate in accordance with good faith and fair dealing. Art. 2:101 ACQP is wider, because it applies to all pre-contractual dealings, including general marketing, and therefore offers a wider scope of application.

2. Legitimate Expectations (Art. 2:102 ACQP)

The concept of "legitimate" or "reasonable" expectations is also found in several areas of the *acquis*, particularly in order to reflect the fact that consumers are entitled to expect an adequate level of performance by a business. This particular provision is not only based on relevant contract *acquis* (e.g., Art. 2(2)(d) of the Consumer Sales Directive), but also the Product Liability Directive (Recital 6), General Product Safety Directive (Art. 3(3)(f) and, once more, the UCPD (Art. 2(h)). Art. 2:102 ACQP therefore provides as follows:

> *In pre-contractual dealings, a business must act with the special skill and care that may reasonably be expected to be used with regard, in particular, to the legitimate expectations of consumers.*

This is intended to supplement the "good faith in pre-contractual dealings" principle found in Art. 2:101 ACQP, and applies only in dealings between a business and a consumer.[22]

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[22] *Ibid.*, p. 70.

DCFR Version

There is no corresponding version to Art. 2:102 ACQP in the DCFR. Although the DCFR should include provisions specifically intended for B2C contracts – mainly taken from the ACQP – this particular B2C rule does not appear here. It may be that this has been done to avoid confusion between the "good faith and fair dealing" standard, which might encompass the idea of legitimate expectations (and Art. 2:102 ACQP is, to an extent, a variation on Art. 2:101 ACQP in the consumer context), but in view of the significance of legitimate expectations in the *acquis*, it is surprising that this has not been taken up in the DCFR.

3. Negotiations Contrary to Good Faith (Art. 2:103 ACQP)

Although there is no express provision in the *acquis* that deals explicitly with negotiations contrary to good faith, it is possible to identify aspects that appear to reflect such an obligation. The Acquis Group resolved to generalise this to form the following principle:

> *(1) A party is free to negotiate and is not liable for failing to reach an agreement.*
> *(2) However, a party who has conducted or discontinued negotiations contrary to good faith is liable for loss caused to the other party.*
> *(3) In particular, a party acts contrary to good faith if it enters into or continues negotiations with no real intention of reaching an agreement.*

The political issues associated with this generalisation are clearly acknowledged in the comments to this provision.[23] Thus, it is conceded that the *acquis* does not yet contain explicit rules on liability for negotiating contrary to good faith, but that such a principle is in accordance with the notion of legitimate consumer expectations.

DCFR Version

The corresponding provision in the DCFR is Art. II.–3:301, paragraphs (1), (3) and (4). This provision substantively reflects Art. 2:103 ACQP, although some linguistic changes have been made. Thus, in accordance with DCFR language, "party" has been replaced by "person", and – as already noted above – the phrase "good faith and fair dealing" is used instead of simply "good faith". Overall, the ACQP rule is identifiable in the

[23] *Ibid.*, p. 74.

DCFR; however, it must be borne in mind that Art. 2:103 ACQP has been developed with reference to Art. 5:301 of the Principles of European Contract Law (PECL), which, in turn, have become Art. II.–3:301 DCFR, and so the parallels are inevitable.

V. Pre-contractual Information Duties

One of the main contributions made by the *acquis communautaire* is the widespread use of pre-contractual information duties, particularly – but not exclusively – in the field of consumer contract law. This is therefore one of the key areas for *acquis*-based provisions to be included in the DCFR.[24]

1. Duty to Inform about Goods and Services (Art. 2:201 ACQP)

This provision is based on familiar rules found in the law of sales (both consumer and business-to-business contracts). In the *acquis*, the relevant provision is Art. 2 of the Consumer Sales Directive,[25] which states that goods are presumed to be in conformity with the contract, if they are fit for the purposes for which goods of the same type are normally used, and if they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect. Although mandatory in nature, the reasonable expectations of consumers, and therefore the conformity standard itself, can be affected by providing specific information about the goods either before conclusion of the contract, or by virtue of the contract terms themselves. A seller can therefore reduce the risk of being held liable for a lack of conformity by pointing out existing defects to the consumer before a contract is made. This is supported by the reference to the contract of sale in Art. 2(1) as well as recital 8; in addition, the description given by the seller (Art. 2(2)(a)) and the reasonable expectations test in Art. 2(2)(d) are also relevant. The most important provision is Art. 2(3), according to which there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity. So providing information about the quality of the goods affects the level of conformity required by the Directive.[26] Li-

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[24] Generally, T. Wilhelmsson and C. Twigg-Flesner, *op. cit.*

[25] Directive 1999/44/EC.

[26] See also C. Twigg-Flesner, "Information Disclosure about the quality of goods – duty or encouragement?" in G. Howells/A. Janssen/R. Schulze (eds.), *Information*

ability for a lack of conformity can only be avoided by giving precise information about the matters affecting the quality or performance of the goods.[27]

Art. 2:201 ACQP uses this situation as the starting point for the development of a disclosure rule, i.e., it inverts the approach from the "you are liable unless you disclose" approach to one of "disclose or you might be liable". The provisions of the Consumer Sales Directive on conformity effectively constitute an "indirect information requirement",[28] which is made express in this article. This is not uncontroversial, because it takes what is essentially a conformity rule with its own remedies and turns this into an information obligation;[29] however, the information-based analysis of the conformity rules is well-established, and whilst this provision may seem odd from the perspective of some jurisdictions, it is unlikely to cause much concern for others.

Of course, the Consumer Sales Directive only applies to business-to-consumer contracts. However, as the CISG (which applies to international business-to-business contracts) may also be relevant in this context (not only because it has been adopted by most Member States, but because Art. 2 of the Directive was inspired by the CISG), one can take into account Art. 35 CISG. This is a provision on non-conformity in very similar terms to that of Art. 2 of the Directive. Because of this parallelism, the disclosure rule derived from Art. 2 can be extended to all sales by a business, i.e., both B2B and B2C. The CISG does not contain an explicit "reasonable expectations" test, but one can infer such a test as underpinning Art. 35 CISG. Its inclusion in Art. 2:201 ACQP is therefore not problematic; the standard is sufficiently flexible to be applied differently depending on whether the recipient of the information is a business or a consumer.

Indeed, Art. 2:201 ACQP goes further by imposing a duty of disclosure not only on business sellers, but also non-business sellers. Once again, the flexible nature of the "reasonable expectations" test should ensure that a non-business seller would not find himself exposed to too onerous a duty under this provision. Moreover, although the *acquis* does not directly

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rights and obligations: a challenge for party autonomy and transactional fairness (Aldershot: Ashgate, 2005).

[27] So also e.g. S. Grundmann, in M. C. Bianca/S. Grundmann (eds.), *EU Sales Directive, Commentary* (Antwerp: Intersentia, 2002), p. 126.

[28] The rule is in fact parallel to a rule that somewhat more explicitly follows from the legitimate expectations text in Art. 6 of the Products Liability Directive (Directive 85/374/EEC). In this article the legitimate expectations test – the safety which a person is entitled to expect – is expressly connected, i.e., to the presentation of the product.

[29] Cf. N. Jansen/R. Zimmermann, *op. cit.*, pp. 1125-1126, who reject this provision for several reasons.

regulate the quality of services, there is no obvious reason to limit this provision to the supply of goods only.[30] This has resulted in the following article:

> *Before the conclusion of a contract, a party has a duty to give to the other party such information concerning the goods or services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.*

So one has to consider what sort of quality and level of performance one could reasonably expect under the circumstances of the particular transaction, and if the goods/services to be provided would fall below this standard, information about this should be given. Thus, if there is a problem with the engine of a car about to be sold by a business seller that does not normally exist with this type of car, then the seller should disclose this.[31]

It should also be noted that this provision does not merely impose a duty on the person supplying the goods or services; it reaches further and can also impose an obligation on the *recipient* of the goods/services to disclose information concerning the goods/services to be provided where the supplier could reasonably expect this. This might be the case, where, e.g., a service is to be provided in the home of a consumer, but access to the home is particularly difficult, making it more burdensome to reach the home and provide the service.

DCFR Version

This article has been incorporated into the DCFR as Art. II.–3:101(1). Although the wording of Art. 2:201 ACQP has been largely retained, there are several noteworthy changes which limit the scope of the DCFR version compared to the ACQP provision.

First, in terms of structure, the ACQP provision has become paragraph (1) of a two-paragraph article in the DCFR. The substance of the second paragraph will be dealt with shortly. Secondly, a rider has been added to the DCFR version that the contract where this duty arises is one "for the supply of goods or services". Whilst this could be seen as narrowing the overall scope of this duty, it might also simply clarify the scope of this article, because the information to be disclosed also relates to goods or services.

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[30] Compare also the general rule requiring average quality of performance in PECL Art. 6:108.

[31] See Example 2, *Acquis Principles – Contract I*, p. 80.

A more obvious limitation to the scope of the DCFR provision has resulted from the addition of the words "by a business to another person" after "the supply of goods or services", as well as by imposing the duty to disclose information only on such a business. This has the effect of restricting this duty in two ways: first, it only arises where the contract requires a business to supply goods or services, and thereby removes purely private transactions from its scope, as well as transactions where a private person might be supplying goods (or services) *to* a business. Secondly, unlike Art. 2:201 ACQP, the duty to disclose information is only imposed on the supplier of the goods or services, whereas the ACQP rule could also require the recipient to give information which the supplier might reasonably expect. The effect of these changes is to restrict significantly the scope of the ACQP provision. Whilst a limitation to B2B/B2C contracts might be acceptable on the basis that EU law does not, generally, affect purely private transactions, the removal of the bi-directional application of Art. 2:201 ACQP brought about by the amendments made in Art. II.–3:101(1) DCFR is regrettable, and should be reviewed at the earliest opportunity.

A further change to the ACQP provision is also significant: a new sub-paragraph (2) has been added, which provides as follows:

> *In assessing what information the other party can reasonably expect to be disclosed, a relevant factor to be taken into account, if the other party is also a business, is whether the failure to provide the information would deviate from good commercial practice.*

This is, in essence, a clarification of the scope of the Art. 2:201 ACQP in contracts between businesses, in that the question of whether information could reasonably be expected to be supplied is answered by considering what good commercial practice would dictate. The motivation for this change seems to be a concern about applying Art. 2:201 ACQP in its original form to B2B and B2C contracts in the same manner. Its purpose is to reflect the fact that there are generally fewer pre-contractual disclosure obligations in B2B sales than in B2C contracts.[32] However, as drafted, this sub-paragraph does not restrict the reasonable expectations of the business recipient of the information to that which would be expected on the basis of good commercial practice; rather, in considering whether information that could reasonably be expected was provided, it is a relevant factor to examine whether the information given was sufficient to meet the demands of good commercial practice. However, that in itself – at least on this formulation of the test – would not be conclusive: information may be in accordance with good commercial practice, and

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[32] *Acquis Principles – Contract I.*

yet there may be other factors that could lead to the conclusion that this duty has not been complied with. Indeed, in its present form, this additional sub-paragraph does little more than to indicate one of the factors which might have to be considered in applying the test – and it seems likely that even without this additional paragraph, the demands of good commercial practice would be taken into account in shaping the reasonable expectations of the recipient of the information.

Perhaps the real reason for this provision is to be found in the nature of the provision itself, and also the potential conflicts between the *acquis* approach and the Study Group approach to creating provisions for the DCFR. As explained above, this rule is a re-interpretation of the general conformity requirement found primarily in the law of sales (both consumer and commercial). Although that requirement is not expressed in terms of a disclosure rule, it has a strong information-based rationale, and a seller can avoid liability for non-conformity by disclosing matters that might otherwise result in a finding that goods are not in conformity with the contract. This is all that Art. 2:201 ACQP seeks to reflect. The conversion of a conformity rule to a clear disclosure rule might not be palatable to everyone, but it is hardly a departure from the substance of the law as it is already. But the approach adopted in Art. 2:201 ACQP might also create tension within the system of the DCFR, and by seeking to modify its impact on B2B transactions, the perceived negative impact of this provision might be reduced.

2. Information Duties towards Consumers (Art. 2:202 ACQP)

One of the most significant consumer law directives is the Unfair Commercial Practices Directive (UCPD).[33] The UCPD introduces a general prohibition of all unfair commercial practices in consumer transactions. Several specific practices are prohibited outright, but all remaining commercial practices are tested against the general clause in Art. 5(2). This general clause is supplemented by Art. 6 (prohibition of misleading actions, including false information, or deceptive information relating to various matters listed); Art. 7 (misleading omissions) and Art. 8 (aggressive commercial practices involving harassment, coercion or undue influence). Whilst Art. 3(2) states that the UCPD is "without prejudice to contract law and, in particular, to the rules on the validity formation or

[33] Directive 2005/29/EC. See J. Stuyck/E. Terryn/T. van Dyck, "Confidence through fairness? The new directive on unfair business-to-consumer commercial practices in the internal market" (2006) 43 *Common Market Law Review* 107-152; G. Howells/H.-W. Micklitz/T. Wilhelmsson, *European Fair Trading Law – The Unfair Commercial Practices Directive* (Aldershot: Ashgate, 2006).

effect of a contract", this does not mean that it *cannot* have any effect on contract law. Domestic and European contract law rules might be influenced by the UCPD, [34] but the Directive does not *require* that any changes are made to contract law rules. The UCPD could affect contract law indirectly, e.g., by influencing the manner in which some of the contract law directives are interpreted.[35]

Nevertheless, although the UCPD is expressed to be without prejudice to contract law, its impact can be felt particularly in the field of pre-contractual duties. Indeed, a closer examination of the UCPD reveals that it does affect pre-contractual information duties, and moves closer towards a broader obligation to provide information before a contract is concluded. The UCPD does not require that particular information is given during the marketing stage and before a contract is made, but it treats as a misleading omission the fact that key information is not given. The relevant provision is Art. 7 UCPD, which contains provisions dealing with the provision of both "material information" when a business is marketing goods and services to a consumer,[36] and of key information when a business is using a commercial communication is which intended to enable a consumer to make a purchase.[37] On the assumption that this provision has pre-contractual relevance, Art. 2:202 ACQP provides as follows:

> *(1) In addition to Art. 2:201, where a business is marketing goods or services to a consumer, the business must, with due regard to all the circumstances and the limitations of the communication medium employed, provide such material information as the average consumer needs in the given context to take an informed decision on whether to enter into a contract.*
> *(2) Where a business uses a commercial communication which enables a consumer to buy goods or services, the following information must be provided to the consumer where this is not already apparent from the context of the commercial communication:*
> – *the main characteristics of the goods or services, the address and identity of the business, the price including delivery charges, taxes and other costs, and, where it exists, the right of withdrawal;*

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[34] C. Twigg-Flesner/D. Parry/G. Howells/A. Nordhausen, *An Analysis Of The Application And Scope Of The Unfair Commercial Practices Directive* (London: DTI, 2005), pp. 49-61 [available at http://www.berr.gov.uk/files/file32095.pdf (last accessed 9 November 2007)].

[35] S. Whittaker, "The Relationship of the Unfair Commercial Practices Directive to European and National Contract Laws" in S. Weatherill/U. Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Oxford: Hart, 2007).

[36] See Art. 7(1) UCPD.

[37] See Art. 7(4) UCPD.

– *peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence*

Once again, this provision effectively converts a prohibition – i.e., a duty to avoid omitting material information (i.e., a negative duty) – into a positive obligation to provide information. This is similar to the approach adopted in the context of Art. 2:201 ACQP.

DCFR Version

The corresponding provision is Art. II.–3:102 DCFR. Although this is along the same lines as the ACQP provision, there are several differences, albeit primarily of a linguistic nature.

In paragraph (1), the cross-reference to the previous article (which would be Art. II.–3:101 DCFR in this case) has been omitted altogether. In addition, the words "with due regard to all the circumstances" in the second/third lines of paragraph (1) have been replaced by "so far as it is practicable having regard to all the circumstances". It is debatable whether this is purely semantic, or whether this raises the threshold before the obligation to provide this information is engaged.

The wording of paragraph (2) has been altered significantly from the ACQP provision. In the DCFR, this now reads:

(2) Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, it must in fact contain all the relevant information.

Although this might appear to be a departure from the ACQP text, it does, in fact, express the mischief which this provision is aimed at more clearly. In this instance, therefore, the DCFR text offers a useful linguistic improvement, which could also be adopted in a revised version of the ACQP, and perhaps eventually in a revision of the UCPD (should this ever be considered on the basis of the CFR).

There are other changes to the wording of paragraph (2). In subparagraph (a), a rider has been added that the address of the business is only to be provided "if relevant". Moreover, the clarification in the ACQP that the price includes "delivery charges, taxes and other costs" has been deleted from the DCFR text. The reason for this is not clear; the DCFR definition of "price" does not make express reference to these elements, and therefore the DCFR version seems to reduce the amount of information to be provided. In view of the fact that price is a significant aspect of any consumer transaction, this is surprising. Moreover, during

the CFR-stakeholder workshop on pre-contractual information duties in February 2006, it was expressly requested by stakeholders that these elements are retained in this provision.

3. Information Duties towards Disadvantaged Consumers (Art. 2:203 ACQP)

As already noted, the *acquis* contains many provisions requiring that information is given to consumers (and, sometimes, non-consumers) before they conclude a contract. This is generally the case where the consumer is at a disadvantage because of (i) the context or manner in which the contract is concluded; and (ii), the particular nature of the transaction.

Examples of the first situation are doorstep and distance selling. Thus, Art. 4(1) of the Door-Step Selling Directive[38] requires that a consumer is informed about the right of withdrawal, as well as the person against whom that right may be exercised. Art. 4 of the Distance Selling Directive,[39] which applies where a consumer concludes a contract using a means of distance communication, including the internet, requires that a consumer is given information about (a) the identity of the supplier (and his address where pre-payment is required); (b) main characteristics of the goods/services; (c) price of the goods including taxes; (d) delivery costs; (e) arrangements for payment, delivery or performance; (f) where available, the existence of a right of withdrawal; (g) cost of using the means of distance communication; (h) period of validity of the particular offer; and (i) minimum term of a contract of indefinite duration.

There are many examples for the second category, too. For example, in the Package Travel Directive,[40] Art. 3 states that a brochure informing a consumer about a package holiday must contain certain items of information, and Art. 4 provides more precise obligations on a trader to give various items information before a contract is concluded. Similarly, the Timeshare Directive[41] requires that a person who requests information about property available on a timeshare basis is given a document which includes, as a minimum, "brief and accurate information" in respect of a number of items listed in the Annex to the Directive, as well as a general description of the properties and how further information may be obtained (Art. 3(1)). In the context of financial services, the directives on

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38 Directive 85/577/EEC.

39 Directive 97/7/EC.

40 Directive 90/314/EEC.

41 Directive 94/47/EC, currently under review: see COM(2007) 303 final.

Life Assurance,[42] Insurance Mediation,[43] and the recent Payment Services Directive[44] each contain detailed pre-contractual information duties.

Despite this plethora of pre-contractual information obligations (and notwithstanding the UCPD), the *acquis* does not assume a general principle which obliges a business to provide pre-contractual information in respect of all consumer contracts. So a more limited restatement of pre-contractual information obligations is needed. Although the lists of items to be disclosed found in directives such as those on Package Travel or Timeshare are very detailed, it is possible to group these items under more general headings.[45] This leads to Art. 2:203 ACQP as a generalisation of the circumstances when pre-contractual information duties are imposed in the consumer *acquis*:

> *(1) In the case of transactions that place the consumer at a significant informational disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction, the business must, as appropriate in the circumstances, provide clear information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures. This information must be provided at the latest at the time of conclusion of the contract.*
> *(2) Where more specific information duties are provided for specific situations, these take precedence over general information duties under paragraph (1).*

This article seeks to restate, in general terms, the circumstances when pre-contractual information duties are imposed on a business dealing with a consumer.[46] It is not intended as a replacement for all the detailed lists

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[42] Directive 2002/83/EC.

[43] Directive 2002/92/EC.

[44] Directive 2007/64/EC.

[45] See also R. Bradgate/C. Twigg-Flesner/A. Nordhausen, *Review Of The Eight EU Consumer Acquis Minimum Harmonization Directives And Their Implementation In The UK And Analysis Of The Scope For Simplification* (London: DTI, 2005), 177-185.

[46] N. Jansen/R. Zimmermann, *op. cit.*, comment that the restriction to B2C contracts reflects an unexpressed political decision *against* a generalisation that would extend at least to some B2B contracts, which they regard as "unconvincing" (p. 1120). However, it would be difficult to find any support in the *acquis* for such a wide-ranging pre-contractual information duty in B2B contracts. Moreover, B2C do still form a special category: see P. Mankowski, "Formation of Contract and

of information items necessary for particular transactions such as time-share or package travel (hence sub-paragraph (2)), but it does facilitate a structured review of the existing provisions by grouping current items under the broad headings in this provision.

DCFR Version

In the DCFR (Art. II.–3:103), this provision has essentially been adopted without significant alteration. There are two changes. The final sentence of paragraph (1), regarding the timing of the information, has been replaced by "This information must be provided a reasonable time before the conclusion of the contract". This appears to be more favourable to the recipient of the information than the ACQP text, because in that version, the information could be provided right up to the moment at which the contract is concluded, whereas the DCFR version requires a larger gap between receiving information and concluding the contract. Of course, what is a "reasonable time will vary from case to case, and in many cases, there might not be a significant difference in practice.

A further change is the addition of the following final sentence: "The information on the right of withdrawal must, as appropriate in the circumstances, also be adequate in the sense of Art. II.–5:104 DCFR (Adequate notification of the right to withdraw)." This is potentially problematic, because Art. II.–5:104 DCFR specifies that adequate notification requires, *inter alia*, "textual form on a durable medium". However, the information to be provided under Art. II.–3:103 DCFR needs not be given in textual form on a durable medium. Whilst it is clearly important that a consumer is given full information about the right of withdrawal in the appropriate form no later than the start of the withdrawal period, it does not seem necessary to require this in the pre-contractual context (particularly because Art. II.–3:106(3) DCFR (Art. 2:206(2) ACQP) contains a confirmation rule for distance selling contracts). It also means that information about the right of withdrawal may have to be given in a different form from the other items of information. It might be that the qualification "as appropriate in the circumstances" would mean that not all the form requirements otherwise imposed under Art. II.–5:104 DCFR need to be adhered to. The intention of this additional sentence might have been to avoid a conflict between Art. II.–3:103(1) DCFR and Art. II.–5:104 DCFR, but it does not appear to be a particularly neat solution.

Pre-contractual duties to inform in a comparative perspective" in S. Grundmann/M. Schauer (eds.) *The Architecture of European Codes and Contract Law* (The Hague: Kluwer Law International, 2006).

4. Information Duties in Real-Time Communication (Art. 2:204 ACQP)

Unsurprisingly, there is *acquis* on contracts concluded by modern communication technology, particularly (but not exclusively) where this could facilitate cross-border transactions. Provisions in both directives, the Distance Selling Directive (Art. 4(3)) and Distance Selling of Financial Services Directive (Art. 3(3)(a)), support the following principle:[47]

> *(1) When initiating real time distance communication with a consumer, a business must provide at the outset explicit information on its identity and the commercial purpose of the contact.*
> *(2) Real time distance communication includes telephone and electronic means such as voice over internet protocol and internet related chat.*
> *(3) The business bears the burden of proof that the consumer has received the information required under paragraph (1).*

The reversal of the burden of proof is based on Art. 15 of the Distance Selling of Financial Services Directive (and there is also a corresponding provision in Art. 33 of the Payment Services Directive), although in both cases, it is left to the Member States whether to introduce such a rule. For the time being, a firm rule has been included in the ACQP, but this may change as the provision is yet to be finalised.

DCFR Version

The DCFR contains a provision in very similar terms in Art. II.–3:104. The only difference is that the phrase "real time distance communication" has been replaced with "direct and immediate distance communication". Beyond that, the provision is identical to the ACQP article.

5. Formation by Electronic Means (Art. 2:205 ACQP)

Although there is no specific *acquis* on the formation of contracts, there are several provisions which supplement the formation of a contract by electronic means in the E-Commerce Directive (2002/31/EC). This Di-

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[47] This was included in *Acquis Principles – Contract I* as a preliminary principle only. The Acquis Group has subsequently decided to revise the principle and to locate this in chapter 4 on contract formation. However, the present discussion is based on the ACQP as published in *Contract I*.

rective is of broad application, and therefore supports the he following principle: [48]

> *(1) If a contract is to be concluded by electronic means, a business, before the other party makes or accepts an offer, must provide reference to any contract terms used, which must be available in textual form. This provision is mandatory.*
> *(2) If a contract is to be concluded by electronic means and without individual communication, a business must provide the following information before the other party makes or accepts an offer:*
> *(a) which technical steps must be followed in order to conclude the contract;*
> *(b) whether or not the concluded contract will be filed by the business and whether it will be accessible;*
> *(c) the technical means for identifying and correcting input errors;*
> *(d) the languages offered for the conclusion of the contract;*
> *This paragraph is mandatory in the sense of Art. 1:203 in relations between businesses and consumers.*

DCFR Version

The corresponding provision is Art. II.–3:105 DCFR. The first thing to note is that the DCFR version is structured differently. Paragraph (1) of Art. 2:205 ACQP has been removed, and instead, a new sub-paragraph (e) has been added to the list in paragraph (2), referring to "any contract terms used". Paragraph (2) has become paragraph (1) in Art. II.–3:105 DCFR, and a new paragraph (2) in the DCFR explains that "the contract terms referred to in paragraph 1(e) must be available in textual form".

Secondly, all references to this provision being mandatory found in Art. 2:205 ACQP have been deleted in Art. II.–3:105 DCFR.

Thirdly, there are several changes to the list of matters about which the other party has to be informed. Of particular noteworthiness is sub-paragraph (b), which, in the DCFR version, reads "whether or not a contract *document* will be filed by the business and whether it will be accessible."[49] The replacement of the phrase "concluded contract" with "contract document" could be seen purely as a stylistic improvement. However, the term "document" might suggest that this relates to a hard-copy version of the contract. The ACQP version is broader, suggesting that the contract might also be "filed" electronically. What would the implications of this be? The information duty would be narrower, requir-

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[48] As with Art.2:204 ACQP, this, too, is only a preliminary principle. This principle will be redrafted and re-located to chapter 4 on contract formation.

[49] Emphasis added.

ing information about the filing of the contract only to be given where a hardcopy is retained by the business. "Filing" need not involve a paper-copy – there can be electronic filing, too. Under Art. 2:205 ACQP, the information obligation covers filing of both electronic and non-electronic versions. However, in practical terms, this is of very limited significance, because this provision relates to information only and does not impose an obligation to file contracts. That, however, raises the question why such a change was deemed necessary by the CRT.

Finally, a gloss has been added to sub-paragraph (c) in that information about the correction of input errors relates to corrections made before an offer is made or accepted. Of course, Art. II.–3:105 imposes an obligation to provide the various items of information "before the other party makes or accepts an offer", and the repetition of this phrase in Art. II.–3:105(1)(c) might seem superfluous. However, sub-paragraph (c) specifies a particular item of information to be provided, and the added gloss has the effect of requiring the provision only of information about the correction of input errors before an offer is made or accepted by the other party, i.e., it narrows the scope of this information duty. Being concerned purely with information, it does not have the effect of restricting the possibility of identifying/correcting such errors, but it does mean that no information would have to be given about the means for identifying/correcting such errors *after* an offer has been made or accepted by the intended recipient of this information. This limitation seems rather odd, and its rationale is difficult to discern.

6. Clarity and Form of Information (Art. 2:206 ACQP)

A standard requirement in *acquis* which accompanies the various information rules is that information has to be provided in a clear and precise manner, and expressed in plain and intelligible language.[50] In the Package Travel Directive, there is a requirement that information has to be given "in a legible, comprehensible and accurate manner" (Art. 3(2)). The Distance Selling Directive requires that the information is given in a clear and comprehensible manner, and it has to be appropriate to the means of distance communication used (Art. 4(2)). Due regard is to be had to the principles of "good faith in commercial transactions" and those relating to the protection of those unable to give their consent under relevant domestic laws, "such as minors" (Art. 4(2)). In the case of Insurance Mediation, it has to be in a clear and accurate manner, comprehensible to the customer (Art. 13(1)). The new Payment Services Directive

[50] See also P. Mankowski, "Information and Formal Requirements in EC Private Law" (2005) *European Review of Private Law* 779-796.

requires that information is provided in easily understandable words and in a clear and comprehensible form (Art. 36(1)).

There are also provisions regarding the form in which this information is given. In older Directives, such as Doorstep Selling, the form requirement was that information had to be written (Art. 4). The Package Travel Directive introduced as an alternative "another form which is comprehensible and accessible to the consumer". This has since evolved into the standard requirement that information is given "on paper or on another durable medium".[51] This is found, int. al., in the directives on Insurance Meditation (Art. 13(1)), Distance Marketing of Financial Services (Art. 5(1)) and Payment Services (Art. 36(1)).

Furthermore, in the context of Distance Selling, there is a requirement that information given before a contract is made is confirmed to the consumer in writing at the time of conclusion.

Although the wording of the various provisions stipulating requirements as to form and style is not always consistent, it has been possible to restate these requirements in Art. 2:206 ACQP as follows:

> *(1) A duty to provide information imposed on a business is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.*
> *(2) In the case of contracts between a business and a consumer concluded at a distance, information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case, need to be confirmed in writing at the time of conclusion of the contract.*
> *(3) Where more specific formal requirements for the provision of information are provided for specific situations, these take precedence over general requirements under paragraphs (1) and (2). Unless stated otherwise, writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the recipient.*
> *(4) Failure to observe a particular form will have the same consequences as breach of information duties.*

The *acquis* is vague on the consequences of failing to comply with requirements as to form and style. In Art. 2:206 ACQP, it was decided to specify – in paragraph (4) – that a failure to observe form requirements is

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[51] Not all the directives contain an appropriate definition, and this phrase is often cited as an instance of insufficient clarity in EU legislation: see House of Lords, *European Contract Law – the way forward?* (HL Paper 95, 2005), para. 40.

equivalent to a failure to comply with pre-contractual information duties themselves, i.e., information which has not been provided in the required form and style is deemed not to have been given at all.

DCFR Version

In the DCFR, this provision has become Art. II.–3:106. As with the other provisions, there have been editorial adjustments to ensure that the language fits with the rest of the DCFR. Thus, instead of the phrase "in writing" used in Art. 2:206(3) ACQP, the DCFR version uses "in textual form on a durable medium", which also ensures consistency within the section itself. Also, paragraph (1) has been qualified with the rider "under this Chapter", making it clear that any other obligations to provide information in other parts of the DCFR are not subject to the form requirements in Art. II.–3:106.

The first obvious difference is that paragraphs (2) and (3) have been reversed. Art. 2:206(2) has been retained in substantively the same form in Art. II.–3:106(3) DCFR, with the one terminological change already noted.

However, the wording of Art. 2:206(3) has been altered significantly in the DCFR version. The first part of this provision in the ACQP states that there may be instances where specific form requirements are imposed. Where this is the case, the form requirements in Art. 2:206(1) and (2) are not applicable. The second part confirms that information which has to be given in "writing" may also be provided in textual form on a durable medium. Art. II.–3:106(2) DCFR expresses this thusly: "rules for specific contracts may require information to be provided on a durable medium or in another particular form". This only replicates part of the original ACQP provision, however, because Art. 2:206(3) ACQP also states that specific form requirements take precedence over the obligations in this article. This clarification is missing in the DCFR version.

7. Remedies for Breach of Information Duties (Art. 2:207 ACQP)

The final issue to be considered in the context of pre-contractual information duties is which remedies for breach of such duties are supported in the *acquis*. Several directives which make available a right of withdrawal link the commencement of the period during which that right may be exercised to the correct provision of the various items of information (e.g., Art. 5 of the Doorstep Selling Directive; Art. 5(1) of the Timeshare Directive, and Art. 6(1) of the Distance Selling of Financial Services Directive). Indeed, it does appear to be established practice to delay the start of

the withdrawal period until all the required information is given, subject to a long-stop which varies between the directives. Art. 2:207(1) ACQP restates this, but also proposes, as a political issue, that the long-stop period should expire after one year from the conclusion of the contract.

Beyond this, finding a remedy for breach of information duties is more difficult. If a contract has been concluded on the basis of incomplete or incorrect information, then there may be expectations about the obligations of the party that should have provided this information regarding the performance of the contract which should be given effect, and this is stated in Art. 2:207(3) ACQP.

However, what might happen if no contract has been concluded? To a large extent, this matter has been left by the *acquis* to the national laws of the Member States. That said, the general principle of effectiveness (*effet utile*) of EU law requires suitable action by the Member States, and if one takes the approach by the *ECJ* in cases such as *Courage v Crehan*[52] and *Antonio Munoz Cia SA v Frumar Limited*[53] and develops it further, it does seem possible to state that a claim for damages for losses suffered as a result of a failure to comply with a pre-contractual information duty is a nascent aspect of the *acquis*. This has therefore been stated in Art. 2:207(2) ACQP as a possible remedy, particularly (but not exclusively) for the situation where no contract has been concluded. Overall, therefore, Art. 2:207 ACQP provides thus:

> *(1) If a business is required under Art. 2:203 to 2:205 above to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period commences when all this information has been provided. However, this rule does not postpone the end of the withdrawal period beyond one year counted from the time of the conclusion of the contract.*
> *(2) Even if no contract has been concluded, breach of the duties under Art. 2:201 to 2:206 entitles the other party to reliance damages. Chapter 8 applies accordingly.*
> *(3) If a party has failed to comply with its duties under Art. 2:201 to 2:206, and a contract has been concluded, this contract contains the obligations which the other party could reasonably expect as a consequence of the absence or incorrectness of the information. Remedies provided under Chapter 8 apply to non-performance of these obligations.*

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[52] Case C-453/99 [2001] ECR I-6297.

[53] Case C-253/00 [2002] ECR I-7289.

DCFR Version

This provision is of particular interest, because this is the only provision where a direct interaction between *acquis*-derived and Study Group texts in the pre-contractual duties section occurs. There are several noteworthy differences between Art. 2:207 ACQP and Art. II.–3:107, the corresponding DCFR provision.

Art. II.–3:107(1) DCFR contains many linguistic alterations if compared to Art. 2:207(1) ACQP, and reads as follows:

> *If a business is required under Art II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.*

Substantively, this alters nothing: the withdrawal period only commences once all the required information has been given, and there is a long-stop of one year from the time the contract was concluded, even if there is a failure to give all this information. However, Art. II.–3:107(1) DCFR is also narrower, because it delays the start of the withdrawal period only for a failure to provide the information required under Art. II.–3:103 DCFR. The ACQP provision also covered a failure to provide the information that has to be given in accordance with Arts. 2:204 and 2:205 ACQP.

Paragraph (2) has also been altered. In Art. 2:207 ACQP, a failure to comply with the information duties grants the intended recipient of that information the right to "reliance damages", to be determined in accordance with Chapter 8 ACQP. In Art. II.–3:107 DCFR, this has been changed to a basic rule that a business required to provide information is liable for any loss caused to the other party to the transaction by such a failure. This, in substance, is akin to the original ACQP rule, but expressed more elegantly.

Next, Art. II.–3:107(3) DCFR corresponds – with minor linguistic alterations – to Art. 2:207(3) ACQP. The main difference is that the cross-reference to the section on non-performance is, of course, to the relevant DCFR provisions. Whilst this is logical, this presupposes that the *acquis* approach and the DCFR approach are compatible, but this has not yet been fully investigated.[54]

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[54] See F. Zoll, "The Remedies for Non-Performance in the System of the Acquis Group" in this volume.

There are then two additional sub-paragraphs not found in Art. 2:207 ACQP. The new Art. II.–3:107(4) DCFR states that "[t]he remedies provided under this article are without prejudice to any remedy which may be available under Art. II.–7:201 DCFR (Mistake)." This sub-paragraph addresses the potential overlap between pre-contractual information duties and the provisions on mistake, which may also give rise to redress in circumstances where information about the subject-matter of the contract was not provided.[55] The ACQP do not contain any provisions on mistake, because this is not something currently addressed in the *acquis*.

Finally, a new sub-paragraph (5) contains an express statement about the mandatory nature of this provision. This provides as follows:

> *In relations between businesses and consumers the parties may not, to the detriment of the consumer, exclude the application of this rule or derogate from or vary its effects.*

This may be contrasted with the definition of the "mandatory nature of consumer rules" in Art. 1:203 ACQP, according to which "contract terms which are prejudicial to the consumer and which deviate from rules applicable specifically to relations between businesses and consumers are not binding on the consumer."[56] Whilst either approaches should produce the same outcome – i.e., ensuring the mandatory application of consumer-specific rules – the *acquis* definition is limited to contract terms, whereas the DCFR one also applies to other means of attempting to curtail the rights of consumers. The DCFR wording might therefore be preferable.

VI. Correction of Input Errors (Art. 2:301 ACQP)

It was already seen in the context of Arts. 2:204 and 2:205 ACQP that there are specific pre-contractual requirements in the field of electronic contracting. A further such provision is found in Arts. 11(2) and (3) of the E-Commerce Directive, which deals with the correction of input errors where contracts are concluded by electronic means. These two provisions have been restated in Art. 2:301 as follows: [57]

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[55] See e.g, R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform* (Cambridge: Cambridge University Press, 2004).

[56] This has yet to be approved by the Acquis Group: see *Acuis-Principles – Contract I*, p. 1, fn. 1, and pp. 34-37.

[57] As with Artt.2:204 and 2:205 ACQP, this is also only a preliminary principle. It will be redrafted and re-located to chapter 4 on contract formation.

(1) A business which offers the facility to conclude contracts by electronic means and without individual communication must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer. This rule is mandatory in the sense of Art. 1:203 in relations between businesses and consumers.
(2) Art. 2:207 applies accordingly.

As with other *acquis* in the field of pre-contractual duties, it is left to the Member States to create appropriate sanctions, but in the context of the ACQP, it was felt appropriate to include appropriate sanctions. Consequently, Art. 2:301(2) refers to Art. 2:207 on remedies for breach of pre-contractual information duties, and thereby treats a breach of this provision as akin to a breach of the pre-contractual information duties.

DCFR Version

Once more, there have been quite significant changes to the style and terminology of this provision, which has become Art. II.–3:201 DCFR. However, in substance, paragraph (1) remains unaltered.

Art. II.–3:201(2) DCFR differs significantly from Art. 2:301 ACQP. Instead of the cross-reference to Art. II.–3:107 DCFR (which corresponds to Art. 2:207 ACQP), a new paragraph (2) has been adopted instead. This specifies that

Where a person concludes a contract in error because of a failure by a business to comply with the duty under paragraph (1) the business is liable for any loss caused to that person by such failure.

Again, this makes more sense than the ACQP version, because this provision does not constitute an information duty, but rather a specific duty to provide a specific mechanism in the context of a particular means of contract formation to deal with any input errors. Tying this into the remedial scheme for a failure to comply with pre-contractual information obligations makes little sense

Art. II.–3:201(3) DCFR is another statement of mandatory character and follows the wording of Art. II.–3:107(5) DCFR. This context provides a better example to illustrate the advantages of the DCFR version over the wording used in the ACQP to express the mandatory nature of the provision, because there is unlikely to be a contract term that would disapply the rule that means for correcting input errors are provided.

VII. Work Still in Progress

Just as the DCFR 2008 is only a preliminary version of what will eventually become the final CFR, so are the ACQP not yet a finished item. There is still work to be undertaken in refining the principles already agreed, and the academic discussion of the work that has been published will have some influence on the Acquis Group's deliberations on any possible revisions.

Moreover, there are aspects not yet included in the ACQP, and drafting work will continue throughout the first half of 2008. In particular, there is now a need to consider whether it is appropriate to add provisions dealing with pre-contractual information duties in specific contracts such as Package Travel or Timeshare, which would flesh out the general statements found in Arts. 2:202 and 2:203. It might, for example, be possible to assess the many individual items required by these directives against the general headings already included in the adopted ACQP rules, and to consider whether the existing lists could be made more transparent, and, indeed, whether particular items are superfluous. This might assist in reviewing further the use of pre-contractual information duties in the *acquis*. Furthermore, there is yet a need to consider whether the rules on form could be enhanced by a provision on the type of language to be used (i.e., whether a particular official language can be required).[58] Language provisions can be found in several directives. For example, the Timeshare Directive requires that both the information document and the contract itself should be drafted in the language of the Member State where the purchaser is a resident, or the language of which the purchaser is a national. The purchaser has the choice in this case (Art. 4, second indent). Another example is the Insurance Mediation Directive, according to which information must be given in one of the official languages of the Member State of commitment, or one agreed by the parties (Art. 13(1)). Similar provisions can be found e.g., in the Life Assurance and Payment Services directives. In light of the multilingual nature of the EU, provisions on language may be of considerable importance in the functioning of the internal market.

Other matters to be considered might be whether there should be general provisions dealing with the burden of proving that the various pre-contractual information obligations have, in fact, been complied with, and with regard to the costs associated of providing information. In respect of both matters, the Payment Services Directive provides a model: Art. 32(1) specifies that no charge may be made in respect of the information that has to be provided in accordance with the Directive.

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[58] See also S. Whittaker, "The Language or Languages of Consumer Contracts" (2007) 8 *Cambridge Yearbook of European Legal Studies* 229-257.

Charges, which must be appropriate and in line with the actual costs incurred, may be imposed where information is provided more frequently or in addition to the mandatory requirements (Art. 32(2) and (3)). Moreover, Art. 33 grants Member States the option to impose the burden of proving compliance with the information obligations on the payment service provider. Both provisions are obviously context-dependent, i.e., were designed for dealing with information duties in the context of payment services. However, it might be possible (whether desirable or not) to identify a general rule for both costs and burden of proof.

Both the ACQP and the DCFR should therefore not be taken as the final word with regard to pre-contractual (information) duties at this stage. Although a lot has already been achieved, more work needs to be done – and that includes taking another look at the provisions already adopted in light of the academic debate which will follow in the wake of the publication of the DCFR (and has already commenced with regard to the first volume of the ACQP).

VIII. From the DCFR to a Revised *acquis* and Beyond

The DCFR is, of course, only a stepping-stone on the way towards the final CFR. Indeed, the Network of Excellence responsible for creating the DCFR will spend the remainder of 2008 on further refinements, before submitting its final DCFR towards the end of the year. The European Commission will then select those aspects of the DCFR needed to pursue its objectives, and produce the final CFR.[59] The immediate use to which the CFR is likely to be put is the revision of the consumer *acquis*. A *Green Paper* was published in February 2007.[60] This contained many significant proposals for improving the consumer *acquis*,[61] and legislative action is set to follow in due course. What was interesting, however, was the absence of any concrete proposals regarding the topic of this chapter: pre-contractual information duties. Although there is a short section dealing with remedies for breach of pre-contractual information duties, this is limited to asking whether there ought to be an extension to the right of withdrawal, where available, in such circumstances. There are no specific plans for reviewing existing pre-contractual information duties, in particular with a view to making these more user-friendly to both consumers

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[59] See H. Schulte-Nölke, "Contract Law or Law of Obligations? The Draft Common Frame of Reference as a multifunctional tool" in this volume.

[60] European Commission, *Green Paper on the Review of the Consumer Acquis* (COM(2006) 744 final).

[61] Cf. C. Twigg-Flesner, "No sense of purpose or direction? The Modernisation of European Consumer Law" (2007) 3 *European Review of Contract Law* 198-213.

and businesses; instead, this is regarded as a matter to be addressed in revising the sector-specific (vertical) directives.[62]

So whilst the final CFR will contain provisions on pre-contractual (information) duties which are not going to be vastly different from those discussed in this chapter, their eventual fate remains uncertain. It is to be hoped that they will be of some use as a "tool" from the "CFR toolbox" that can be used to fix the current problems associated with pre-contractual information duties in the *acquis*.

However, one final *caveat* needs to be made: despite the popularity of pre-contractual information duties, there has never been a thorough debate about the fundamental values underpinning *acquis* generally – a matter which has been of particular concern to the well-known *Study Group on Social Justice*.[63] In this context, the rationale for the introduction of detail pre-contractual information obligations in the *acquis*, has also not been debated at the European level.[64] Consequently, there is uncertainty about their rationale, and, indeed, whether the rules as adopted reflect that rationale. Perhaps this debate needs to be had before one can complete the review of the *acquis* and put the CFR to good use – maybe even in the form of an "optional instrument".[65]

IX. Conclusions

The purpose of this chapter has been to chart the development of the Acquis Principles on pre-contractual duties, particularly pre-contractual information duties, and to consider how these were inserted into the DCFR. These particular ACQP provisions are clearly identifiable in the DCFR and are an important and useful addition to the overall product. Whilst the process of adding the ACQP to the DCFR has, on occasion, helped to clarify the meaning, or simply improve the drafting, of individual ACQP provisions, there have also been instances where DCFR provisions depart from the source in the ACQP. From the perspective of the Acquis Group's work, such departures have not always been for the better, notwithstanding the apparent necessity of such changes for the overall coherence of the DCFR. In one or two instances, there are serious concerns about the substance of the DCFR provision compared to the

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62 *Green Paper*, p. 20.

63 See Study Group on Social Justice in European Private Law, "Social Justice In European Contract Law: A Manifesto" (2004) 10 *European Law Journal* 653-674.

64 See T. Wilhelmsson/C. Twigg-Flesner, *op. cit.*, esp. pp. 446-452.

65 The now famous "blue button": cf. H. Schulte-Nölke, "EC Law on the Formation of Contract – from the Common Frame of Reference to the 'Blue Button'" (2007) *European Review of Contract Law* 332-349.

corresponding ACQP rule, e.g., the changes made to Art. 2:201 ACQP in Art. II.–3:101 DCFR.

If one were to take the stage that has been reached in the development of the (D)CFR for a moment of reflection, one could raise the question whether the process of drafting the ACQP and their subsequent incorporation into the DCFR has been altogether successful. The ACQP restate what is already in the *acquis*, frequently after generalisation of the fragmented individual rules. However, this might not mean that the ACQP inevitably offer the "best solution" for dealing with a particular issue. Of course, the DCFR (and the CFR eventually to emerge) need to incorporate those matters already dealt with in the *acquis* to ensure that the CFR can be used for improving existing legislation. Provisions dealing with the matters also covered by the *acquis* (notably pre-contractual information duties, non-discrimination, right of withdrawal, and unfair terms in consumer contracts) therefore need to be included in the (D)CFR. However, rather than supplying the text of the relevant (D)CFR provisions, the ACQP could also be treated as the first step in a two-stage process, whereby the ACQP restatement is developed further on the basis of a comparative analysis of how the various national jurisdictions have transposed and supplemented *acquis*-based rules. Such an analysis (in part, of course, already undertaken in the *EC Consumer Compendium*[66]) might lead to a more comprehensive set of principles/model rules than the ACQP themselves do. This does not, by any means, imply that the ACQP are in some way of limited value; quite the opposite is the case: the ACQP are a crucial restatement of the *acquis* which is needed to understand what has already been achieved, as well as to identify where further work is needed in creating a more coherent *acquis* in the future.

Much of 2008 will see further intensive drafting activity by the various research groups before the final version of the DCFR is submitted to the Commission at the end of the year. As part of this, a review of how the ACQP were inserted into the DCFR is necessary – perhaps best undertaken within the Acquis Group. It is regrettable, however, that the pace at which this project has proceeded leaves little time for the various groups to retrace their steps and adjust the overall approach, even where this could provide an opportunity for an altogether higher quality product than the one already achieved.

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[66] H. Schulte-Nölke/C. Twigg-Flesner/M. Ebers, *op. cit.*

Non-Discrimination

Stefan Leible (Bayreuth)[*]

I. Introduction

The Principles of European Contract Law (PECL),[1] do not mention, let alone provide rules on the topic "protection against discrimination through private law".[2] At first glance, this might seem surprising. However, after giving it more thought this is not the case. The PECL are nothing more than a reflection of European private law as it stood at the era of their making, i.e. in the eighties and nineties of the 20th Century. At this time, the issue of discrimination was discussed against the background of human rights, but not against that of private law.[3] There were hardly any private law rules which dealt with the topic. In extreme cases, one would refer to general clauses such as good faith.

Towards the end of the last millennium, things started to change. The European Community entered the scene. In the Treaty of Amsterdam, its powers were extended. For the first time, the Community could now "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (Art. 13 EC Treaty).

It did not take long until the EC used this power to adopt no less than four directives against discrimination. Since then, the protection against discriminatory behavior has become a basic tenet in European private

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1 *Ole Lando/Hugh Beale* (eds.), Principles of European Contract Law, Parts I and II, The Hague 2000; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermannn* (eds.), Principles of European Contract Law, Part III, The Hague 2003.

2 On this topic, see the various contributions in *Stefan Leible/Monika Schlachter* (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006.

3 From a comparative law perspective *Matthias Lehmann*, Diskriminierungsschutz und Vertragsrecht – Entwicklungstendenzen im Rechtsvergleich, in Reiner Schulze (ed.), New Features in Contract Law, Munich 2007, pp. 67 et seq.; *Martin Schmidt-Kessel*, Fremde Erfahrungen mit zivilrechtlichen Diskriminierungsverboten, in Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006, pp. 53 et seq.

law. It is therefore clear that the Common Frame of Reference must also draw upon this subject.

But whoever tries to adopt general rules of protection against discrimination will enter a minefield of legal policy. The topic is likely to stir emotional debates, because it touches on political convictions, ideas of justice as well as the identity of those affected or partially affected. For instance, my Belgian colleague *Matthias Storme* considers the possibility to discriminate as a fundamental freedom.[4] Some even think non-discrimination would be the death knell for private law.[5] At the same time, others view the right not to be discriminated against as a human right that cannot be waived.[6] It is hard to imagine a wider rift of opinion.

II. Preliminary Considerations

The topic is so hot because of the fact that the protection against discrimination is no longer seen as a task exclusively delegated to the state, from now on, it shall also be guaranteed by private law. The function of private law has therefore, changed: it has been transformed into an instrument to achieve political goals; this was done by formulating prohibitions of unequal treatment. Private autonomous decisions, e.g. with whom to enter into a contract, may no longer depend on certain banned criteria. The principle of equal treatment as a corollary of the prohibition of illegal discriminations is considered to be everybody's social duty. It is viewed as part of distributive justice (*iustitia distributiva*), defined as justice in relation to other human beings.[7]

But the commandment to treat your fellows equally collides with another fundamental principle common to the legal systems of all EU Member States: freedom of contract. Party autonomy and freedom of con-

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[4] *Matthias E. Storme*, De fundamenteelste vrijheid: de vrijheid om te discrimineren (http://webh01.ua.ac.be/storme/vrijheidsprijs.pdf).

[5] Cf. the title of the contribution by *Tilman Repgen*, Antidiskriminierung; die Totenglocke des Privatrechts läutet, in Josef Isensee (ed.), Vertragsfreiheit und Diskriminierung, Berlin 2007, pp. 11 et seq.

[6] Cf. Recital 2 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37: "The right to equality before the law and protection against discrimination for all persons constitutes a universal right…".

[7] *Claus-Wilhelm Canaris*, Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht, Munich 1997, pp. 11 et seq.; *Jörg Neuner*, Vertragsfreiheit und Gleichbehandlungsgrundsatz, in Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006, pp. 73 et seq., 79.

tract as its most important pillar not only form the common basis of the Members States' legal rules on private law,[8] upon which Community law is built.[9] They are also the *conditio sine qua non* for the enjoyment of the fundamental freedoms and the fulfillment of the internal market.[10] It is unthinkable to have a system that is committed to the principles of an open market economy with free competition and at the same time not to recognize private autonomy.[11] Thus, freedom of contract is presupposed by the EC Treaty and is guaranteed by Community law.[12]

To begin with, freedom of contract must be interpreted as a formal rule of protection against interferences.[13] By doing so, it becomes immediately clear that private persons can choose their cocontractors, draft the terms of the contract or refuse to enter into a contract on the most arbitrary grounds. In short, they can do what they like in contract law. The reason is that private persons know best about their situation and their needs. That is why the law accords them freedom of contract.

On the other hand, it is also clear that party autonomy cannot be unrestricted, but must have some limits. Such limits can arise from the common weal and from certain individual interests. By virtue of its democratic mandate, the legislator has the right to flesh out the details of the limits to party autonomy. One of them is the prohibition to discriminate.

So far, the task to render the limits of party autonomy more precise was fulfilled by the national legislatures. More and more, it is taken over by the European Community. This is especially true in the field of anti-discrimination law. The EC has become a driving force in this area.[14] The

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[8] *Fritz Rittner*, Die wirtschaftsrechtliche Ordnung der EG und das Privatrecht, Juristenzeitung (JZ) 1990, pp. 838 et seq., 842; *Peter-Christian Müller-Graff*, Privatrecht und Europäisches Gemeinschaftsrecht (Gemeinschaftsprivatrecht), 2. ed., Baden-Baden 1991, p. 17.

[9] *Peter von Wilmowsky*, EG-Freiheiten und Vertragsrecht, JZ 1996, pp. 590 et seq., 591.

[10] *Peter von Wilmowsky*, (*cit.* fn. 8).

[11] *Stefan Leible*, Marktintegration und Privatrechtsvereinheitlichung – Notwendigkeit und Grenzen, in Andreas Furrer (ed.), Europäisches Privatrecht im wissenschaftlichen Diskurs, Bern 2006, pp. 5 et seq., 9.

[12] *Karl Larenz/Manfred Wolf*, Allgemeiner Teil des Bürgerlichen Rechts, 9. ed., Munich 2004, § 34 no. 22.

[13] The question has been treated extensively by *Ralf Poscher*, Grundrechte als Abwehrrechte, Tübingen 2002; *Matthias Ruffert*, Vorrang der Verfassung und Eigenständigkeit des Privatrechts, Tübingen 2001.

[14] Cf. the references in *Acquis Group* (ed.), Principles of the Existing EC Contract Law – Contract I: Pre-contractual obligations, Conclusion of Contract, Unfair Terms, Munich 2007, pp. 105 et seq.

Principles of the Existing EC Contract Law (ACQP)[15] as well as the Draft Common Frame of Reference (DCFR)[16] try to give account of this fact.

III. Non-Discrimination in Contract Law

1. The Attempt to Formulate a Prohibition Against Discrimination

In Book II ("Contracts and other judicial acts"), the DCFR immediately addresses the issue "Non-discrimination" in chapter 2. The first provision of this chapter, Art. II.–2:201 DCFR, introduces a right not to be discriminated against. According to this rule, a person has

> "a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods or services which are available to the public."

As can be inferred from the overall structure of the DCFR, the right not to be discriminated against corresponds to an obligation of the other party not to discriminate. This obligation serves as a basis for the remedies of the DCFR.[17] Art. II.–2:202 DCFR explains the meaning of discrimination, while Art. II.–2:203 DCFR provides for certain exceptions.

2. Non-Discrimination as a Problem of Contract Law

Before addressing the rules in detail, a more general question must be asked: is the protection against discrimination at all a problem of contract law? One could also take the opposite view and qualify it as a question of tort law. After all, every kind of illegal discrimination can also be seen as a violation of personality rights, resulting in an obligation to pay damages. However, European private law chooses a different standpoint – and for good reasons. It follows a dual approach: discrimination may be sanctioned like torts, but they must nevertheless be respected when negotiating a contract, entering into a contract and performing a contract. Art. III.–1:105 DCFR is quite explicit on this point:

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[15] *Acquis Group* (ed.), Principles of Existing EC Contract Law (*cit.* fn. 14).

[16] *Christian von Bar/Eric Clive/Hans Schulte-Nölke* (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Munich 2008.

[17] See *infra* IV.

> "Chapter 2 (Non-discrimination) of Book II applies with appropriate adaptations to:
> (a) the performance of any obligation to provide access to, or supply, goods, services or other benefits which are available to members of the public;
> (b) the exercise of a right to performance of any such obligation or the pursuing or defending of any remedy for non-performance of any such obligation; and
> (c) the exercise of a right to terminate any such obligation."

It would indeed be more than a minor mistake to solely focus on tort law and neglect contract law altogether.[18] The fact that the rules on non-discrimination must be respected not only when executing, but as well when negotiating a contract can also be inferred from the insertion of Art. II.–2:101 et seq. into Book II DCFR. The phrase "in relation to a contract" used in Art. II.–2:101 DCFR must be given a broad meaning, also covering pre-contractual behavior. The special mention in Art. III.–1:105 DCFR serves only to clarify that the obligation not to discriminate is not restricted to the pre-contractual stage, but governs the whole execution of the contract.

3. The Prohibited Grounds of Discrimination

The question is, however, which grounds for unequal treatment should be mentioned as prohibited by the DCFR. Art. 13 of the EC Treaty enumerates "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[19] As straightforward as this may seem, one has to bear in mind that the provision does not have any direct effect.[20] It merely serves

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[18] Cf. introductory note to the DCFR no. 31: "Private law must contribute to the protection of human rights and human dignity. In contract law and in pre-contractual relations, for instance, the rules on non-discrimination serve this purpose."

[19] On the background and historical development of the provision see *Mark Bell*, The New Article 13: A Sound Basis for European Antidiscrimination Law?, Maastricht Journal of European and Comparative Law (MJ) 1999, 5 et seq., 6 et seq.

[20] See, e.g., *Astrid Epiney*, in Christian Calliess/Matthias Ruffert, EUV/EGV, 3. ed., Munich 2006, Art. 13 EGV no. 1; *Carl-Otto Lenz*, in Carl-Otto Lenz/Klaus Borchardt (eds.), EU- und EG-Vertrag, 3. ed., Cologne 2003, Art. 13 EGV nos. 11 and 28; *Isabelle Pingel-Lenuzza*, in Philippe Léger (ed.), Commentaire article par article des traités UE et CE, Basel 2000, Art. 13 EC Treaty no. 2; *Rudolf Streinz*, Die Kompetenzen der EG zur Verwirklichung des Gleichbehandlungsgrundsatzes im Zivilrecht, in Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz

as an authorization to the Council to take appropriate action against discrimination within the framework of the European Community.

If one looks for guidance in the EC's secondary law, the situation does not become much clearer. While Directives 2000/43/EC[21] and

durch Privatrecht, Munich 2006, pp. 11 et seq., 24; *Rudolf Streinz* in Rudolf Streinz (ed.), EUV/EGV, Munich 2003, Art. 13 EGV no. 17. For a different view, cf. *Michael Holoubek*, in Jürgen Schwarze (ed.), EU-Kommentar, Baden-Baden 2000, Art. 13 EGV no. 9.

[21] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22. Cf. Affirmative Action in Europa. Positive Maßnahmen zur Förderung benachteiligter Personengruppen im Anwendungsbereich der EG-Richtlinien 2000/43/EG und 2000/78/EG, Aachen 2004; *Nikolaus Högenauer*, Die europäischen Richtlinien gegen Diskriminierung im Arbeitsrecht. Analyse, Umsetzung und Auswirkung der Richtlinien 2000/43/EG und 2000/78/EG im deutschen Arbeitsrecht, Hamburg 2004; *Gisela Kern*, Rassendiskriminierung im Zivilrecht. Zivilrechtliche Problemstellungen und Lösungsvorschläge bei der Umsetzung der Richtlinie 2000/43/EG unter Berücksichtigung der Rechtslage in Portugal, Baden-Baden 2007; *Christine Köhncke*, Vertragsfreiheit in Deutschland und Spanien. Unter Einfluss von Art. 3 Abs. 1 lit. h der Antidiskriminierungsrichtlinie 2000/43/EG, Hamburg 2006; *Astrid Lingscheid*, Antidiskriminierung im Arbeitsrecht. Neue Entwicklungen im Gemeinschaftsrecht auf Grund der Richtlinien 2000/43/EG und 2000/78/EG und ihre Einfügung in das deutsche Gleichbehandlungsrecht, Berlin 2004; *Matthias Mahlmann*, Gleichheitsschutz und Privatautonomie, Zeitschrift für Europäische Studien (ZEuS) 2002, pp. 407 et seq.; *Rainer Nickel*, Handlungsaufträge zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie 2000/43/EG, Neue Juristische Wochenschrift (NJW) 2001, pp. 2668 et seq.; *Karl Riesenhuber*, Das Verbot der Diskriminierung aufgrund der Rasse oder der ethnischen Herkunft sowie aufgrund des Geschlechts beim Zugang zu und der Versorgung mit Gütern und Dienstleistungen, in Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006, pp. 123 et seq.; *Klaus Röttgen*, Der zivilrechtliche Schutz vor Diskriminierung und seine verfahrensrechtliche Gewährleistung. Eine Untersuchung unter besonderer Berücksichtigung der Richtlinie 2000/43/EG sowie rechtspolitischer und rechtsvergleichender Aspekte, Munich 2004; *Dagmar Schiek*, Diskriminierung wegen „Rasse" oder „ethnischer Herkunft" – Probleme bei der Umsetzung der RL 2000/43/EG im Arbeitsrecht, Arbeit und Recht (AuR) 2003, pp. 44 et seq.; *Ingo Scholten*, Diskriminierungsschutz im Privatrecht? Beweis- und verfahrensrechtliche Probleme der Umsetzung der Richtlinie 2000/43/EG, Cologne et al. 2005; *Waas*, Die neue EG-Richtlinie zum Verbot der Diskriminierung aus rassischen oder ethnischen Gründen im Arbeitsverhältnis, Zeitschrift für Wirtschaftsrecht (ZIP) 2000, pp. 2151 et seq.

2004/113/EC[22] mention sex, ethnical or racial origin as prohibited grounds for discrimination,[23] Directive 2000/78/EC[24] also rules out different treatment based on religion, belief, disability, age or sexual orientation.[25] But this directive applies only with regard to employment and occupation, and hence does not cover private law in general. Thus, there is no reason to formulate a broad principle in the DCFR that would comprise discriminations on grounds other than "sex, ethnical or racial origin". Such an extension would have a strong political dimension. It would also not be justified by the common tradition in the legal systems of the Member States, at least as they stand today.

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[22] See *supra*, fn. 6. Cf. *Dirk Looschelders*, Das Verbot der geschlechterspezifischen Diskriminierung im Versicherungsvertragsrecht, in Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006, pp. 141 et seq; *Karl Riesenhuber/Jens-Uwe Franck*, Das Verbot der Geschlechtsdiskriminierung beim Zugang zu Gütern und Dienstleistungen, Zeitschrift für europäisches Wirtschafts- und Steuerrecht (EWS) 2005, pp. 245 et seq.; on the proposal for the directive cf. *Riesenhuber/Franck*, Verbot der Geschlechtsdiskriminierung im Europäischen Vertragsrecht, JZ 2003, pp. 529 et seq.

[23] Cf. Art. 1 Directive 2000/43/EC and Art. 2 Directive 2004/113/EC.

[24] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16. On the directive or on certain aspects of it see, e.g., *Solveig Hansen*, Affirmative Action in Europa. Positive Maßnahmen zur Förderung benachteiligter Personengruppen im Anwendungsbereich der EG-Richtlinien 2000/43/EG und 2000/78/EG, Aachen 2004; *Nikolaus Högenauer*, Die europäischen Richtlinien gegen Diskriminierung im Arbeitsrecht. Analyse, Umsetzung und Auswirkung der Richtlinien 2000/43/EG und 2000/78/EG im deutschen Arbeitsrecht, Hamburg 2004; *Pierre M. Kummer*, Umsetzungsanforderungen der neuen arbeitsrechtlichen Antidiskriminierungsrichtlinie (RL 2000/78/EG), Frankfurt a. M. 2003; *Martin Lüderitz*, Altersdiskriminierung durch Altersgrenzen. Auswirkungen der Antidiskriminierungsrichtlinie 2000/78/EG auf das deutsche Arbeitsrecht, Constance 2005; *Jochen Mohr*, Schutz vor Diskriminierungen im Europäischen Arbeitsrecht: Die Rahmenrichtlinie 2000/78/EG vom 27.11.2000 – Religion, Weltanschauung, Behinderung, Alter oder sexuelle Ausrichtung, Berlin 2004; *Heidi Reichegger*, Die Auswirkungen der Richtlinie 2000/78/EG auf das kirchliche Arbeitsrecht unter Berücksichtigung von Gemeinschaftsgrundrechten als Auslegungsmaxime, Frankfurt a. M. 2005; *Markus Sprenger*, Das arbeitsrechtliche Verbot der Altersdiskriminierung nach der Richtlinie 2000/78/EG, Constance 2006; *Matthias Triebel*, Das europäische Religionsrecht am Beispiel der arbeitsrechtlichen Anti-Diskriminierungsrichtlinie 2000/78/EG, Frankfurt a. M. 2005.

[25] Art. 1 Directive 2000/78/EC.

a) Race

One of the criteria prohibited as a ground for unequal treatment by the ACQP is "racial origin".[26] The phrase is by itself a problem, because it seems to embrace a crude theory of race.[27] Indeed, different wording such as "on racial grounds", as suggested by *Jansen* and *Zimmermann*, would avoid misunderstandings and would be more convincing.[28] At any rate, it is clear that European private law is not based on race theories.[29] On the contrary, it tries to prevent that people are treated differently on the basis of utterly unacceptable theories such as the race theory. On the other hand, European primary law also uses the term "racial origin".[30] For good reasons, the DCFR has chosen to deviate from this language and refers to "racial grounds". In this way, the subjective element of the criterion is highlighted even more.[31]

b) Nationality

EC law prohibits every kind of discrimination based on nationality,[32] be it in private or other relationships. However, all directives on non-discrimination exclude unequal treatment on the grounds of nationality

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[26] Art. 3:101 ACQP.

[27] *Nils Jansen/Reinhard Zimmermann*, Grundregeln des bestehenden Gemeinschaftsprivatrechts?, JZ 2007, pp. 1113 et seq., 1117.

[28] Cf. *Nils Jansen/Reinhard Zimmermann* (*cit.* fn. 27).

[29] Cf. Recital 6 Directive 2000/43/EC: "The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories." See also *Acquis Group* (ed.), Principles of the Existing EC Contract Law (*cit.* fn. 14) Art. 3:101 ACQP no. 13.

[30] Cf. Art. 13 EC Treaty: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, *racial* or ethnic *origin*, religion or belief, disability, age or sexual orientation." (emphasis added).

[31] See also *Acquis Group* (ed.), Principles of the Existing EC Contract Law (*cit.* fn. 14) Art. 3:101 ACQP no. 13.

[32] Cf. Art. 12 of the EC Treaty. This prohibition is the *leitmotiv* of the whole Treaty, its "Magna Charta". In this sense *Ernst Wohlfahrt*, in Ernst Wohlfahrt/Ulrich Everling/Hans Joachim Glaesner/Rudolf Sprung, Die Europäische Wirtschaftsgemeinschaft. Commentary, Berlin 1960, Art. 7 EWGV no. 1.

from their scope of application.[33] The DCFR follows these directives and also leaves out nationality. This does not mean that a gap would be created, because Art. 12 EC Treaty is – at least according to the majority opinion in the literature – horizontally applicable,[34] repetition of Art. 12 would only be narrative.

c) Age

Age is also not included within the DCFR, thereby contradicting the the *ECJ*'s judgment in *Mangold*.[35] In this decision, the Court asserts the existence of a general principle of non-discrimination based on age. Although the judges in Luxembourg realize that the principle of equal treatment in employment and occupation is not established by Directive 2000/78/EC – which only gives a general framework for combating discrimination for reason of religion or belief, disability, age or sexual orien-

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[33] Art. 3 (2) Directive 2000/43/EC; Art. 3 (2) Directive 2000/78/EC.

[34] See *Rudolf Streinz/Stefan Leible*, Die unmittelbare Drittwirkung der Grundfreiheiten, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2000, pp. 459 et seq., 460 and the references given there.

[35] *ECJ*, Case C-144/04, [2005] E.C.R. I-9981 – *Mangold*. On this decision and its consequences cf. e.g., *Jobst-Hubertus Bauer*, Ein Stück aus dem Tollhaus: Altersbefristung und der EuGH, Neue Zeitschrift für Arbeitsrecht (NZA) 2005, pp. 800et seq.; *Fausto Capelli*, Gli „accordi quadro" comunitari come strumenti per risolvere i conflitti nazionali in materia di lavoro, Rivista italiana di diritto del lavoro 1/2005, pp. 59 et seq.; *Wolfgang Koberski*, Befristete Arbeitsverträge älterer Arbeitnehmer im Einklang mit Gemeinschaftsrecht, NZA 2005, pp. 79 et seq.; *Moritz Lange*, Der Fall Mangold – Das Verbot der Altersdiskriminierung im Europarecht, Studentische Zeitschrift für rechtswissenschaft (StudZR) 2007, pp. 189 et seq.; *Anna von Oettingen/David Rabenschlag*, Europäische Richtlinien und allgemeiner Gleichheitssatz im innerstaatlichen Recht – Anmerkungen anlässlich des Mangold-Urteils des EuGH, ZEuS 2006, pp. 363 et seq.; *Ulrich Preis*, Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht. Der Fall „Mangold" und die Folgen, NZA 2006, pp. 401 et seq.; *Hermann Reichold*, Der Fall Mangold: Entdeckung eines europäischen Gleichbehandlungsprinzips?, Zeitschrift für Europäisches Sozial- und Arbeitsrecht (ZESAR) 2006, pp. 55 et seq.; *Dagmar Schiek*, Grundsätzliche Bedeutung der gemeinschaftsrechtlichen Diskriminierungsverbote nach der Entscheidung Mangold, AuR 2006, pp. 145 et seq.; *Gregor Thüsing*, Europarechtlicher Gleichbehandlungsgrundsatz als Bindung des Arbeitgebers?, ZIP 2005, pp. 2149 et seq.; *Marc Alexander Zedler*, Das Verbot der Altersdiskriminierung als allgemeiner Grundsatz des Europarechts: Anmerkung zu EuGH, Urteil vom 22.11.2005, C-144/04 – Mangold/Helm, Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2006, pp. 151 et seq.

tation[36] – they point to "various international instruments and in the constitutional traditions common to the Member States" as a source of such a principle.[37] In the opinion of the *ECJ*, those texts would result in a prohibition of non-discrimination which would have to be regarded as a "general principle of Community law".[38] It would therefore be "the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, by setting aside any provision of national law which may conflict with that law".[39]

However, this statement is hardly convincing. It is contradicted by the history and structure of Art. 13 of the EC Treaty. There is general agreement that this provision, which served as the basis for Directive 2000/78/EC, does not have any direct effect.[40] That is indeed what distinguishes Art. 13 from the prohibition to discriminate on the ground of nationality and sex, which by now have become directly applicable and bind the EC, the Member States as well as – in some cases – private persons. Moreover, it is somewhat surprising from a methodological point of view that the Court deduces a general principle of non-discrimination from a rather specific directive.[41] Consequently, the same approach would have to be taken with regard to the other reasons for discrimination mentioned in the directives, such as belief or sexual orientation. If one were to follow the *ECJ*'s line of argument, the transposition of Art. 13 in Community directives would ultimately become meaningless, since the prohibition on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation laid down in this provision could be used as a basis for a comprehensive rule against discrimination. This rule could justify any result which pleases the *ECJ*.[42] Moreover, the transformation of the directives into national law would be virtually superfluous.[43]

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[36] *ECJ*, Case C-144/04, [2005] E.C.R. I-9981 No. 74 – *Mangold*.

[37] *ECJ*, Case C-144/04, [2005] E.C.R. I-9981 No. 74 – *Mangold*.

[38] *ECJ*, Case C-144/04, [2005] E.C.R. I-9981 No. 75 – *Mangold*.

[39] *ECJ*, Case C-144/04, [2005] E.C.R. I-9981 No. 77 – *Mangold*.

[40] Cf. the references *supra*, fn. 20.

[41] *Norbert Reich*, Comment on the decision in "Mangold", EuZW 2006, pp. 21 et seq.

[42] *Kay Hailbronner*, Hat der EuGH eine Normverwerfungskompetenz?, NZA 2006, pp. 811 et seq., 814.

[43] *Jobst-Hubertus Bauer*, Ein Stück aus dem Tollhaus: Altersbefristung und der EuGH, NZA 2005, pp. 800 et seq., 803; *Norbert Reich*, Anmerkung zum Urteil „Mangold", EuZW 2006, pp. 17 et seq., 21.

As a side issue, it is worth noting that the *ECJ* omitted to furnish any evidence for the asserted "common tradition of the Member States' constitutions", by simply referring to the Recitals 1 and 4 of Directive 2000/78/EC. One may seriously doubt that such a tradition exists. For instance, the prohibition to discriminate on the ground of age has never been mentioned in the decisions of the German Constitutional Court.[44] All mandatory rules on retirement ages, be it of chimney sweepers, midwifes, engineers, notaries or doctors, were controlled against the standard of freedom to exercise a profession enshrined in Art. 12 of the Constitution, and have been generously upheld.[45]

Even if one were to conclude that an unwritten principle of non-discrimination on the basis of age truly exists and was accepted by the states through treaty law, this would not necessarily imply that it has a direct effect on private legal relationships. The same is true, by the way, for the European Convention on Human Rights, the provisions of which are addressed to the contracting States and not to private individuals.

The view that is taken here is also shared by the Advocate General *Mazák*. He stresses that: "indeed, various international instruments and constitutional traditions common to the Member States to which the Court refers in *Mangold* enshrine the *general principle of equal treatment*, but not – except in a few cases, such as the Finnish constitution – the specific principle of non-discrimination on grounds of age as such".[46] One cannot but agree with the Advocate General when he calls it a "a bold proposition and a significant move" to infer, solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on grounds of age – or any other specific type of discrimination as referred to in Art. 1 of Directive 2000/78/EC,[47] because it is "far from compelling" that the general principle of equality leads to a prohibition of discrimination on a specific ground.[48] As the Advocate General correctly points out, it is the task of the Community legislature and the Member States to take appropriate action to combat discrimination and

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[44] *Ulrich Preis*, Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht – Der Fall „Mangold" und die Folgen, NZA 2006, pp. 401et seq., 403.

[45] *German Constitutional Court*, BVerfGE 1, 264, 274 et seq.; BVerfGE 9, 338, 345 et seq.; NZA 1998, pp. 589 et seq.; BVerfGE 67, 1 (17 et seq.).

[46] Opinion of Advocate General *Mazák* in Case C-411/05 No. 88 – *Palacios de la Villa* (emphasis added).

[47] Opinion of Advocate General *Mazák* in Case C-411/05 No. 89 – *Palacios de la Villa*.

[48] Opinion of Advocate General *Mazák* in Case C-411/05 No. 94 – *Palacios de la Villa*.

to define the precise cases in which there is illegal discrimination.[49] New principles of equal treatment must be forged through political process, not by way of the *ECJ*'s deductive selection,[50] and, one might add, even less by the DCFR.

It has to be noted that the influence of European constitutional and primary law on private relationships shall not be denied. EC law may require the Member State to amend their private laws and to exclude any possibility of a violation of the general principle of equal treatment and of special prohibitions of discrimination.[51] This obligation applies not only to the legislative branch, but to the judicial branch as well,[52] for instance when it must interpret national law in conformity with primary law,[53] particularly general clauses. In all of these cases a robust basis for asserting a an obligation under European Constitutional or primary law is needed. Such a basis is missing with regard to anti-discrimination, and the *ECJ* has failed to provide it![54]

4. Justification

Another deliberate contradiction between the Community law as it stands and the DCFR concerns the possibility of justifying a discriminatory measure.

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[49] Opinion of Advocate General *Mazák* in Case C-411/05 Nos. 95 et seq. – *Palacios de la Villa*.

[50] *Norbert Reich*, „Mangold" und kein Ende – oder doch? – Kurzbesprechung zu den Schlussanträgen des Generalanwalts Ján Mazák vom 15.2.2007 in der Rechtssache C-411/05 – Félix Palacios de la Villa/Cortefiel Servicios SA, EuZW 2007, pp. 198 et seq.

[51] Cf. *Stefan Leible*, Fundamental Freedoms and European Contract Law, in: Stefan Grundmann (ed.), Constitutional Values and European Contract Law, The Hague 2008 (forthcoming).

[52] *Claus-Wilhelm Canaris*, Drittwirkung der gemeinschaftsrechtlichen Grundfreiheiten, in: Bauer/Czybulka/Kahl/Voßkuhle (eds.), Umwelt, Wirtschaft und Recht. Wissenschaftliches Symposium aus Anlass des 65. Geburtstages von Reiner Schmidt, Berlin 2002, pp. 29 et seq., 52.

[53] Cf. *Stefan Leible*, Die primärrechtskonforme Auslegung, in: Karl Riesenhuber (ed.), Europäische Methodenlehre. Grundfragen der Methoden des Europäischen Privatrechts, Berlin 2006, pp. 116 et seq.

[54] Unfortunately, the question was not addressed in *ECJ*, case C-411/05, EuZW 2007, pp. 762 et seq. – *Palacios de la Villa*, with a comment by *Adam Sagan*.

a) Status quo of Community law

Under the various directives, every indirect discrimination presupposes by definition that there is no justifying reason for the unequal treatment.[55] The situation is different with regard to direct discrimination. The standard example is the proscription to treat persons unequally on the grounds of race and ethnic origin in Directive 2003/43/EC.[56] It is formulated as an absolute principle without any exception, there is no possibility of justification. A counter-example is the prohibition of treating men and women unequally. Art. 4 (5) of Directive 2004/113/EC provides that differences in treatment between the two sexes shall not be precluded if they can be justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In addition, Art. 5 (2) of the same directive allows different premiums and benefits in insurance for men and women.[57]

b) Rules of the DCFR

It is understandable that the DCFR chooses not to differentiate between direct and indirect discrimination with regard to justification. Life is too multifold and unpredictable to allow for an *ex ante* provision of all necessary exceptions. All prohibitions of the DCFR are therefore relative and not absolute, which is spelled out in Art. II.–2:103 DCFR:

> "Unequal treatment which is justified by a legitimate aim does not amount to discrimination if the means used to achieve that aim are appropriate and necessary."

Dangers are not imminent. It is clear that all justifications call for a restrictive interpretation and are subject to the control by the *ECJ*. It also goes without saying that the conditions for a justification are more difficult to meet in the case of a direct discrimination than in the case of an indirect discrimination.[58]

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[55] See, e.g., Art. 2 (2) (b) Directive 2000/43/EC and Art. 2 (b) Directive 2004/113/EC.

[56] Art. 2 (2) (a) Directive 2000/43/EC.

[57] On this topic, see also *Dirk Looschelders*, Das Verbot der geschlechterspezifischen Diskriminierung im Versicherungsvertragsrecht, in: Stefan Leible/Monika Schlachter (eds.), Diskriminierungsschutz durch Privatrecht, Munich 2006, pp. 141 et seq., 146 et seq.

[58] *Acquis Group* (ed.), Principles of the Existing EC Contract Law (*cit.* fn. 14), Art. 3:103 nos. 3 and 4.

IV. Remedies

Legal regulation against discrimination can only be effective if the legal system provides the persons affected with powerfull remedies to vindicate their rights.

1. Status quo of Community Law

Unfortunately, Community law does not provide for any specific remedies that the victim of discriminatory behavior could use. All directives leave it to the Member States to determine the sanctions which are to be adopted in the event of discrimination taking place. They only require Member States to provide sanctions which are effective, proportionate and dissuasive.[59] However, all four directives set out that the sanctions may comprise the payment of compensation to the victim. Detailed provisions on damages can only be found in Art. 8 (2) of Directive 2004/113/EC and Art. 6 (2) of Directive 2002/73/EC. According to these rules, Member States shall introduce into their national legal system such measures as are necessary to ensure real and effective compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination. The directives set out that such compensation or reparation should be dissuasive and proportionate to the damage suffered.

2. Rules of the DCFR

The DCFR differs from the status quo of Community law in that it provides for an independent remedy. This approach is convincing. If one adopts a comprehensive system of rules against discrimination, one cannot skip over the question of remedies.

The relevant rule of the DCFR set out in Art. II.–2:104 (1) reads:

> "If a person is discriminated against contrary to II.–2:101 (Right not to be discriminated against) then, without prejudice to any remedy which may be available under Book VI (Non-contractual Liability for Damage caused to Another), the remedies for non-performance of an obligation under Book III, Chapter 3 (including damages for economic and non-economic loss) are available."

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[59] See Art. 15 Directive 2000/43/EC, Art. 17 Directive 2000/78/EC, Art. 8 (d) Directive 2002/73/EC and Art. 8 (2) Directive 2004/113/EC.

Thus, a plethora of remedies is available. However, the DCFR seems to deviate in this respect from the ACQP, which contain a different rule in Art. 3:201 ACQP:

> "(1) A person who is discriminated against on the grounds of sex, ethnic or racial origin in relation to contracts that provide access to, or supply goods or services which are available to the public, including housing, is entitled to compensation.
> (2) Where appropriate, the discriminated person is entitled to other remedies which are suitable to undo the consequences of the discriminating act, or to prevent further discrimination."

Thus, the basic remedy under the ACQP is compensation. But the right to compensation must be supplemented, if necessary, by further remedies, in order to remove the consequences of an unjustified discrimination. One can think, for instance, of the possibility to adapt the contract, to claim its invalidity, or the right to terminate it. All those rights are, however, also granted by the remedies for non-performance of an obligation in Book III, Chapter 3 of the DCFR. Yet a gap seems to remain with regards to the right to forbearance. It can be closed by using Art. III.–3:302 (1) DCFR, according to which

> "The creditor is entitled to enforce specific performance of an obligation other than one to pay money."

Since the "right not to be discriminated against" under Art. II.–2:201 DCFR leads to a corresponding "obligation not to discriminate",[60] Art. II.–3:302 (1) DCFR allows the victim to claim specific performance and prevent any violations in the future. It remains that the right to forebearance is much more explicitly spelled out in the ACQP than in the DCFR.

V. Burden of Proof

Problems similar to those mentioned are raised by the question of burden of proof.[61] All four directives on non-discrimination set out an identical rule in this regard. Accordingly, it is sufficient that "a person establishes, before a court or another competent authority, facts from which it may be

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[60] See *supra*, section III. 1.

[61] Cf. also *Peter A. Windel*, Der Beweis diskriminierender Benachteiligungen, Recht der Arbeit (RdA) 2007, pp. 1 et seq.; Beweisprobleme des AGG im Schuldrechtsverkehr, Zeitschrift für das gesamte Schuldrecht (ZGS) 2007, pp. 60 et seq.

presumed that there has been such discrimination".[62] In this case, the burden of proof shifts to the other party.

This modification of the ordinary rules is especially relevant in the run-of-the-mill cases of discrimination. These are the cases in which a landlord discriminates against a prospective tenant, and those in which restaurant owners or their personnel treat customers unequally. It is typical for these situations that the victim suffers from a lack of hard evidence, since either the discrimination is committed covertly or there are no witnesses or other means to prove the case. That is where the shift of the burden of proof becomes relevant: it forces the other side to give rational reasons for the unequal treatment and prove them. Such a rule can therefore, also be found in the DCFR, namely Art. II.–2:105 (1):

> "If a person who considers himself or herself discriminated against on one of the grounds mentioned in II.–2:101 (1) establishes, before a court or another competent authority, facts from which it may be presumed that there has been such discrimination, it falls on the other party to prove that there has been no such discrimination."

This provision raises a problem: under the directives, the Member States have discretion to provide for a different rule on burden of proof. [63] The DCFR curtails this discretion because it contains a uniform rule applicable in all Member States. The explanation for this fact is that the DCFR aspires to give comprehensive rules.

There is another, similar problem. All of the anti-discrimination directives allow the Member States to refrain from applying the rule on burden of proof with regard to procedures in which a competent authority has to investigate the facts of the case.[64] The DCFR reflects this rule in Art. II.–2:105 (2) DCFR, which is, however, again phrased as a uniform rule and not as a simple option. It reads:

> "Paragraph (1) does not apply to proceedings in which it is for the court or another competent authority to investigate the facts of the case."

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[62] See Art. 8 (1) Directive 2000/43/EC, Art. 10 (1) Directive 2000/78/EC and Art. 9 (1) Directive 2004/113/EC.

[63] See Art. 8 (2) Directive 2000/43/EC, Art. 10 (2) Directive 2000/78/EC and Art. 9 (2) Directive 2004/113/EC.

[64] See Art. 8 (5) Directive 2000/43/EC, Art. 10 (5) Directive 2000/78/EC and Art. 9 (5) Directive 2004/113/EC.

VI. Conclusion

By and large, the DCFR reflects the principles of existing Community law in the area of non-discrimination. But on a second level, it also develops some of those principles further. Finally, on a third level one can find independent rules that have been added to the text for the sake of completeness. Overall, I think the DCFR contains a coherent and convincing system of anti-discrimination rules.

At first glance, the divergences between the ACQP and the DCFR seem remarkable. After looking closely, however, it becomes clear that these divergences are due to the structure of the DCFR and do not lead to conflicting results. The sometimes different phraseology of the DCFR and the combination between its second and third books do not facilitate its application. Insofar, the rules of the ACQP were certainly more succinct and easier to grasp. But it seems that abstractions and cross-references are the price one has to pay for a comprehensive codification like the DCFR.

The Right of Withdrawal, the Acquis Principles and the Draft Common Frame of Reference

Evelyne Terryn (Leuven)

I. Introduction

The aim of this contribution is to have a closer look at the way the right of withdrawal has been dealt with in the DCFR and to see to what extent the DCFR rules present an improvement compared to the current *acquis* (VI). Such an exercise not only requires an overview of the current *acquis* (IV) and the Principles of the Existing EC Contract Law ("ACQP") (V),[1] but it also requires a further step back into the history and aim of the right of withdrawal, as an instrument to protect a party to a contract that is considered to be weaker (II and III).

II. History of the right of withdrawal

1. As a first preliminary remark it is useful to recall that the right of withdrawal is not a European invention.[2] Even before the Doorstep Selling Directive 85/577/EEC – the first European directive introducing such instrument – many national laws granted a right of withdrawal to the consumer in varying circumstances.

2. First proposals to introduce a legal "*Reurecht*" (right to repent) for an instalment sale already appeared in the nineteenth century at the *Deutsche Juristentag*.[3] Buyers would be in need of such right because of their weak psychological position: they would be tempted by the immedi-

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[1] The rules here referred to are the rules as published as preliminary results of the *Acquis Group* (ed.), Principles of the Existing EC Contract Law, Munich 2007.

[2] Cf. *T. Möllers*, Europäische Richtlinien zum Bürgerlichen Recht, Juristenzeitung (JZ) 2002, pp. 121-134.

[3] See *Ph. Heck*, Verhandlungen des 21. Deutschen Juristentags, 1891, 2nd vol., pp. 180-182, cited by *J. Hijma, W. Valk*, Wettelijke bedenktijd, Deventer, The Hague 2004, p. 5. See also *D. Heinrich*, Verbraucherschutz: Vertragsrecht im Wandel, in V. Beuthien (ed.), Festschrift für Dieter Medicus, Cologne 1999, pp. 199-209, 205.

ate enjoyment while the corresponding future obligations would be underestimated.[4] No agreement was, however, reached on this proposal on the *Deutsche Juristentag*. In Austria, a similar proposal emerged in 1931 which would have allowed the consumer buying on credit at the doorstep to withdraw his offer within three days or to withdraw from a contract within three days.[5] The proposal was not adopted but it reappeared some thirty years later and was adopted in quite similar wording in the *Ratengesetz* in 1961. In 1962 Switzerland followed, in the case of an instalment sale, a new Art. 226c of the *Obligationenrecht* states that "the instalment sale only enters into force for the buyer five days after the receipt of a copy of the contract signed by both parties".[6] It is quite striking that two different approaches to the right of withdrawal immediately emerged, although the regulations pursued the same aim. In Austria, the buyer was allowed to withdraw from a contract that has been concluded, in Switzerland, the moment of conclusion of the contract seemed to be postponed.[7] The discussion on the effect of a right of withdrawal on contract formation still exists in certain countries today.[8] The right of withdrawal finally also appeared in the German legislation by the end of the nineteen sixties, in the *Auslandinvestmentgesetz*,[9] where the buyer was granted a right of withdrawal in a doorstep selling situation. The *Gesetz über Kapitalanlagegesellschaften*[10] and the *Abzahlungsgesetz*[11] followed, as well as other acts, some of which implementing European directives.[12]

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[4] See for more information *E. Terryn*, Bedenktijden in het consumentenrecht, Antwerpen/Oxford 2008, no. 16 et seq.

[5] *D. Heinrich*, (*cit.* fn. 3), p. 205.

[6] „Der Abzahlungsvertrag tritt für den Käufer erst fünf Tage nach Erhalt eines beidseitig unterzeichneten Vertragsdoppelten in Kraft. Innerhalb dieser Frist kann der Käufer dem Verkäufer schriftlich seinen Verzicht auf den Vertragsabschluss erklären (...) verzichtet der Käufer auf den Vertragsabschluss, so darf von ihm kein Reugeld verlangt", cited by *D. Heinrich*, (*cit.* fn. 3), p. 205.

[7] *D. Heinrich*, (*cit.* fn. 3), p. 206.

[8] E.g. in Belgium, for more information see *E. Terryn*, (*cit.* fn. 4).

[9] *Gesetz über den Vertrieb ausländischer Investmentanteile und über die Besteuerung der Erträge aus ausländischen Investmentanteilen* (Auslandinvestmentgesetz) of 28 July 1969 (BGBl. I 986).

[10] KAGG, 14 January 1970 (BGBl. I 127).

[11] § 1 b Abs. 1 AbzG, that preceded § 7 *Verbraucherkreditgesetz*, inserted by the 2. *Novelle zum AbzG* of 15 May 1974, BGBl. I 1169, see *T. Möllers*, Europäische Richtlinien zum Bürgerlichen Recht, JZ 2002, pp. 121-134, 131.

[12] *Gesetz zum Schutz der Teilnehmer am Fernunterricht (FernUSG)* of 24 August 1976, BGBl. I 2525, *Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (HwiG)* 16 January 1986, BGBl. I 122, *Gesetz über den Versicherungsvertrag* 30 May 1908 *(VVG)*, as amended by *Gesetz zur Änderung versicherungsrechtlicher*

3. In Belgium, France, the Netherlands and the U.K., the right of withdrawal was first introduced for doorstep sales.[13] In France, the right of withdrawal becomes a popular instrument of consumer protection in the seventies.[14] In the Netherlands, the cooling off period is introduced with the 1973 Doorstep Selling Act (Colportagewet).[15] In the U.K., the Committee on Consumer Protection ("Molony Committee") first suggested in 1962 to make a "cooling off period" obligatory in cases of doorstep selling.[16] British mail order companies did already grant consumers such cooling off period on a voluntary basis. Finally in Belgium, the cooling off period first appears in 1970 for instalment sales in doorstep situations.[17]

Vorschriften 17 December 1990, BGBl. I 2864, *Gesetz über die Veräußerung von Teilzeitnutzungsrechten an Wohngebäuden (TzWrG)* 20 December 1996, BGBl. I 2154, and the *Fernabsatzgesetz (FernAbsG)* 27 June 2000, BGBl. I 987. The right of withdrawal in the HWiG, TzWrG and FernAbsG are based on European directives (see *G. Reiner*, Der verbraucherschützende Widerruf im Recht der Willenserklärungen, Archiv für die civilistische Praxis (AcP) 2003, pp. 1-45, 4).

13 See *E. Hondius*, De afkoelingsperiode in het ontwerp-colportagewet, Weekblad voor privaatrecht, notariaat en registratie (WPNR) 1971, pp. 329-333, 341-345.

14 *L. Bernardeau*, Le droit de rétractation du consommateur. Un pas vers une doctrine d'ensemble. A propos de l'arrêt CJCE, 22 avril 1999, Travel Vac, aff. C-423/97, La semaine juridique (J.C.P.) 2000, no. 218, pp. 623-628, 624 with reference to L. No. 72-6, 3 January 1972 and L. No. 72-1137, 22 December 1972 (*démarchage financier et placement à distance*), L. 22 December 1972 (*démarchage à domicile*, C. consom. Art. L. 121-125), L. No. 78-22, 10 January 1978 (*crédit à la consommation*, C. consom. Art. L 311-15), L. No. 81-5, 7 January 1981, amended by L. No. 85-608, 11 June 1985, No. 92-665, 16 July 1992 and No. 94-5, 4 January 1994, C. assur., Art. 132-5-1 (*assurance-vie*), L. 23 June 1989 (*courtage matrimonial*), L. 31 December 1989 (*réservation d'immeubles à construire*), L. No. 92-645, 13 July 1992 (*organisation et vente de voyages ou de séjours*), L. 6 January 1998, C. consom. Art. L. 121-16 (*vente à distance*), L. No. 98-566, 8 July 1998, C. consom. L. 121-64 (*contrats de jouissance d'immeuble à temps partagé*).

15 See *M. B. M. Loos*, De effectiviteit van de bedenktijd als instrument van consumentenbescherming, Tijdschrift voor Consumentenrecht (TvC) 2003, p. 6.

16 See *Final Report of the Committee on Consumer Protection* (Cmnd. 1781, 1962), paras. 525-529 ("Molony Report"). The idea taken up in the *Hire Purchases Act* from 1964, later i.a. also in the *Consumer Credit Act* 1974, *Insurance Companies Act* 1982 and *Timeshare Act* 1992. See on this also *B. Sher*, The 'cooling-off' period in door-to-door sales, UCLA Law Review, 1967/68, pp. 717-786.

17 See Art. 5 Act of 8 July 1957 on instalments sales, Belgian Official Gazette 26 July 1957, as amended by the Act of 8 July 1970. This act was later abolished by the 12 June 1991 *Consumer Credit Act*. It is only in 1991, with the adoption of the *Unfair Trade Practices Act* (*Wet van 14 juli betreffende de handelspraktijken en de voor-*

4. The Member States have of course in the mean time all implemented the European directives that grant the consumer a right of withdrawal (see below, IV. 1), but many countries have enacted additional legislation in recent years, for example in Belgium, where the consumer also enjoys a right of withdrawal when concluding a contract with a real estate broker or with dating agencies;[18] in the Netherlands, the consumer even has a right of withdrawal when buying immovable property.[19] Furthermore, in many countries, consumers already enjoy a right of withdrawal when concluding a consumer credit contract, although the current Consumer Credit Directive 87/102/EEC does not oblige Member States to do so.[20]

5. Although it is fair to say that an important part of the national legislation granting the consumer a right of withdrawal has a European background, I wish to stress the non-European origin of this right of withdrawal and the fact that in many countries "non-European based rights of withdrawal" exist, as the DCFR provisions on the right of withdrawal make certain choices on the contractual qualification of such a right; choices that are familiar to certain jurisdictions, but that are alien to the way the right of withdrawal is dealt with in other jurisdictions. If these choices in a DCFR make their way to new Community legislation – e.g. to a horizontal instrument – this will affect national contract law; in the first place for the "European based rights of withdrawal". But if coherence in national contract law is somehow pursued, "spontaneous" harmonization will be the only solution: the contractual qualification that has been adopted in the DCFR will then also need to be adopted for the non-European based rights of withdrawal.[21]

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lichting en bescherming van de consument), that the consumer also enjoys a right of withdrawal for other doorstep contracts.

[18] *Wet van 9 maart 1993 ertoe strekkende de exploitatie van huwelijksbureaus te regelen en te controleren*, Belgian Official Gazette 9 March 1993; KB van 12 January 2007 betreffende het gebruik van bepaalde bedingen in de bemiddelingsovereenkomsten van vastgoedmakelaars, Belgian Official Gazette, 10 January 2007.

[19] Act of 5 June 2003, supplementing title 7.1 (Sales and Barter) of the new Dutch Civil Code with provisions on the sale of immovable property and the determination and implementation of Title 7.12, Staatsblad 2003, p. 238.

[20] See however, *infra* II. 1, for the pending proposal on a revised consumer credit directive.

[21] Cf. M. B. M. *Loos*, The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization, European Review of Private Law (ERPL) 2007, pp. 515-531.

III. Aim of the right of withdrawal

6. As a second preliminary remark, I wish to reiterate the aim of the right of withdrawal. The right of withdrawal is an instrument that wants to ensure that the consent to a contract is informed, free and well-considered. It thus wants to maximise the chances for the contract concluded to be a fair contract. It is granted in those situations where the legislator *presumes* the consent of one of the parties does not present these characteristics and that the (formal) freedom of contract therefore does not provide sufficient guarantees for a fair contract: there is no "material" or effective freedom to contract. These situations in which there is no material freedom to contract may differ. There are two broad categories in which a right of withdrawal can be a useful instrument:[22]

a) in cases of "psychological deficits": mainly when the consumer is confronted with aggressive sales practices and is therefore not in a position to consider his decision appropriately;

b) in cases of "informational deficits": in situations where the consumer does not have sufficient information at his disposal to make a well-considered decision. This may be because of the complexity of the contract but it may also be because of the way in which the contract has been concluded (e.g. distance selling of goods).

This should also be kept in mind when having a look at the ACQP on the right of withdrawal and at the way they have been incorporated in the DCFR (see especially *infra* VI., 1. d)).

IV. Situation at European level

1. Overview of the directives and reasons for introducing a right of withdrawal

7. These reasons for granting the consumer a right of withdrawal are also reflected in the relevant European instruments. In addition, the achievement of the internal market has also been a reason to adopt consumer protection instruments at EU level. The first "European" right of withdrawal appeared in the Doorstep Selling Directive 85/577/EEC. The fact that a large number of Member States had adopted legislation in the

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[22] For similar categorisations, see i.a. *J. Hijma, W. Valk*, Wettelijke bedenktijd, The Hague 2004; *G. Reiner*, Der verbraucherschützende Widerruf im Recht der Willenserklärungen, AcP 2003, pp. 1-45; *P. Rekaiti, R. Van den Bergh*, Cooling-Off Periods in the Consumer Laws of the EC-Member States. A Comparative Law and Economics Approach, Journal of Consumer Policy 2000, pp. 371-408.

seventies to counter aggressive practices was one of the reasons for the proposal.[23] In 1994, the right of withdrawal was also introduced in the Timeshare Directive 94/47/EC.[24] Specific complaints on aggressive practices and abuses led to a report on timesharing at European level,[25] several resolutions of the European Parliament,[26] and a proposal for a directive in 1992.[27] About four Member States had specific legislation in force at the time; in the other Member States general contract law or tort law was applied. The application of these different sets of rules was felt to hinder the functioning of the internal market.[28] Further rights of withdrawal were introduced in the Distance Selling Directive 97/7/EC.[29] This directive was not so much adopted to deal with differences in national legislation, but rather to promote the use of new technologies as instruments to achieve the internal market.[30] The reason for introducing a right of withdrawal seems to be the lack of information caused by distance communication: the consumer is not actually able to see the product or ascertain the nature of the service provided before concluding the contract.[31] The Distance Selling of Financial Services Directive 2002/65/EC was in a way merely the logical consequence of the general

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[23] *H. Micklitz*, Richtlinie 85/577/EWG, in E. Grabitz, M. Hilf (eds.), Das Recht der Europäischen Union, Munich looseleaf, no. 2 and see recital 2 of the original proposal that dates back to 1977 (COM(1976) 544 final). For an overview of the legislation in the Member States before the adoption of the directive see *H. Schulte-Nölke, M. Ebers, C. Twigg-Flesner* (eds.), EC Consumer Law Compendium, available online at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm, p. 169.

[24] OJ L 280, 29.10.1994.

[25] Report by *M. Garcia*, (doc. A2-199/88), see *A. van Velten*, Het wetsontwerp inzake de koop van rechten van gebruik in deeltijd van onroerende zaken, WPNR 1996, pp. 73-77, 75.

[26] Resolution of the European Parliament of 13 October 1988 on the need to fill the legal gap in the time-share market, OJ C 290, 14.11.1988, p. 148 and Resolution of the European Parliament of 11 June 1991 A3-155/1, point 91, doc. PE 152.802, p. 54.

[27] Proposal for a Council Directive concerning the protection of purchasers in contracts relating to the utilisation of immovable property on a timeshare basis, COM(1992) 220 final, OJ C 222, 29.8.1992, p. 5.

[28] See considerations 4-6 of the proposal (*cit.* fn. 27).

[29] OJ L 144, 4.6.1997.

[30] On the background of this directive, see *E. Terryn*, Bedenktermijnen in het consumentenrecht, (*cit.* fn. 4), no. 258 et seq.

[31] Recital 14 of the Directive, see also Opinion of AG *Stix* Hackl of 11 November 2004 in *CFI* Case C-336/03, *EasyCar ./. Office of Fair Trading* [2005] ECR II-4667, para. 39.

Distance Selling Directive 97/7/EC.[32] Originally, financial services were also included in the proposal, but the Council wanted to exclude financial services for several reasons.[33] In 1998, a specific proposal for distance marketing of financial services followed.[34] It is quite interesting to see that in the original proposal the cooling off period was framed differently. Indeed, contrary to what is the case when physical goods are sold using distance selling means, the fact that a contract for (immaterial) financial services is concluded at a distance does not make it impossible to obtain all relevant information before the conclusion of the contract. This finding was originally reflected in the proposal of the Commission. There was a "right for reflection" before the conclusion of the contract: the supplier had to communicate all the contractual terms and conditions to the consumer and could not unilaterally modify these terms for a period of fourteen days. Only if the consumer had concluded the contract before the communication of the contractual terms and conditions or when the consumer had been "unfairly induced" to conclude a contract during the reflection period, the consumer would have a right of withdrawal after the conclusion of the contract.[35] This distinction was abandoned and the directive as finally adopted only knows a right of withdrawal after the conclusion of the contract.[36]

In my opinion, a right of withdrawal for *distance* selling of financial services after the conclusion of the contract is hard to justify. The means of communication itself does not create an information deficit as the services are immaterial and if extra time for consideration is granted because of the complex nature of the contract, it would be more logical to grant consumers a right of withdrawal for *all* contracts for financial services. I will come back to this below. The ACQP – and the DCFR rules that incorporate the ACQP – reflect the current *acquis*. When taking the step

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[32] See on the history of this directive: M. *van Huffel*, Commercialisation à distance des services financiers: derniers développements d'une – déjà – longue histoire ..., Révue Européenne de Droit de la Consommation (REDC) 2001, pp. 295-300.

[33] The specific nature of these services, the fact that specific legislation already existed for several aspects, and the fact the amended proposal excepted these services to a large extent from the right of withdrawal. See Common Position (EC) No. 19/95 adopted by the Council on 29 June 1995 with a view to adopting Directive 95/ /EC of the European Parliament and of the Council of ... on the protection of consumers in respect of distance contracts, OJ C 288, 30.10.1995, p. 1.

[34] Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, COM(1998) 468 final.

[35] See Artt. 3 and 4 of the proposal (*cit.* fn. 34).

[36] Cf. Art. 6 Distance Selling of Financial Services Directive 2002/65/EC.

towards a CFR, one may also wish to again question the appropriateness of a right of withdrawal limited to distance selling of financial services.

The "cancellation right" of Directive 2002/83/EC goes back to Directive 90/619/EEC on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (second life assurance directive).[37] The primary aim of this directive was the facilitation of the freedom to provide assurance services. The directive sought to facilitate the conclusion of life assurance policies in another Member State at the initiative of the policy holder ("passive free movement of services"). There was only limited liberalisation for the assurance policies concluded at the initiative of the insurer ("active free movement of services").[38] The right to cancellation was first introduced in this context: the Member States were obliged to grant the "active" policy holder a period of between 14 and 30 days from the time when he was informed that the contract had been concluded within which to cancel the contract.[39] The right to cancellation was essentially meant to allow the "active policy holder" sufficient time to consider the exact commitment entered into properly and to compare the contract concluded in another country with the contracts that are customary in his home country.[40] In the third life assurance directive 92/96/EEC the distinction between "active and passive free movement of services" was abandoned and the further liberalisation of the internal market for assurance services also implied that both passive and active assurance takers now enjoyed a cancellation right. Directive 2002/83/EC coordinates both the second and third life assurance directive and abolishes both directives.[41]

As to consumer credit, the original Consumer Credit Directive 2002/83/EEC did not grant the consumer a right of withdrawal. The pending proposal for a revised consumer credit directive could, however,

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[37] OJ L 330, 29.11.1990, pp. 50-61.

[38] *H. Claassens, H. Cousy*, Het algemeen kader van de richtlijnen van de derde generatie, in Centrum Verzekeringswetenschap der Katholieke Universiteit Leuven (ed.), De richtlijnen van de derde generatie. Het Europa van de verzekeringen, Antwerpen 1992, pp. 27-28.

[39] Cf. Art. 15 Directive 90/619/EEC.

[40] Explanatory memorandum proposal for a second directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (comments on Art. 15) ("droit de renunciation"), for more information on the background of this directive see *E. Terryn*, Bedenktijden in het consumentenrecht, (*cit.* fn. 4), no. 286.

[41] Annex 5 of Directive 2002/83/EC.

quickly change this situation.[42] Although the current directive does not oblige the Member States to grant consumer such rights, it does exist in many jurisdictions.[43] The minimum harmonisation character of the current directive allows Member States to do so.[44] Apparently, the main reason for the absence of such right in the directive was the lack of consensus between the Member States and the compromissary character of the directive.[45] The directive did suggest to include an information obligation in case national legislation granted a right of withdrawal.[46]

2. Inconsistencies

8. The way the right of withdrawal has been regulated at European level is not the best example of consistent and coherent regulation, but that has been pointed out many times before.[47] The terminology used varies from a "right to cancellation"[48] over a "right to renounce"[49] to a "right of withdrawal"[50] and different terms are sometimes used within the same

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[42] A second revised proposal was adopted in 2005 (COM(2005) 483 final). A Common Position on the second revised proposal was adopted in September 2007 and transmitted to the European Parliament for a second reading.

[43] For an overview of the current (diverging) regimes on withdrawal for consumer credit, see the discussion paper on the review of the Consumer Credit Directive 87/102/EEC, http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/cons_cred1a_en.pdf, footnote 31. The consumer currently has a right of withdrawal when concluding a credit contract in i.a. Germany, Belgium, France, England, Ireland and Luxembourg.

[44] Art. 15 Consumer Credit Directive 87/102/EEC.

[45] *J. Büßer*, Das Widerrufsrecht des Verbrauchers, Frankfurt 2001, p. 58 with reference to *G. Howells*, Seeking social justice for poor consumers in credit market, in I. Ramsay (ed.), Consumer law in the global economy, Aldershot 1997, p. 312.

[46] See Art. 4 (3) and the Annex. Art. 4 (3) provides that the written agreement shall include the essential terms of the contract. By way of illustration, the Annex to the Directive contains a list of terms which Member States may require to be included in the written agreement as being essential. Information on a cooling-off period was included in the Annex.

[47] See the Consumer Law Compendium for a good overview of the differences in regulation, pp. 702 et seq.

[48] E.g. in the Life Assurance Directive, 2002/83/EC.

[49] E.g. in the Doorstep Selling Directive 85/577/EEC (Art. 5).

[50] E.g. in the Doorstep Selling Directive 85/577/EEC (Art. 4) and the Distance Selling Financial Services Directive 2002/65/EC.

instrument.[51] The time periods for withdrawal differ and – what is harder to justify – so does the calculation of these periods. Some directives make it clear that the withdrawal period is timely when the consumer sends off his notice within the period for withdrawal ("dispatch rule"); other directives are silent or unclear in this regard. The rights and obligations of both parties during the period for withdrawal and after withdrawal are regulated differently.

9. Information obligations concerning the right of withdrawal also differ, as well as the sanction in the event of breach. Thus, the Distance Selling Directive 97/7/EC and the Timeshare Directive 94/47/EC provide for a prolongation of the right of withdrawal if the information required has not been provided, but with a cap of three months and three months plus ten days respectively. The Doorstep Selling Directive 85/577/EEC, on the other hand, does not provide for maximum period and the directive calculates the period for withdrawal from receipt by the consumer of the notice concerning his right of withdrawal. In *Heininger*,[52] the *ECJ* made clear that this implied that the Member States could not provide that the consumer's right of cancellation must in any event be exercised within a period of one year, even if the trader had not notified the consumer of the existence of that right.[53] The argument that it was essential, for reasons of legal certainty, to restrict the period within which the right of cancellation may be exercised, was held not to prevail since this implied a limitation of the rights expressly conferred on consumers by the Doorstep Selling Directive.[54] The *Heininger* decision thus allowed consumers who had not been properly informed to withdraw from doorstep contracts even years after they had been concluded. The findings of the Court can also be applied in cases of distance selling of financial services.[55] Directive 2002/65/EC indeed also calculates the period for withdrawal from the day on which the consumer receives the contractual

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[51] E.g. in the Doorstep Selling Directive 85/577/EEC.

[52] *ECJ* Case C-481/99 *Heininger ./. Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-9945.

[53] At para. 46 and 48. See also recently the Conclusion of AG *Maduro* of 21 November 2007, C-412/06, *Hamilton ./. Volksbank Filder eG*, who pleads for a certain refinement of *Heininger,* in that Member States should be allowed to set a time limit for exercise of the right of withdrawal from the moment the consumer was aware of should have been aware of his right of withdrawal, even if the seller did not provide the required information.

[54] See Doorstep Selling Directive, para. 47.

[55] *E. Terryn* (*cit.* fn. 4), no. 303; *L. Bernardeau*, Le droit de rétractation du consommateur: un pas de plus vers une doctrine d'ensemble. A propos de l'arrêt CJCE, 13 décembre 2001, Heininger, aff. C-481/99, J.C.P. 2002, no. 40, pp. 1719- 725.

terms and conditions and the required information, if that is later than the day of the conclusion of the contract and no maximum period for withdrawal is provided for.[56] The consequences for failure to provide the consumer with the required information thus vary from a prolongation to three months to an indefinite prolongation.

3. Gaps

10. Finally, there are important gaps in the European regulation of the right of withdrawal. The detail in which the right of withdrawal is being regulated differs widely. Older directives (e.g. Doorstep Selling Directive 85/577/EEC) tend to regulate the right of withdrawal only in essence, more recent directives provide for detailed provisions on, for example, the information to be given by the seller, on the obligations of both parties, on the effect of withdrawal on linked contracts etc.[57] Are gaps in the regulation of the right of withdrawal necessarily problematic? One could argue that it is then for the Member States to regulate these aspects and that such gaps allow Member States to take into account the specificities of their own national systems. Nevertheless, the effectiveness of the right of withdrawal depends to a large extent on the way in which it is regulated and such rules can make the difference between a theoretical right and a right that can be effectively exercised. Strict formal requirements, for example, can make it considerably more difficult for the consumer to withdraw; also the fact that the consumer remains bound by linked contracts can make withdrawal from the main contract useless. Finally, the extent to which the consumer can be held responsible for a loss of value to the goods during the period for withdrawal will have important effects.

11. Where directives do not deal with certain aspects, Member States remain competent to regulate them. However, this competence is not unlimited. The effectiveness of the Community legislation should indeed not be impaired. The only problem is that it is very hard to judge in advance what the requirement of "effectiveness" exactly implies. This leads to uncertainty at national level and to preliminary references to the *ECJ*. The answers to such references sometimes come as a "Jack in the Box" and can in a rather surprising and far reaching way rummage through national legislation. We have seen this with *Heininger* (cf. above) and the

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[56] Cf. Art. 6 Distance Selling of Financial Services Directive 2002/65/EC.

[57] Cf. the far more detailed provisions of the Distance Selling of Financial Services Directive 2002/65/EC.

Schulte and *Crailsheimer* cases have once more illustrated that gaps in the directives lead to uncertainty.[58]

Like *Heininger*, the *Schulte* and *Crailsheimer* cases are so-called "*Schrott-immobilien*" cases. In the early nineties, banks and property development companies in Germany started approaching consumers rather aggressively to sell their products,[59] often through intermediaries.[60] Investment into new buildings and restoration of old buildings was then heavily promoted, mainly through tax benefits for investors. The consumers were told that the operations could be completely financed through the anticipated rental income of the immovable property and through the tax benefits. The immovable property was, however, often worth substantially less than the price paid and the property could not be let profitably. The consumers were therefore obliged to pay the instalments from their own income. The intermediaries that had specialized in marketing these investments disappeared and often the only solvent addressees for consumer claims were the banks involved.[61] *Heininger* made clear that consumers could withdraw from their secured credit agreements even years after these agreements had been concluded if they had not been informed of their right of withdrawal. The interpretation of the eleventh Senate of the *Bundesgerichtshof* ("BGH") of the effects of withdrawal, however, soon made clear that the consumers only had a theoretical right of withdrawal. Exercise of this right obliged parties to return what they had received under the contract and to pay for the use of what had been supplied up to the date of cancellation.[62] Consumers cancelling a secured loan agreement therefore had to pay back the loan proceeds immediately (without instalment payments). In addition, interest at market rate was due. The BGH further refused to accept any implications for the linked contract (the contract for the purchase of immovable property). As such contracts

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[58] *ECJ* Case C-350/03, 25 October 2005, *Schulte ./. Deutsche Bausparkasse Badenia AG* [2005] ECR I-09215; *ECJ* Case C-229/04, 25 October 2005, *Crailsheimer Volksbank eG ./. Klaus Conrads and Others* [2005] ECR I-09273.

[59] Mostly flats or hotel rooms in other Länder or distant cities were offered for sale, often also more complex products such as participations in real estate funds.

[60] On the factual background of these cases, see a.o. *K.-O. Knops*, Die Umsetzung der EuGH-Urteile *Crailsheimer Volksbank* und *Schulte* für die Abwicklung an der Haustür vermittelter Finanzierungen von Anlagen in Immobilien und Immobilienfonds, Teil 1, Verbraucher und Recht (VuR) 2006, pp. 90-95.

[61] See *P. Rott*, Linked contracts and Doorstep Selling. Case note on *ECJ*, Judgments of 25 October 2005. Cases C-350/03-Schulte and C-229/04 – Crailsheimer Volksbank, Yearbook of Consumer Law 2006, pp. 403-410.

[62] *Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften* (Law on the cancellation of doorstep transactions and analogous transactions) of 16 January 1986, BGBl. I, p. 122 ('HWiG').

fall outside the scope of application of Doorstep Selling Directive,[63] direct withdrawal was impossible and withdrawal from the secured credit agreement – according to the BGH – did not affect the validity of the purchase contract. Withdrawal from a secured credit agreement thus put the consumers in a worse situation than if they did not exercise their right of withdrawal. In *Schulte* and *Crailsheimer*, several questions on the effects of withdrawal were referred to the *ECJ*.

12. The questions related i.a. to the consequences on national law of the absence of explicit provisions in the Doorstep Selling Directive, i.a. with regard to linked contracts. Contrary to other directives,[64] the Doorstep Selling Directive[65] is indeed silent on this issue. In *Schulte*, the *ECJ* was i.a. asked whether the requirements of a high level of protection in the field of consumer protection and of effectiveness of the directive allowed national law to limit the legal effects of withdrawal to the main contract without accepting any effect on a linked contract. The *ECJ* found that, in doorstep selling situations, it remains in principle for national law to decide whether there is an effect on a linked contract. It was indeed not evident for the *ECJ* to interpret the silence in the Doorstep Selling Directive 85/577/EEC as an express requirement to join the fate of the contracts at stake, especially in view of Art. 7 of the Directive that refers explicitly to national law as governing the legal effects of a renunciation. This case therefore illustrates that there are limits to the extent to which the principle of effectiveness can be relied on to deal with lacunae in the regulation of the right of withdrawal in the directives.

13. With regard to the effects of withdrawal more generally, the Court had to strike another difficult balance between the need to ensure the effectiveness of the Directive and the fact that it explicitly provides that the legal effects of withdrawal are to be governed by national law (Art. 7). The Doorstep Selling Directive itself only provides that cancellation is to release the consumer from any obligations under the cancelled contract. The *ECJ* accepted that cancellation of a secured credit agreement can give rise to restitutionary claims and that it leads, for the consumer and for the lender, to the restoration of the *status quo ante*.[66] The Directive was held

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[63] Art. 3 (2) (a) of the Doorstep Selling Act ('HWiG') that regulated these obligations at the material time.

[64] See Art. 7 Timeshare Directive 94/47/EC; Art. 6 (4) Distance Selling Directive 97/7/EC; Art. 6 (7) Distance Selling of Financial Services Directive 2002/65/EC, Artt. 3 and 14 of the second revised proposal for a new consumer credit Directive COM(2005) 483 final.

[65] And the Life Assurance Directive 2003/83/EC.

[66] *Schulte* (*cit*. fn. 58), para. 88.

not to preclude national legislation which obliges the consumer who cancels a secured credit agreement to repay the amounts received and to pay interest at the market rate.[67] The foregoing was, however, only the general principle. The *ECJ* did not rely directly on the need to ensure the effectiveness of the Directive to derogate from that general principle but chose to interpret Art. 4 (3) Doorstep Selling Directive extensively.[68] According to the *ECJ*, this article entails that in a situation where, if the Bank had informed the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue, Member States have to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.[69]

"Appropriate consumer protection measures" thus have to be taken by the Member State in such situation, but how exactly this ought to be translated into national law and to what extent it is still open for national courts to impose additional requirements to justify imposing the named risks on the banks,[70] was left open by the *ECJ*. The "*Schrottimmobilien*" cases therefore illustrate the importance for the effectiveness of a right of withdrawal of explicit rules on liability in restitution. They also illustrate the limited possibilities of the *ECJ* to deal with gaps in directives in preliminary reference procedures.

4. Plans at EU level to harmonize the rules on withdrawal

14. The need for more coherence is clearly felt at EU level. The European legislator has been aware of the discrepancies in the way the right of withdrawal is regulated for some time, and recently steps are being taken for a more comprehensive reform of the way the right of withdrawal is being regulated.

15. A statement by the Council and the Parliament that "the Commission will examine the possibility and desirability of harmonizing the method of calculating the cooling-off period under existing consumer-protection legislation", notably Directive 85/577/EEC on "door-to-door sales" was already added to the Distance Selling Directive 97/7/EC. In the

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67 *Schulte* (*cit.* fn. 58), para. 93; *Crailsheimer* (*cit.* fn. 58), para. 49.

68 This article provides that Member States are to ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this article is not supplied.

69 *Schulte* (*cit.* fn. 58), para. 101.

70 See C. *Hofmann*, Case note Schulte v Badenia, European Review of Contract Law (ERCL) 2006, pp. 376-385.

more recent 2003 Action Plan on a more coherent European contract law,[71] the different modalities concerning the right of withdrawal were also cited as a problematic example of inconsistent EC legislation in the field of contracts. In the Consumer Law Compendium, the divergences in the way the right of withdrawal is regulated have been criticized and it was suggested to bring together the common EC *consumer acquis* elements in a horizontal measure, which would then contain key general rules applicable to all relevant consumer protection directives. General rules on the right of withdrawal were suggested to be part of such horizontal instrument.[72] The Green Paper on the Review of the Consumer Acquis,[73] which heavily relies on the findings of the Consumer Law Compendium, proposes several options for the review of the *consumer acquis*. The adoption of a horizontal instrument to regulate common features, underpinned where necessary by sectoral rules, is clearly also the Commission's preferred option. The 2007 Green Paper furthermore contains several proposals to harmonize specific aspects of the right of withdrawal, including the period for withdrawal, the modalities of exercising the right of withdrawal and certain contractual effects of the right of withdrawal.[74]

V. The ACQP

16. In the ACQP, a preliminary version of which were published last year, the researchers of the Acquis Group have tried to a develop a general set of rules based on the current directives.[75] I will not go into detail explaining and justifying the choices that were made – this has been done in the principles and the comments to the ACQP and I therefore refer to them. I will however, reiterate the main choices made in so far as relevant to contrast them with the DCFR principles.

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[71] Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, COM(2003) 68 final, OJ 15.03.2003, point 16.

[72] Consumer Law Compendium Comparative Analysis (*cit*. fn. 23), pp. 746-747.

[73] COM(2006) 744 final.

[74] Although the Green Paper does represent a willingness to reform the provisions on the right of withdrawal more comprehensively, it should be kept in mind that not all relevant directives are included in the review. The review is limited to eight directives: the 85/577/EEC Doorstep Selling Directive; the 90/314/EEC Package Travel Directive; the 93/13/EEC Unfair Contract Terms Directive; the 94/47/EC Timeshare Directive; the 97/7/EC Distance Selling Directive; the 98/6/EC Price Indication Directive and the 98/27/EC Injunctions Directive.

[75] See *Acquis Group* (ed.), Principles of the Existing EC Contract Law – Contract I (Acquis Principles – ACQP), Munich 2007.

17. Chapter 5 ACQP on "Withdrawal" contains two sections: the first section contains a set of rules applicable to all individual rights of withdrawal within the different areas of European contract law (unless it is otherwise provided for by a *lex specialis*).[76] The second section sets out a number of specific situations in which the consumer enjoys a right of withdrawal. This second section will still have to complemented when the (revised) Consumer Credit Directive will finally be adopted and a specific provision on life assurance will also need to be provided. Life assurance has currently not been dealt with as insurance contract law is the specific area of research of the Project Group Restatement of European Insurance Contract Law which will deliver its Principles of European Insurance Contract Law at the same time to the Commission as the DCFR is delivered.

18. The rules in the first section will only apply where a party has a statutory right of withdrawal from a contract. These rules do not create a general right of withdrawal. Specific provisions remain necessary to grant a party such a right and these specific provisions may derogate from the general rules if this is considered necessary and justified to protect the party who is entitled to withdraw from the contract. What do these general rules then look like? First of all, a uniform period for withdrawal of fourteen calendar days was chosen (Art. 5:103 ACQP), thus partly deviating from the current seven, ten, (fourteen) and thirty days in the directives. Once more, it should be noted that such uniform period in these general rules does not preclude a *lex specialis* to provide for a different period if this is justified by specific needs of protection.[77] Furthermore, the beginning of the withdrawal period was harmonized, again subject to derogations in a *lex specialis*, but only where justified. As a general rule, the period for withdrawal only commences when the contract has been concluded, the information on the right of withdrawal has been provided and – if the contract is for the delivery of goods – the goods have been

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[76] Cf. Art. 5:101 ACQP.

[77] Nevertheless, some streamlining in the periods for withdrawal could in any event help to make the rights of withdrawals to become common knowledge. Available data indeed illustrate that this awareness is not at all optimal. An OFT study in the U.K. e.g. illustrated that only 6 % of the consumers was (spontaneously) aware of the existence of a right of withdrawal when buying in a doorstep situation. When informed that they did enjoy extra protection in such situation, 7 % could identify the right of withdrawal out of a list of four possibilities and 1 % of the participants could identify a seven days period as the relevant period for withdrawal (Studies on doorstep selling, OFT 2004, Annex K of the doorstep selling report, Consumers' knowledge of their rights when buying at the doorstep or in the home, p. 12, http://www.oft.gov.uk/Business/Market+studies/door step.htm).

received. It was also decided to provide for a maximum time limit of one year. As set out above, a similar (but shorter) maximum time limit can be retrieved in the Distance Selling Directive 97/7/EC and the Timeshare Directive 94/47/EC but not in the Doorstep Selling Directive 85/577/EEC nor the Distance Selling of Financial Services Directive 2002/65/EC and the *ECJ* indeed made clear that in doorstep selling situations, Member States could not provide for such a limit under national law.[78] The *acquis* was not consistent in this regard and in order to avoid the problems related to a potential eternal right of withdrawal, a maximum time limit of one year was proposed in the ACQP.

19. Further coherence was reached by referring to Regulation 1182/71 for the computation of the time period. The dispatch rule, again only referred to in some of the directives, was included as a general rule (Art. 5:103 (2) ACQP). This rule implies that the declaration of withdrawal is timely if it is dispatched within the withdrawal period, even if the other party receives it after the withdrawal period has lapsed. Exercise of a right of withdrawal is dealt with in Art. 5:102 ACQP: communication to the other party is required, but no reasons need to be given and no formal requirements are imposed. Exercise of a right of withdrawal is also possible by returning the goods. Some common principles on the information to be provided to the consumer on his right of withdrawal were deduced from the somewhat deviating provisions in the directives and form Art. 5:104 ACQP. The entitled party needs to be informed in textual form on a durable medium and in plain and intelligible language about the existence of a right of withdrawal, the period for withdrawal and the name and address of the person to whom withdrawal may be communicated.

20. So far, the rules set out mainly concern technical aspects of the right of withdrawal that should – in principle – not give rise to that much controversy.[79] At least they do not go to the core of national contract law. Defining the rights and obligations of parties during the period for withdrawal and especially the effects of withdrawal does affect the legal nature of the right of withdrawal and national contract law to a much larger extent. The ACQP take the point of view that the right of withdrawal does not affect the conclusion of the contract – this follows from Art. 5:103 (1) that generalizes Art. 6 (1) sent. 1 Distance Selling Directive 97/7/EC with regard to the calculation of the period of withdrawal: the entitled

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[78] *ECJ* Case C-481/99, *Heininger* [2001] ECR I-9945 and see *supra*.

[79] Although it must be said that there were objections from some stakeholders against not imposing any formal requirements for the exercise of the right of withdrawal.

party has a claim for performance during the withdrawal period and accordingly until the exercise of the right of withdrawal the contract should (initially) be considered valid and enforceable.[80] The ACQP thus accept that the existence of a right of withdrawal does not preclude the validity of the contract although an unstable situation exists until the right of withdrawal ceases to exist. This is in line with the Distance Selling Directive although – as set out in the comments – national implementing measures of other directives, such as the Doorstep Directive 85/577/EEC, sometimes provide that the contract is not "concluded" before the period for withdrawal has expired.[81] It would in any event not have been possible to adopt the concept of "pending invalidity" (schwebende Unwirksamkeit) as a general rule as this would not be reconcilable with the Distance Selling Directive 97/7/EC.[82]

21. More delicate than the effect of the existence of a right of withdrawal on the validity of the contract are the effects of exercising a right of withdrawal on the contract. As set out in the comments to the ACQP, the directives are based upon the main principle that through the withdrawal the performance obligations arising from the contract cease to exist and that performance of obligations already fulfilled are to be returned or reimbursed. The current provisions in the *acquis* and in *ECJ* case-law, however, do not conclusively determine whether the contract ceases to have effect retrospectively or whether the contract only ceases to have effect for the future when the consumer withdraws. The Advocate General in *Crailsheimer* did state that withdrawal "*has the effect of making the agreement void from the outset*", so that "*it seems that the status quo that existed before the conclusion of the agreement should be restored*". The wording of the *ECJ* in that case was not conclusive. The *ECJ* did not refer to the voidness of the contract, but merely referred to the restoration of the *status quo ante*. The *status quo ante* can be achieved both by considering that the contract has never existed and is to be regarded as void (claims for restitution are then often based on principles of unjustified enrichment), or through the establishment of specific legal obligations to return what one has received under the contract (cf.

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[80] Cf. Art. 6 (1) sent. 1 Distance Selling Directive 97/7/EC that calculates the period for withdrawal in the case of goods, from the day of receipt by the consumer and Art. 6 (1) sent. 3 in conjunction with Art. 7 (1) Distance Selling Directive 97/7/EC.

[81] See e.g. Art. 89 of the *Belgian Unfair Trade Practices Act* and see *supra*, no. 3.

[82] In Germany the concept of "schwebende Unwirksamkeit" – originally adopted with regard to doorstep selling – was also abandoned when the Distance Selling Directive 97/7/EC was implemented and the legal nature of the right of withdrawal was harmonized in §§ 361a and 361b BGB (now § 355 BGB) (see *Principles of the Existing EC Contract Law* (*cit.* fn. 75), p. 182).

§§ 357, 346 et seq. BGB). The directives and the case-law thus seem to leave it open to the Member States whether the contract a consumer withdraws from is ended retrospectively or only prospectively. As explained in the comments to the ACQP and as set out in more detail below, this question also remains subject to debate in a number of Member States.[83] Art. 5:105 (1) ACQP therefore only states that withdrawal terminates the obligations to perform the contract but the rule does not take stand in the discussion whether withdrawal extinguishes all contractual obligations completely (even *ex ante*) or whether it only ends the original obligations to perform at the moment it is exercised and replaces them by obligations to return and reimburse.[84] Art. 5:105 (2) ACQP only sets out – in a "contractually neutral way" – some rules that are considered to be essential in order to make the right of withdrawal an effective instrument of consumer protection and not to deter the entitled party from exercising its right of withdrawal. I will come back to these provisions and the way they have been incorporated in the DCFR in detail below (point VI. 1. d)).

22. Finally, the last article in Section 1 Chapter 5 of the ACQP deals with linked contracts (Art. 5:106 ACQP). Again, such a provision was felt useful in a general set of rules on the right of withdrawal as not all current directives deal with linked contracts and as this has proved to be problematic (as has been illustrated in *Schulte* (cf. *supra*)).

VI. From the ACQP to the DCFR rules

23. The right of withdrawal is clearly one of the parts of the DCFR where the *acquis* has had a role to play. As there were no specific provisions on withdrawal in the PECL, the DCFR rules on withdrawal are based on the proposals of the Acquis Group. Special care was taken to incorporate them in the broader structure that mainly reflects principles gained by a comparative law approach. The wording of the ACQP on withdrawal has been improved on several occasions and made consistent with the wording of the PECL. What are then the changes and the added value of the DCFR? I will briefly go through the articles of the DCFR.

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[83] See *Principles of the Existing EC Contract Law* (*cit*. fn. 75), pp. 182-183.

[84] See *Principles of the Existing EC Contract Law* (*cit*. fn. 75), p. 183.

1. Exercise and Effects (Book II Chapter 5 Section 1)

a) Scope

24. Art. II.–5:101 DCFR sets out the scope of the general articles in the first section of chapter 5 Book II as well as the mandatory nature of the rules of the chapter (cf. Art. 5:101 ACQP). It is, however, formulated somewhat differently, as the section applies "where under any rule in section 2 or Book IV" DCFR a party has a right to withdraw. Book IV deals with specific contracts, section 2 regulates "specific rights of withdrawal". I will come back to this structure in chapter VI. 2.

b) Exercise

Art. II.–5:102 DCFR "Exercise of right to withdraw",[85] is also fairly similar to the ACQP rule, however the wording of the article has been improved and it has been made clear that returning the subject matter of the contract will only be considered to be a notice of withdrawal if the circumstances do not indicate otherwise. The DCFR rule also states that withdrawal is exercised by "notice". The added value in the DCFR lies in the fact that it contains a detailed rule on "notice" (Art. II.–1:106 DCFR), making clear by which means notice can be given, when it becomes effective, when it reaches the addressee.[86] This rule cannot be considered to be a "restatement" of the national laws, as the national laws provide for deviating solutions in this regard.[87] This is as such not problematic as the rule provides for a clear answer to questions sometimes subject to debate in certain jurisdictions. It does, however, raise the question as to the exact effect of incorporating a term of the DCFR in a Community instrument if that term is further elaborated in model rules. It is

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[85] "A right to withdraw is exercised by notice to the other party. No reasons need to be given. Returning the subject matter of the contract is considered a notice of withdrawal unless the circumstances indicate otherwise."

[86] The current *acquis* did not allow the Acquis Group to develop a detailed rule on notice – the ACQP adopted a "grey rule" (Art. 1:301 ACQP) – indicating that notice may be given by any appropriate means. There were some indications that supported such rule in the *acquis*, but there was no basis in the *acquis* to fully develop how "notice" operates as the DCFR does.

[87] As it indeed appears from the notes to Art. I:303 PECL, where Art. II.–1:106 DCFR is mainly derived from. Both the dispatch and the receipt principle can be retrieved; actual knowledge is required in certain jurisdictions but not in others. In certain jurisdictions, clear rules are established, whereas in others, considerable room for appreciation is given to judges.

stated in the introduction to the DCFR that – if the DCFR were adopted by the European institutions as a CFR – a word or concept in a directive would be presumed to be used in the sense in which it is used in the CFR unless the directive states otherwise.[88] The question however rises whether the adoption of the DCFR as a guide for legislative drafting – would *also* indirectly imply the adoption of *model rules* when a word or concept that is elaborated in model rules is used in a directive? For example, whether the use of the term "notice" in say a revised timeshare directive would not only imply the adoption of the definition of "notice" in the (D)CFR but also the adoption of the model rule of Art. II.–1:106 (D)CFR. I did not find a direct answer to this question in the introductory notes to the DCFR. Clear decisions need therefore to be made on the consequences of the adoption of certain terms of the (D)CFR in a directive or a regulation. If the consequences are not clearly set out, the adoption of a CFR as a legislative guide may have consequences for national law that reach further than might have been envisaged. A harmonizing influence on national contract law is not necessarily problematic, but it should be made clear in the political debate. The adoption of a broad CFR is therefore not necessarily completely "harmless" (cf. no 71 of the Introduction to the DCFR). This is not to say that a broad CFR should not be adopted, the European institutions should just carefully consider and set out what the effects of the adoption of certain words and concepts of a CFR in a legislative instrument should be.

The comments to the DCFR will in any event have a very important role to play, as they will clarify to what extent the rules of the DCFR may deviate from the *acquis*, or from national law and will assist national and European decision-makers in appreciating the effects on national contract law.

c) Withdrawal period

25. Art. II.–5:103 DCFR, that regulates the period for withdrawal, is identical to the *acquis* rule and does therefore not provoke any comments. Similarly, Art. II.–5:104 DCFR on "Adequate notification of the right of withdrawal" reflects Art. 5:104 ACQP, albeit with improved wording.

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[88] See no. 64 of the introduction of the DCFR. See similarly *H. Beale*, who suggested that it would be useful if the definitions of the DCFR were adopted by the European institutions by an inter-institutional agreement or something equivalent, as a guide for legislative drafting. Whenever a term of the CFR would then be used in a horizontal instrument, that would create a presumption that the term is used in the sense in which it is used in the CFR (*H. Beale*, The Future of the Common Frame of Reference, ERCL 2007, pp. 257-276, 263).

d) Effects of withdrawal

26. Art. II.–5:105 DCFR "Effects of withdrawal", raises similar "problems" as Art. II.–5:102 DCFR. As set out before, there were only limited indications in the *acquis* to elaborate a complete set of rules dealing with all the effects of withdrawal. *Schulte* learnt that withdrawal implies the restoration of the *status quo ante*, but the case also illustrated that at least the Doorstep Selling Directive leaves considerable discretion to the Member States on the concrete elaboration of this principle. As indicated in the introduction to the DCFR, the consumer directives indeed presuppose the existence of certain rules in national law.[89] With regard to withdrawal, the directives presuppose certain rules on liability in restitution.

In the DCFR, as had been suggested in the comments to the ACQP,[90] a choice had to be made on the incorporation of the right of withdrawal in the wider system of contract law and law of obligations. The restitutionary principles that govern the situation after withdrawal do present similarities to other situations where a contract is "ended" and the parties are under an obligation to return what has been received under the contract. It does not seem appropriate to duplicate a set of rules to govern these restitutionary obligations. It seems preferable to refer to existing principles of contract law/ law of obligations – with amendments where appropriate due to the specific nature of the right of withdrawal. As said, the directives presuppose the existence of such rules, but such rules differ considerably in the different jurisdictions. It is therefore interesting to have a look at these rules before turning to the choice made in the DCFR.

Germany has detailed rules dealing with the effects of withdrawal. The right of withdrawal has been construed as a slightly modified "Rücktrittsrecht" (right of termination)[91] and the rules on termination (§§ 346 et seq. BGB) apply to the right of withdrawal, except where otherwise provided for (cf. § 357 para.1 sentence 1 BGB).[92] Exercise of the right of withdrawal operates *ex nunc* and brings the parties in an "Abwicklungsverhältnis", that replaces the original contractual duties to perform by duties to return and to reimburse.[93] Exercise of the right of withdrawal does not have retroactive proprietary effect.[94]

In other jurisdictions, there can be more uncertainty on the effects of withdrawal. Thus in the Netherlands, although the right of withdrawal is

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[89] See no. 70 and no. 74 of the introduction to the DCFR.

[90] *Principles of the Existing EC Contract Law* (*cit.* fn. 75), p. 183.

[91] G. *Ring*, in B. Dauner-Lieb (ed.), Schuldrecht, Bonn 2002, p. 546.

[92] § 357 BGB indeed derogates to some extent from the rules of §§ 346 et seq. BGB.

[93] *J. v. Staudinger*, Kommentar zum BGB, 14th ed., Berlin 2001, § 355, no. 21.

[94] *J. v. Staudinger*, (*cit.* fn. 93), § 355, no. 21.

systematically referred to as an "ontbindingsrecht" (right of termination),[95] this terminology seems to have been adopted without giving thorough thought to the exact consequences to be attached to it.[96] The terminology seems to imply that the rules governing restitution upon termination (Art. 6:269 et seq. Dutch Civil Code) would also apply upon withdrawal and withdrawal would terminate the contract *ex nunc*.[97] Some authors however do not accept that the rules that govern the effects of termination for non-performance should also govern the effects of withdrawal. *Sander* has argued this should not be the case as these rules are meant to deal with a situation where performance was problematic. The absence (or irrelevance) of non-performance is exactly what distinguishes the right to terminate the contract from the right of withdrawal.[98] Other Dutch authors, such as *Hijma* have pleaded to qualify the right of withdrawal as a right to avoid the contract retrospectively. The rules on unjustified enrichment (Art. 6:201 Dutch Civil Code) would then govern the effects of withdrawal.[99]

Many authors have indeed pointed out the similarities between the situations in which a party can avoid a contract because his consent was vitiated ("vices de consentement") and situations in which the consumer has a right of withdrawal.[100] The latter situations can be considered as situations in which the legislator *presumes* that the consent of the consumer was vitiated. Avoidance operates retrospectively and this is indeed the position that has been taken in several other jurisdictions with regard to the effect of withdrawal.

In the UK, as a general rule, exercise of the right of withdrawal has as an effect that the contract is treated as if had never been entered into,

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[95] With the exception of the recent Wet Financieel Toezicht (WfT) that implemented Distance Selling of Financial Services Directive 2002/65/EC. (See Art. 4:63 WfT and *M. Loos*, Le droit de rétractation aux Pays-Bas, in : Le droit de rétractation, Brussels forthcoming).

[96] *J. Hijma, W. Valk*, (*cit.* fn. 3), p. 30.

[97] Although the *Doorstep Selling Act* deviates in this regard and provides that withdrawal operates retrospectively (Art. 25 (5) Colportagewet).

[98] *C. Sander*, Consumentenbescherming bij transacties op afstand, The Hague 2001, 58-59. The Dutch Minister of Justice nevertheless was of the opinion that an analogous interpretation of the rules governing the effects of termination for non performance could be considered (*C. Sander,* ibid., pp. 58-59 with reference to Kamerstukken II, 1999/2000, 26 861, no. 5, p. 24).

[99] *J. Hijma, W. Valk*, (*cit.* fn. 3), p. 33.

[100] See e.g. *J. Hijma, W. Valk*, (*cit.* fn. 3), 33; *G. Reiner*, Der verbraucherschützende Widerruf im Recht der Willenserklärungen, AcP 2003, 1-45; *E. Terryn*, Bedenktijden in het consumentenrecht, (*cit.* fn. 4), no. 98 et seq.

except as otherwise provided.[101] The contract is terminated retrospectively and is considered to be void *ab initio*.[102] In Belgium, there is considerable discussion as to the effects of withdrawal but I have at least argued on what I believe good grounds in my PhD that withdrawal should be considered to work retrospectively and that the contract should be regarded as if it had never been entered into. Similar voices can be heard in France, where *Detraz* has pleaded to qualify the right of withdrawal as an avoidance of a contract.[103]

If it would have been accepted that withdrawal operates with retrospective effect, it would have been logical in the system of the DCFR to refer to the rules on unjustified enrichment to govern the effects, except as otherwise provided by the specific rules on withdrawal.[104] This is indeed the approach taken in case of avoidance of a contract (Art. II.–7:303 DCFR).

A different approach has now been taken in the DCFR by referring to the rules that govern the effects of termination (cf. Art. II.–5:105 (2) DCFR with reference to Art. III.–3:511 to III.–3:515 DCFR). This approach reflects the German approach. This is of course not something that is as such to be criticized but it should be made clear in the notes that other solutions are possible and are currently adopted in some Member States. Whereas the *acquis* and the ACQP in my opinion leave this open to the Member States, the article on withdrawal in the DCFR makes it clear that withdrawal is considered to operate *ex nunc*. Not only does withdrawal terminate the obligations to perform the contract (cf. Art. 5:105 ACQP), Art. II.–5:105 (1) DCFR also states that it terminates the contractual relationship and it follows from the definition of termination in the DCFR that this only work prospectively.[105] Such choice also implies the absence of retroactive proprietary effect.

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[101] See e.g. Regulation 10 (2) *Consumer Protection Distance Selling Regulations* 2000, Regulation 4 (6) of the *Consumer Protection* (Cancellation of Contracts Concluded away from Business Premises) *Regulations* 1987, *Consumer Credit Act* 1974 (section 69 (4)) – except as otherwise provided an agreement cancelled shall be treated as if it had never been entered into.

[102] *G. Guest, G. Lloyd*, Encyclopaedia of consumer credit law, London loose-leaf, comment on s. 69 *Consumer Credit Act* 1974, in the same sense *J. Macleod*, Consumer sales law, London 2002, p. 364.

[103] *S. Detraz*, Plaidoyer pour une analyse fonctionnelle du droit de rétractation en droit de la consommation, Contrats Concurrence Consommation, may 2004, pp. 7-13.

[104] Cf. what *J. Hijma* (*cit.* fn. 3) pleads for in the Netherlands.

[105] "Termination" in relation to an existing right, obligations or legal relationship, means bringing it to an end with prospective effect except in so far as otherwise provided (cf. Annex 1 DCFR).

Again, if the DCFR were to be adopted by the European institutions and used as a legislative guide e.g. when reviewing the *consumer acquis*, careful attention will have to be paid to the extent to which one wishes to incorporate the definitions but also the model rules of the DCFR. It will have to be spelled out clearly whether a rule stating that "withdrawal terminates the contractual relationship and the obligations of both parties to the contract" abolishes Member States' discretion on the retrospective or prospective effect of withdrawal and whether it also implies that the rules on restitution upon termination of the (D)CFR govern the effects of withdrawal (except where modified by more specific rules).

Spelling out the presupposed rules on liability in restitution nevertheless has very important merits: it indeed shows how the right of withdrawal interrelates with other provisions of national contract law and it answers many questions on the restitutionary effects of withdrawal for which it was difficult to find a solid basis in the *acquis*. It also shows that these presupposed rules on liability in restitution do determine to a large extent the effectiveness of a right of withdrawal so that the European legislature may want to go further in regulating the right of withdrawal in directives if it indeed wants to ensure the same (minimum) level of protection in the member states.

In the DCFR rules, only one possible way of interaction with other contract law rules could be illustrated. As said, the alternatives should be set out in the comments. In addition, if we look at the concrete implications of the reference in Art. II.–5:105 (2) DCFR to the rules on termination, some further modifications seem necessary to fully reflect the specific nature of the right of withdrawal. The basic rule in Artt. III.–3:511 to III.–3:515 DCFR, is that the recipient is obliged to return any benefit received by the other's performance. The same principle stemmed from Art. 5:105 (2) second sentence ACQP.[106] If possible, this benefit will be returned in kind but in certain situations return in kind will not be possible (e.g. if services have been provided or if the goods that were delivered were destroyed). In such cases, the recipient of the benefit will need to pay the value of the benefit. The DCFR clearly sets out such a rule (Art. III.–3:511 (4) DCFR) and it also determines how the value of such a benefit is to be determined (Art. III.–3:513 DCFR).[107] In the ACQP,

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[106] "Each party has to return at its own expenses to the other what it received under the contract, unless the contract provides otherwise in favour of the entitled party."

[107] "Art. III.–3:513: Payment of value of benefit

(1) The recipient is obliged to:

(a) pay the value (at the time of performance) of a benefit which is not transferable or which ceases to be transferable before the time when it is to be returned; and

there was no explicit rule to determine the value of the benefit as there was no clear *acquis* to base such rule on.

Already the first section of Art. III.–3:513 DCFR could be problematic in the case of withdrawal, as (1) (b) provides that the recipient needs to pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit between the time of receipt and the time when it is to be returned, but Art. II.–5:105 DCFR explicitly deviates from Art. III.–3:513 (1) (b) so that that problem is solved. However, the remainder of the DCFR article starts from the *agreed price* to determine the value of the benefit and this is, in my opinion, problematic. Derogations to this principle are foreseen in the article, but they are focused on the hypothesis that there were problems with the performance of one party. However, there is no need for non-performance for the consumer to have a right of withdrawal – non-performance is an issue that is totally separate from withdrawal. The actual performance may very well match the promised performance and the consumer may nevertheless want to withdraw from the contract. If the agreed price is then the sole standard to determine the value of the benefit, the right of withdrawal may miss its protective effect. The right of withdrawal aims to protect the consumer in situations where he lacks sufficient information or is put under pressure, e.g. in a doorstep selling situation (cf. III). In such a situation, the consumer is taken by surprise and will not be able to calmly compare prices before taking a decision. Such a situation may create a "situational monopoly" that can be exploited by traders to charge

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(b) pay recompense for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit between the time of receipt and the time when it is to be returned.

(2) Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed.

(3) The recipient's liability to pay the value of a benefit is reduced to the extent that as a result of a non-performance of an obligation owed by the other party to the recipient:

(a) the benefit cannot be returned in essentially the same condition as when it was received; or

(b) the recipient is compelled without compensation either to dispose of it or to sustain a disadvantage in order to preserve it.

(4) The recipient's liability to pay the value of a benefit is likewise reduced to the extent that it cannot be returned in the same condition as when it was received as a result of conduct of the recipient in the reasonable, but mistaken, belief that there was no non-conformity."

excessive prices ("monopoly rents").[108] There is empirical evidence that such situations are indeed abused by traders: the OFT found that in doorstep situations prices up to 144% higher than prices in a normal shop were charged.[109] If a consumer contracts e.g. in a doorstep situation for some maintenance work for his house and the trader starts performing the contract straight away, the consumer who finds out after a couple of days that the price is excessive and withdraws from the contract will need to pay the value of the work already carried out. If that value is determined according to the agreed price, the trader will actually be rewarded for charging excessive prices and will have an incentive to perform the contract during the period for withdrawal. The right of withdrawal will then not offer any protection to the consumer. Therefore, in the case of withdrawal, the agreed price can only be an indication in determining the value of the benefit but derogations should be possible in case of excessive pricing. A further modification to Art. III.–3:513 DCFR should thereto be inserted in Art. II.–5:105 DCFR.

A further addition to the ACQP is the fact that liability for use and the faith of improvements are now also dealt with in detail in the DCFR.

According to Art. III.–3:514 (1) DCFR, "the recipient is obliged to pay a reasonable amount for any use which the recipient makes of the benefit except in so far as the recipient is liable under Art. III.–3:513 DCFR (Payment of value of benefit) paragraph (1) in respect of that use". For withdrawal – this rule at first sight does not seem easy to apply. Art. III.–3:514 (1) DCFR refers to Art. III.–3:513 (1) DCFR. It is explained in the (draft) comments to this provision that Art. III.–3:514 (1) DCFR obliges the recipient of a returnable benefit to pay a reasonable amount for any use made of the benefit and that the exception in the second part of the paragraph prevents double liability from arising: in so far as the use of the benefit led to a reduction in the value of the (returnable) benefit and the debtor is already obliged to pay recompense under Art. III.–3:513 DCFR (Payment of value of benefit) paragraph (1) DCFR, there is no need to pay again. In the case of withdrawal, Art. III.–3:513 (1) will not be the only provision determining whether the recipient is liable for use of the benefit: Art. II.–5:105 (3) and (4) DCFR derogate from Art. III.–3:513 (1) DCFR to determine such liability. It might therefore be useful to ex-

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[108] See *P. Rekaiti*, *R. van den Bergh*, Cooling-Off Periods in the Consumer Laws of the EC-Member States. A Comparative Law and Economics Approach, Journal of Consumer Policy 2000, pp. 371-408, 379.

[109] See http://www.dti.gov.uk/ccp/topics2/doorstep.htm, annex I to the doorstep selling report, price variability for mobility aids, p. 6; see also *M. Eisenberg*, The bargain principle and its limits, Harvard Law Review 1982, pp. 741-802, 773, who reports prices in doorstep selling situations up to twice the prices charged in the normal shops.

plain in the comments that the reference to Art. III.–3:513 (1) DCFR has to be read as "Art. III.–3:513 (1) DCFR as modified by Art. II.–5:105" in case of withdrawal. Art. II.–5:105 (4) DCFR provides that "the withdrawing party is liable for any diminution in value caused by normal use, unless that party had not received adequate notice of the right of withdrawal". This then means that if the party has been informed of the right of withdrawal and the value decreased due to normal use, he will have to pay for the diminution in value but not for the use. Thus if the consumer buys a car through the internet, and uses it to go on holiday and withdraws from the contract once he returns, he has done more than merely testing and inspecting it (cf. Art. II.–5:105 (a) DCFR) and will need to compensate for the decrease in value of the car if he was informed of his right of withdrawal. If the consumer has not been informed of his right of withdrawal and uses the car during two weeks or more (as he will have a longer right of withdrawal), he will not have to compensate for the decrease in value as the care is no longer new (Art. II.–5:105 (4) DCFR), but he will have to pay a reasonable amount for the use of the car (Art. III.–3:514 (1) DCFR). The market rental price then seems a reasonable amount. Such rule does not seem to interfere with an effective right of withdrawal.

Art. III.–3:514 (2) DCFR deals with improvements. Again, this is an addition compared to the ACQP, but the rule does not seem problematic in case of withdrawal. It any event, as the period for withdrawal will be limited to fourteen calendar days if the consumer was correctly informed, the hypothesis that the consumer would have improved the benefit in the mean time, but then nevertheless decides to withdraw is rather unlikely. The fact that in this situation no right to payment of the value of the improvement exists (Art. III.–3:541 (2) (b) DCFR) does therefore not seem that problematic. The period for withdrawal can be longer (but remains limited to one year) if the consumer has not been correctly informed. In such situation the consumer will be entitled to the value of improvements under Art. III.–3:541 (2) DCFR. It should, however, be said that current national provisions may differ from this DCFR rule to the advantage of the consumer. For Belgian law, for example, I came to the conclusion that the consumer that had improved the benefit to be returned would be entitled to compensation for all costs made in case the expenses were necessary; to compensate for the value of the benefit if the expenses were useful, and if they were superfluous, no compensation was due.[110]

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[110] See *E. Terryn*, Bedenktijden in het consumentenrecht (*cit.* fn. 4), no. 753 (starting from the presumption that withdrawal operates retrospectively), and see *T. Starosselets*, Restitutions consécutives à la dissolution ex tunc, Tijdschrift voor Belgisch Burgerlijk Recht (TBBR) 2003, pp. 67-86, 79 et seq.

One last question that needs to be tackled is the question whether the requirement in *Schulte* and *Crailsheimer* that "in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Art. 4 of the [Doorstep Selling] Directive requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks" is adequately reflected in the DCFR rules.[111] The *ECJ* has made a distinction in these cases between the situation in which the consumer has been informed of his right of withdrawal and the situation in which he has not been informed, but left considerable discretion to the Member States as to how to implement such distinction.

As regards compensation for a reduction in value due to normal use, the ACQP did distinguish depending on whether the consumer had received reasonable notice (Art. 5:105 ACQP). Incorporation of these principles into the DCFR has not changed this: Art. II.–5:105 DCFR modified the general rules on termination in this regard.

As regards the obligation to pay the value of the benefit which is not transferable and as regards compensation for use, the DCFR rules do not distinguish depending on whether the consumer has been informed of his right of withdrawal (Artt. III.–3:513 to III.–3:514 DCFR). This seems, however, not necessarily problematic or in conflict with the jurisprudence of the *ECJ*. In the DCFR, a set of remedies is available for breach of information duties: specific remedies (i.a. in the form of a prolongation of the period for withdrawal Art. II.–3:107 DCFR cf. Art. 2:207 ACQP), but also the general remedies for non-performance are available Art. II.–3:107 (3) DCFR). These general remedies include the right to damages for loss caused by the debtor's non-performance, in this case the breach of the information duty (Art. III.–3:701 DCFR). It seems that such remedy could be considered to constitute "suitable means to allow a consumer to avoid bearing the consequences of such risks".

e) Linked contracts

27. Art. II.–5:106 DCFR deals with linked contracts. Again, this article is not based on a prior PECL rule, but reflects the *acquis* and is based on Art. 5:106 ACQP, albeit with certain changes; thus has Art. 5:106 (2) ACQP been abolished which stated that "contracts are linked if they ob-

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[111] See the case *Crailsheimer* (*cit.* fn. 58), para. 49. Similar in *Schulte* (*cit.* fn. 58), no. 14. *T. Starosselets* (*cit.* fn. 110), p. 79.

jectively form an economic unit". The DCFR now does not contain any general indication on how to determine when contracts are sufficiently closely connected so as to be considered as linked contracts. Paragraph (2) of Art. II.–5:106 DCFR does set out the criteria that can be taken into consideration when a contract is financed by a credit contract, but other contracts than credit contract can also be linked contracts (e.g. a contract for the purchase of a car and a car insurance contract), so that the abolition of Art. 5:106 (2) ACQP is in my opinion not an improvement.

The fact that criteria to determine what linked contracts are, are only set out for credit contracts, might also create the false impression that the category of linked contracts is limited to contracts that are financed by credit contracts and this would contrast with Art. 5:106 ACQP and it would also be contrary to the *acquis* (more particularly to the Distance Selling of Financial Services Directive 2002/65/EC). The comments can of course clarify this.

2. Particular Rights of Withdrawal (Book II Chapter 5 Section 2)

28. In the DCFR, apart from the general rules on withdrawal in section 1, a section 2 on "particular rights of withdrawal" was also incorporated. The rules on "Contracts negotiated away from business premises" and "Timeshare contracts" have been taken from the ACQP principles with minor amendments (cf. Artt. II.–5:201 to II.–5:202 DCFR with Artt. 5:201 to 5:202 ACQP). This approach illustrates how the chapter works and how sections 1 and 2 interrelate with each other. Section 1 determines how a right of withdrawal functions; the provisions in section 2 determine when a party is entitled to withdraw. These specific provisions may derogate from the general provisions in Section 1 if this is necessary. Thus, although as a general rule performance is not barred during the period for withdrawal (cf. section 1), the specific provision on timeshare contracts derogates from this rule, as it is provided that the business must not demand or accept any advance payment by the consumer during the period in which the latter may exercise the right of withdrawal (Art. 5:202 (3) ACQP / Art. II.–5:202 (3) DCFR).

Although it thus seemed useful to include specific rights of withdrawal in the ACQP, I hesitate whether it is useful at this point in time to include these specific provisions in the DCFR. Protection through a right of withdrawal is not the only protection the specific directives – where these provisions stem from – grant the consumer. It would then seem more logical to also include specific provisions on information requirements for e.g. timeshare contracts. Also, the list of specific provisions is as yet not complete. A specific provision for life assurance is lacking as

well as a specific provision on consumer credit (as the directive has still not been adopted). In any event, a thorough political debate on the desirability of certain rights of withdrawal seems necessary (cf. *supra* chapter IV. 1 with regard to the right of withdrawal for distance selling of financial services). Finally, it seems somehow illogical to have both Book IV dealing with specific contracts and provisions on the right of withdrawal for specific contracts in Book II., chapter 5, section 2.

VII. Conclusion

The ACQP on withdrawal have definitely had their importance for the DCFR: the PECL did not focus on consumer contracts and there were no provisions on the right of withdrawal. The relevant provisions of the DCFR quite closely reflect the ACQP, be it that the wording was adjusted to the DCFR rules and has often been improved. This is, however, not the only added value of the DCFR. The rules on withdrawal have been embedded in a wider system of law of obligations. This allowed answering questions the current *acquis* did not allow to answer unequivocally. Whereas the *acquis* (and therefore also the ACQP) did not answer all questions relating to the effects of the right of withdrawal, this has been solved in the DCFR by a clear choice to refer to the rules determining restitution upon termination, albeit with certain modifications. This choice also implies that withdrawal has no retrospective effect in the DCFR system.

This integration in a wider system of contract law or law of obligations is as such to be welcomed. It spells out the national rules that are presupposed by the directives (i.a. the rules on liability in restitution) and it makes it clear that these rules have an important effect on how withdrawal functions. However, some further modifications from the rules that govern the effects of termination seem necessary to assure the effectiveness of the right of withdrawal as an instrument of consumer protection. Thus, for example, the reference to the agreed price to determine the value of the benefit that cannot be returned in kind is problematic in cases of excessive pricing. In addition, it should be kept in mind and be set out in the comments to the DCFR that the contractual qualification chosen in the DCFR was not the only option. It would equally have been possible (as illustrated by some national systems) to determine that withdrawal does operate retrospectively and to refer to the rules on unjustified enrichment – also with certain modifications – to determine the effects of withdrawal.

If the provisions of the DCFR were to alter from a "Draft CFR" to a "CFR" and to be used as a drafting tool, the European legislator will moreover have to ensure that it is very clear from the regulation or direc-

tive in question to what extent these choices on contractual qualification of the right of withdrawal in a CFR are also indirectly incorporated in the *acquis* by copying out concepts, terms or model rules or whether merely the result of the rule (e.g. the maximum liability in restitution of the consumer) is binding so that Member States remain free to choose their own contractual qualification for the right of withdrawal.

Non-Negotiated Terms

Thomas Pfeiffer (Heidelberg)

I. Introduction

Comparing existing EC-contract law to the Draft Common Frame of Reference is at the same time both easier and more difficult than in other parts of contract law: on the one hand, it is easier, because there is a particular legal instrument in EC law which deals with the problem of non-negotiated terms, namely Directive 93/13/EEC on Unfair Contracts. On the other hand, such a comparison is more difficult because the core provision on the unfairness of contract terms – Art. II.–9:404 DCFR[1] – is one of the few provisions in the DCFR, which is phrased in two different versions due to the circumstance that a consensus between the Acquis Group and the Study Group could not be achieved.

This controversy indicates that the rules on unfair or non-negotiated terms are more significant for general conceptions of contract law than the rules of many other parts of contract law. They are closely related to basic concepts of freedom of contract and of contractual fairness. Moreover, they raise the general problem whether both freedom of contract and contractual fairness can be best achieved by standardised ("hard and fast") rules or by looking at each case individually.

To be sure, it is impossible to answer these fundamental questions of contract law within the framework of this article. However, it may be helpful to have them in mind when we look at the DCFR rules on unfair terms.

The following remarks address three main topics: the extended scope of application of the DCFR compared to the Unfair Terms Directive (*infra* II.), the different way as to how the provisions on unfair or non-negotiated terms are organised in the DCFR compared to the Acquis Principles (*infra* III.) and the standard of judicial control in relation to B2C-contracts (*infra* IV.).

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[1] Art. II.–9:404: Meaning of "unfair" in contracts between a business and a consumer. In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.

II. Organization of DCFR Provisions

1. Provisions placed in their particular context

The Unfair Terms Directive, as a typical sectoral EC-contract law instrument, is a collection of provisions which, under a systematic organization of contract law, would belong to different parts of contract law. By contrast, the DCFR-provisions on non-negotiated or unfair terms form a part of the respective chapters or sections, to which they belong under a systematic order. Art. II.–4:209 DCFR on conflicting terms is part of the chapter on the formation of contracts; Art. II.–8:104 DCFR on preference for negotiated terms is part of the rules on interpretation. Art. II.–9:103 DCFR on the inclusion of terms is part of the chapter on content and effect of contracts (section 1 on the contents of contracts). Art. II.–9:401 et seq. DCFR form the section on the unfairness of terms.

It is one of the aims of the DCFR to achieve a more coherent contract law, whose goal encompasses a more coherent organisation of contract law rules. A systematic organization of the rules on non-negotiated or unfair terms is therefore preferable over a sectorial approach and in line with the general goals of the DCFR.

However, the placement of Art. II.–9:103 DCFR on inclusion of terms raises some doubts. Whilst this provision itself addresses questions of consent, it is part of a section on contents, which comprises rules on consent as well as on interpretation of contracts and contractual duties. Due to this diffused character of the articles of section 1 in chapter II.–9 DCFR, it may be advisable to reconsider the systematic organization of this whole section (or maybe break it up completely and place its provisions in other chapters of the draft) in order to achieve a more coherent systematic order of these provisions.

2. Three provisions on standards

In the section on unfair terms, there are three rules providing for different standards: Art. II.–9:404 DCFR for B2C-contracts;[2] Art. II.–9:405 DCFR for C2C-contracts;[3] and Art. II.–9:406 DCFR for B2B-contracts.[4] Multi-

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[2] See *supra* fn. 1.

[3] Art. II.–9:405: Meaning of "unfair" in contracts between non-business parties
In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.

ple definitions of fairness would not have been necessary if a different drafting style had been used. This would have been possible rather easily by referring to one single definition of unfairness and good faith and adding the necessary modifications for specific situations in the following provisions. By contrast, the provisions of the DCFR follow a more casuistic style, closer to common law type of rules, and deviate from techniques used in other parts of the DCFR.

In this context, style is not only a matter of personal preference but may also become relevant for an interpretation of rules. Insofar, the existence of three different definitions of fairness might give rise to the conclusion that there are different ideas of fairness behind these provisions; this, however, is not the case. Judicial control of non-negotiated terms is justified because, in the particular situation of the formation of the contract, there was no free consent to the terms by one side. One party had no meaningful freedom of choice as to the terms, or in other words: judicial control is justified (and not an infringement of freedom of contract) because, as a matter of fact, there was no such freedom in the first place.

This analysis is correct for non-negotiated terms in consumer contracts as well as for standard terms in B2B-contracts; therefore, there is a connection between the fairness standards in the three different provisions on unfairness. The drafting technique used in the DCFR is more likely to hide this connection (and therefore to be less coherent) than the alternative of having one basic common standard of unfairness and to add the necessary modifications for specific situations.

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[4] Art. II.–9:406: Meaning of "unfair" in contracts between businesses
A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

III. Extended Scope of Application

1. Rule on inclusion

Art. II.–9:103 DCFR[5] provides for a rule on inclusion of non-negotiated terms into a contract. Although the Unfair Terms Directive does not provide for a rule on the inclusion of unfair terms, there are several sectoral rules in the *acquis* which provide support for developing such a rule.[6] Consequently, a rule on inclusion had already been part of the Acquis Principles (Art. 6:201 ACQP). According to both Art. II.–9:103 DCFR and Art. 6:201 (1) ACQP, non-negotiated terms may be invoked against a party only if this party was aware of them, or if the user took reasonable steps to draw the other party's attention to them. In addition, Art. 6:201 (4) states a further requirement for non-negotiated terms, if they are meant to be invoked against consumers. In such a case, it is necessary that the consumer had a real opportunity to become acquainted with the terms before conclusion of the contract.

Thus, Art. 6:201 ACQP provides for a stricter test than Art. II.–9:103 DCFR for B2C-contracts. Under the latter provision, it is sufficient that the other party's attention is drawn to the terms; then the other party bears the responsibility to take care that it has a real opportunity to become acquainted with the terms before conclusion of the contract. Under Art. 6:201 ACQP, it is the responsibility of the user that the circumstances are such that the other party has a real opportunity to become acquainted with the terms.

That difference is critical in some situations. If, for example, the standard terms of a department store are posted behind the cashier so that a

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5 Art. II.–9:103: Terms not individually negotiated
(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
(2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.
(3) For the purposes of this article
(a) "not individually negotiated" has the meaning given by II.–9:403 (Meaning of "not individually negotiated"); and
(b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document.

6 *Thomas Pfeiffer*, *Martin Ebers*, in Acquis-Group (ed.), Principles of the Existing EC-Contract Law (Acquis Principles) – Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Munich 2007, Art. 6:201, margin nos. 1-9.

consumer will not overlook them, this may be sufficient to draw the attention to the terms. On the other hand, if the consumer is pre-occupied with payment and if other consumers are waiting in line, there may be no real opportunity to become acquainted with the terms before the conclusion of the contract. (Of course, the consumer could step aside, read the terms, and line-up for a second time but this may be inconvenient, too difficult or time-consuming).

It may yet be argued that the term "reasonable" in Art. II.–9:103 DCFR includes that the circumstances, under which the terms are brought to the other side's attention, must be such that a real opportunity to get acquainted with them is given. Under such an interpretation of Art. II.–9:103 DCFR, there would be no difference to Art. 6:201 (4) ACQP. However, it seems that there is no sufficient support for such a "harmonious" interpretation. At any rate, pursuant to the wording of Art. II.–9:103 DCFR, the term "reasonable" only relates to the other side's attention and not to the real opportunity to become acquainted with the terms.

In order to evaluate this deviation of Art. II.–9:103 DCFR from Art. 6: 201 ACQP from an EC-law perspective, it is necessary to take a brief glance at the sources for Art. 6:201 ACQP. Whereas the requirements in Art. II.–9:103 DCFR (and Art. 6:201 (1) ACQP) are perfectly in line with case-law under the CISG,[7] the lack in the DCFR of an equivalent for the special consumer provision in Art. 6:201 (4) ACQP raises some questions. The most significant provision in the *acquis*, in this context, is Annex 1 (i) of Directive 93/13/EEC. Although Annex 1 (i) is neither a binding provision nor directly applicable on the conclusion of contracts, this provision gives sufficient indication that EC-law considers it a principle of consumer contract law that consumers should be bound only by terms they had a real opportunity to become acquainted with. In this respect, Art. II.–9:103 DCFR falls back behind the *acquis* and is, therefore, insufficient from an EC-law perspective.

Moreover, Art. 6:305 ACQP, which is a restatement of the indicative list in the Annex to Directive 93/13/EEC, could drop Annex 1 (i) of the Directive only because the latter provision is sufficiently reflected by Art. 6:201 (4) ACQP. By contrast, in the DCFR, there is neither an equivalent for Annex 1(i) of Directive 93/13/EEC in the indicative list of Art. II.–9:411 DCFR, nor in Art. II.–9:103 DCFR.

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[7] For references see *Thomas Pfeiffer, Martin Ebers* (*cit.* fn. 6) Art. 6:201 ACQP margin no. 3.

2. Rule on conflicting standard terms

Art. II.–4:209 DCFR provides for a rule on conflicting standard terms.[8] The provision is taken from Art. 2:209 PECL. A similar provision had already been adopted as a so-called "grey letter rule" in Art. 6:204 ACQP because uncertainty and international differences as to the legal rules for the "battle of forms" render it necessary to provide for such rule. The current situation presents serious obstacles within the EC single market.[9] Seen from an EC-law perspective, it is definitely advisable to include such a rule in the DCFR.

3. Applicability to contracts other than B2C

Whereas the scope of application of the Unfair Terms Directive 93/13/EEC is limited to B2C-contracts, the DCFR includes rules for B2B-contracts as well as for C2C-contracts. However, EC-law is not limited to B2C contracts. Some EC-instruments relate to the unfairness of B2B-contracts (Art. 3 (3) of the Late Payment Directive, Art. 3 of the Cross-Border Credit Transfer Directive, see also Art. 29 of the Collective Investment Directive and Art. 19 (7) of the Financial Instruments Markets Directive). Although the latter provisions do not give sufficient support for proposing a general extension of the Unfair Terms Directive 93/13/EEC to B2B, they give some indication that EC law does not completely abstain from assessing the fairness of terms in contracts other than B2C if these terms have not been (or must be presumed to have not been) negotiated freely.[10]

Under general EC-law principles, an extension of judicial control to contracts other than B2C is acceptable provided the principle cross-border contractual freedom is appropriately respected. Pursuant to the standard of Art. II.–9:406 DCFR, this is the case. This rule provides for judicial control only if a term is part of the standard terms of one side

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[8] II.–4:209: Conflicting standard terms
(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance.
(2) However, no contract is formed if one party:
(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or
(b) without undue delay, informs the other party of such an intention.

[9] For a further analysis cf. *Thomas Pfeiffer, Martin Ebers* (*cit.* fn. 6) Art. 6:204 ACQP margin nos. 3 et seq.

[10] *Thomas Pfeiffer, Martin Ebers* (*cit.* fn. 6) Art. 6:101 margin no. 5.

which have been successfully made part of the contract; it furthermore refers to a standard which is particularly appropriate for B2B-contracts ("grossly deviates from good commercial practice, contrary to good faith and fair dealing"). *Mutatis mutandis*, the same is true for C2C-contracts under Art. II.–9:405 DCFR.

IV. Non-negotiated versus Unfair Terms

Art. II.–9:404 DCFR has two different versions. Under the version without the text in brackets ("version 1"), the provision is applicable to all clauses supplied by the business. This version has to be read with Art. II.–9:403 (5) DCFR,[11] pursuant to which all terms are supplied by the business unless the consumer introduced them into the contract. The other version with the text in brackets ("version 2") limits its scope of application to non-negotiated clauses, which is in line with Art. 3 of the Unfair Terms Directive 93/13/EEC.

An extension of Art. 3 of Directive 93/13/EEC has been discussed frequently. Nevertheless, the provision remained unchanged. The law of the Member States is not uniform in this respect; some Member States limit judicial control to non-negotiated clauses; others do not. Moreover, it has not been argued that Art. 3 of Directive 93/13/EEC suffers from a coherence problem with respect to this criterion for judicial control. It has, however, been argued that clauses which are individually negotiated are so rare in B2C contracts that there is no practical need for such a criterion and that distinguishing non-negotiated clauses from clauses which have been individually negotiated may be complicated. Yet, a look at the

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[11] II.–9:403: Meaning of "not individually negotiated"
(1) A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.
(2) If one party supplies a selection of terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
(3) The party supplying a standard term bears the burden of proving that it has been individually negotiated.
(4) In a contract between a business and a consumer, the business bears the burden of proving that a term supplied by the business, whether or not as part of standard terms, has been individually negotiated.
(5) In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

law of the Member States which limit judicial control to non-negotiated terms does not support that argument.[12]

With respect to their underlying principles, both versions agree that the principle of freedom of contract is relevant also for B2C contracts. Even the more restrictive "version 1" accepts that a consumer should be allowed to agree on certain contract terms without judicial control – but only to a very limited extent: freedom of contract is given only for clauses which have been actively introduced to the contract by the consumer. By contrast, under "version 2", freedom of contract is given also in a case where a term was introduced into the contract by the business but where individual negotiations took place.

The question is therefore whether the criterion of individual negotiations sufficiently safeguards the consumer against being taken by surprise or otherwise tricked by the business. This is the case if a correct definition of negotiations is used, which is given by Art. II.–9:402 (1) DCFR. Under this definition, a negotiation requires more than a simple conversation about the term. The negotiation must be real and meaningful. A negotiation is real and meaningful if it offers a chance to influence a contract term.[13]

On the other hand, there may be cases where a term is suggested by the business but nevertheless freely negotiated between the parties. A consumer may be willing to accept an offer with a no liability clause for a lower price if he has sufficient personal insurance against all possible risks under the contract. Under "version 1", only the consumer may ask for such a lower price; the business is, for all practical purposes, barred from making such an offer whereas under "version 2" such an offer can be made and result into a valid contract term, provided that meaningful negotiations take place.

To be more general: Art. 6:101 et seqs. ACQP tried to point out that it is rather the lack of a meaningful negotiation than the content of a term that justifies judicial interference into the parties' contract. Art. II.–9:404 DCFR "version 2" follows this approach. By contrast, Art. II.–9:404 DCFR "version 1" shifts the focus back to an "unfair terms"-approach. Although there is only a slight difference between both versions, it seems that "version 2" provides for the better solution within the framework of a market economy.

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[12] For this whole problem see *Thomas Pfeiffer, Martin Ebers* (*cit.* fn. 6), Art. 6:101 ACQP margin nos. 7 et seq.

[13] *Thomas Pfeiffer, Martin Ebers* (*cit.* fn. 6), Art. 6:101 ACQP margin nos. 12 and 15.

V. Conclusion

Apart from some more marginal or formal aspects, there are two issues concerning non-negotiated terms which are closely connected to the whole concept of a market economy and the role of contract law within such a concept. The first is the exercise of judicial control of terms in B2B-contracts. Insofar, the DCFR correctly recognizes that a lack of meaningful freedom of contract is a phenomenon not limited to B2C contracts and provides for a rule that may help SMEs to have a better access to the single market. As far as B2C contracts are concerned, it will have to be decided which of the two suggested versions Art. II.–9:404 DCFR is more appropriate for a single market because a sufficient level of consumer protection is provided for by either of them.

Finally, it would be desirable to have a rule such as Art. 6:201 (4) ACQP in the DCFR in order to avoid a deviation from Annex 1 (i) of the Unfair Terms Directive 93/13/EEC.

Part IV
Remedies

The Remedies for Non-Performance in the System of the Acquis Group

Fryderyk Zoll (Cracow)

I. Restating the European Private Law on Non-performance: Particular Challenges

The aim of the Acquis Group[1] was to restate the system of the Contract law of the Community by building a consistent set of rules from the incoherent and broadly widespread detailed provisions of the various Community sources of law – in particular the directives, regulations and European case-law.[2] The methodology adopted by the Acquis Group has already been presented to the public and it does not need to be repeated here. It is however necessary to look into the specifics of the Community law concerning non-performance and investigate some details of the application of the methodology of the Acquis Group in this particular field. The part of the Acquis Principles concerning the non-performance of a contract has also a slightly different function than the rules concerning pre-contractual duties, formation, unfair terms, non-discrimination and the right to withdraw. The aforementioned parts (excluding formation), with some modifications, became the components of the academic Draft Common Frame of Reference (hereinafter: the DCFR).[3] This can not be said of the part on the "performance and non-performance" of the Acquis

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1 More details are available on the Research Group on the Existing EC Private Law (Acquis Group) website – http:///www.acquis-group.org.

2 *H. Schulte-Nölke*, *Ch. Busch*, in: Acquis Group (ed.), Principles of the Existing EC Contract Law – Contract I, Munich 2007 (*Acquis-Principles*), pp. 17-20. See also *N. Jansen, R. Zimmermann*, Grundregeln des bestehenden Gemeinschaftsprivatrechts, Juristenzeitung (JZ) 23/2007, pp. 1113-1126, 1115.

3 *G. Dannemann*, Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group, in: *Acquis Principles* (*cit.* fn. 2), pp. XXIII-XXIV; *R. Schulze*, Die "Acquis-Grundregeln" und der Gemeinsame Referenzrahmen, Zeitschrift für Europäisches Privatrecht (ZEuP) 3/2007, pp. 731-734. See *Ch. v. Bar, E. Clive, H. Schulte-Nölke, H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano, F. Zoll*, Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition, Munich 2008.

Principles, which is not going to be included in the DCFR. The reason for this is timing, but only partially. The two parts of the Acquis Principles, namely performance and non-performance, are now just about ready, although the various improvements are still going to be enforced. The DCFR needs to be completed right now, however the question regarding the time of its completion was not the decisive one. The rules of the Acquis Principles concerning the pre-contractual duties, unfair terms, non-discrimination or the consumer's right to withdraw are in the centre of the Community private law, but they also constitute (albeit with a different "intensity") the new developments of contract law (even if "new" means hundred years in the case of the unfair terms). The performance and non-performance parts are situated in the centre of the law of obligations; they form the main part of the system. The core of the non-performance concept of the DCFR consists of the development of the ideas used in PECL.[4] The system of the *acquis communautaire* on non-performance did not draw sufficient attention that would allow for significant influence of these projects. It was also a question within the Acquis Group, whether it is possible to develop a system of the *acquis*, based on the rules of non-performance which is consistent with the Acquis Group's own methodology. The Community private law does not pay too much attention to the rules on non-performance which appear somehow on the edge of the system. However, the Consumer Sales Directive[5] may probably be named here as constituting an exception. This Directive is so significant that it shows a tendency of the *acquis communautaire* in expanding also into the territories of the core issues of the law of obligations.[6] While looking closer at the various rules on non-performance of

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4 See *R. Schulze*, „Die Acquis-Grundregeln" (*cit.* fn. 3), p. 733.

5 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, pp. 12-16.

6 See *S. Grundmann*, in: S. Grundmann, M. Bianca (eds.), EU-Kaufrechtsrichtlinie. Kommentar, Cologne 2002, p. 30, no. 19; *S. Grundmann*, Nationale Kodifikation vor dem Hintergrund der Europäisierung des Privatrechts, in: C. Fischer-Czermak, G. Hopf, M. Schauer, Das ABGB auf dem Weg in das 3. Jahrtausend, Vienna 2003, p. 46; *M.B.M. Loos*, The role of a European consumer law in the creation of European contract law, in: Z. Radwański, Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej, Warsaw 2006, pp. 446-447. See also *D. Staudenmayer*, The Directive on the Sales of Consumer Goods and Associated Guarantees – Milestone in the European and Consumer Private Law, European Review of Private Law (ERPL) 4/2000, p. 547-564; *U. Magnus*, Richtlinie 1999/44/EG des Europäischen Parlaments und des Rates zu bestimmten Aspekten des Verbrauchsgüterkaufs und der Garantien für Verbrauchsgüter, in: E. Grabitz, M. Hilf, Das Recht der Europäischen Union, Munich 2007, Preface p. 8, no. 27.

the Community private law the picture becomes more consolidated. The Community law on non-performance can be put together and form a consistent system. The rules are expressed by very different directives governing quite narrow fields, for example package holidays. The non-performance provisions of the *acquis communautaire* are however drafted in a quite general way, not dependent on the specifics of the concrete legal issue of the Directive. The right to damages according to Art. 5 (2) of the Package Travel Directive[7] could work in any case of non-performance, irrespective of the kind of obligation that has been violated. Even the provisions containing some detailed solutions designed just for the narrow scope of application of the Directive express an idea which can be easily generalized and, after some modifications, be converted into the rule on non-performance which is applicable to the different kinds of obligations. The system of remedies of the Consumer Sales Directive is, for example, feasible for the generalization.[8]

In the case of pre-contractual duties, non-discrimination, unfair terms and the right to withdraw, the most prominent agenda of the Acquis Group was to propose a more coherent system than the existing one. In the case of performance and non-performance the goal was to "discover" that also in the core of the law of obligations the existing *acquis communautaire* already provides the system that is eligible for the generalization.

The system of the Acquis Principles is built predominantly on the basis of the three following directives: Consumer Sales Directive, Package Travel Directive and Late Payment Directive.[9] These three directives provide sufficient material to offer a generalized structure for the system of remedies.

The result obtained so far is not yet fully satisfying. The project of the Acquis Group is being developed as a common undertaking of more than forty researchers. The results are achieved not only through academic research but also through the democratic procedures within the group itself, which requires convincing majority and compels compromises. Such a decision making process brings some sort of internal academic legitimacy and generally improves the quality of the drafts.[10] However, sometimes the established voting procedure produces results which are unsatisfactory. It happens mostly when the majority rejects a part of the proposal

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[7] Directive 1990/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, pp. 59-64.

[8] See *R. Schulze*, Die „Acquis-Grundregeln" (*cit.* fn. 3), p. 733.

[9] Directive 2000/35/EC of the European Parliament and Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, pp. 35-38.

[10] On the decision-making process of the Acquis Group see *G. Dannemann*, Consolidating EC Contract Law (*cit.* fn. 3), pp. XXIII et seq.

which constituted an important element of the whole structure; this situation brings about some gaps and possible inconsistencies. Consequently, there still is a need for improvement in some places of the draft on non-performance. Fortunately the work of the Acquis Group is going to be continued and the inconsistencies mentioned above will also be subjected to further review and improvement.[11]

II. The Acquis-Principles on Non-performance: the basic Structure

The Acquis-Principles on the remedies for the non-performance consist of four sections: "general rules"; performance and cure of non-performance; termination and reduction of performance and finally the damages. The first section provides a definition of non-performance (Art. 8:101) and sets general limits on the creditor's right to remedies for the non-performance (Art. 8:102). In the second section there are two articles governing the performance of monetary claims and specific performance of non-monetary obligations (Artt. 8:202-8:203). These provisions constitute the so called "grey letter rules",[12] since the Plenary of the Acquis Group decided that the Community law does not offer a sufficient basis to formulate a "black letter rule" for the enforcement of performance. The third section consists of three articles governing the termination of contract and "reduction of performance" (which could be described as being somewhat equivalent to the concept of "price reduction") – Artt. 8:301-8:303. Art. 8:202 on notice of termination is only "a grey letter rule". The last article of this chapter concerns the right to withhold performance, which is also adopted as a "grey letter rule". In the last section on damages there are three groups of provisions. Artt. 8:401-8:403 concern the right to damages, its content and limits. Art. 8:404 lays down a grey letter rule on interest in case of the delayed payment. The provisions of Artt. 8:405-8:407 determine the right to interest in commercial contracts. Art. 8:405 (on the limits of the entitlement to the interests in the event of the non-performance of the creditor's reciprocal obligation) may apply to both kinds of interests.

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[11] The members of the Drafting Team of the Chapter 8 on Remedies: *Piotr Machnikowski, Ulrich Magnus, Jerzy Pisuliński, Judith Rochfeld, Matthias Storme, Reiner Schulze, Maciej Szpunar, Carole Aubert de Vincelles, Fryderyk Zoll.*

[12] On the notion and function of the "grey letter rules" see G. *Dannemann*, Consolidating EC Contract Law (*cit.* fn. 3), pp. XXIX-XXX.

III. The General Notion of Non-performance

Art. 8:101 defines the notion of non-performance. According to this provision non-performance is any failure to perform an obligation, including delayed performance, defective performance and failure to co-operate in order to give full effect to the obligation. This provision expresses a view of the Acquis Group that the existing *acquis communautaire* tends to provide a general concept of the violation of the obligation and the scope of application of different remedies which does not depend on the qualified type or kind of non-performance (such as delay or impossibility). It does not however mean that some specified or qualified categories of the non-performance are completely irrelevant. The concept of the delay of performance is still used in the case of the right to interest (Art. 8:404). It is possible to locate the broad general concept of violation of the obligation in various directives. So, for example, the Consumer Sales Directive states in Art. 3 (1) that "[t]he seller shall be liable to the consumer for any lack of conformity (…)".[13] The broad concept of non-performance may be also seen in Art. 5 (2) of the Package Travel Directive which grants a right to damages in cases of a "failure to perform" or "improper performance of the contract".[14]

The term "non-performance" is used in the meaning of a failure in performance and complete lack of performance. It has been disputed whether it is a good idea to use the slightly misleading term of "non-performance" instead of "breach of obligation". In some cases the use of the term "non-performance" makes it difficult to express a helpful, or even a necessary, distinction between failure to perform and improper performance. The decision in favour of the formulation finally accepted was taken in order

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[13] C. M. *Bianca*, in: S. Grundmann, C.M. Bianca, EU-Kaufrechtrichtlinie. Kommentar (*cit*. fn. 6), pp. 169-170, no. 3.

[14] See however *K. Riesenhuber*, Europäisches Vertragsrecht, Berlin 2003, pp. 326-327. The Author stresses the lack of the homogenous concept in the *acquis communautaire*. In the Package Travel Directive there is not only a general concept of non-performance, but also specified remedies in some qualified kinds of non-performance. Some directives, on the contrary, deal only with the specific kind of non-performance. It is true, but these non-performance provisions of the *acquis*, which may be generalized because they are not determined by the specific subject matter of the directive in question, follow the unitary concept of non-performance. According to M. *Schmidt-Kessel*, European Community law has not developed a generally accepted notion of breach of contract – M. *Schmidt-Kessel*, Remedies for Breach of Contract in European Private Law, in: R. Schulze (ed.), New Features in Contract Law, Munich 2007, pp. 183-196, 184.

to secure the consistency with the terminology of the DCFR.[15] Art. 8:101 clarifies that all kinds of breach or frustration of the obligation are meant under the formulation of non-performance.

IV. Non-performance Attributable to the Creditor

According to Art. 8:102 the creditor is precluded from exercising the remedies against the debtor to the extent that the non-performance is attributable to the creditor. The existence of such a rule can be inferred from the different provisions governing the system of remedies in the *acquis communautaire*. In the Consumer Sales Directive the seller's liability is independent of fault. The system of strict liability would literally authorize the creditor to make use of the remedies even if the debtor's non-performance is due to the circumstances lying exclusively in the sphere of creditor's risk. In order to prevent such an unjust result it is necessary to have a rule such as Art. 8:102. In the case of the absence of such a rule it would be inevitable to obtain such results by the reductive interpretation of the provisions governing the remedies; therefore it is possible to see this provision as an "implied term" of the *acquis communautaire*. The existence of such rule has to be assumed mostly in cases of the Consumer Sales Directive.[16] If there is a lack of conformity of the delivered good caused by the buyer, but prior to the transfer of risk, it would be unfair to allow a full right to remediation to this person. Art. 8:102 is also based upon the same consideration. This conclusion is not only justified by the pure functional reasoning from the existing provisions of the Consumer Sales Directive, but also by Art. 6 (3) of the Cross-Border Credit Transfer Directive which lays down the rule that "[n]o compensation shall be payable (…) where the originator's institution or, as the case may be, the beneficiary's institution can establish that the delay is attributable to the originator or, as the case may be, the beneficiary". Some traces for the idea expressed in the Art. 8:102 may also be found in the formulation of Art. 5 (2) of the Package Travel Directive.[17] According to this provision "the failures which occur in the performance of the contract [which] are attributable to the consumer" constitute one of the circumstances excluding the liability for damages. Art. 5 (2) of the Package Travel Directive creates some difficulties because it mixes up the different regimes of liability for damages. I will come back to this issue later.

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[15] See Art. III.–3:101 DCFR. The general notion of non-performance is used also by PECL – see Chapter 9.

[16] See: *S. Grundmann* in: S. Grundmann, C.M. Bianca, EU-Kaufrechtrichtlinie. Kommentar (*cit.* fn. 3), p. 164, no. 55-56.

[17] *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), pp. 328-329.

In the course of further work of the Acquis Group it needs to be taken into consideration whether Art. 8:102 should also cover the remedy of specific performance. Such a detailed question is difficult to be solved by way of restating the Community law. It is however a necessary effect of the generalization of the idea that the restrictions need to be defined autonomously. The remedy of specific performance (although in the text of the Acquis Principles governed only by the "grey letter rules") should not be affected and restricted by the question of the responsibility for the non-performance. Extinguishing the right to specific performance (if it is generally allowed) should be obtained only by a specific remedy such as termination of contract. The application of Art. 8:102 on specific performance would disorganize a system of other remedies. Some improvement is probably needed here.

V. The Problem of Specific Performance in Relation to other Remedies

The Acquis Group adopted the provisions on specific performance only as grey letter rules taken from the DCFR.[18] In the view of the majority of the group there was not a sufficient justification in Community law for adopting the provisions directly governing specific performance. The original view of the drafting team was however slightly different. The drafting team was suggesting the adoption of such provisions:

> "*(1) The creditor is entitled to performance of the obligation, unless this is impossible, unreasonable, or contrary to personal freedom.*
> *(2) The right to performance includes the right to require, free of additional charge, repair, replacement, or any other cure for non-performance, unless the cure is unavailable or disproportionate.*
> *(3) The creditor has the right to choose between different types of cure.*
> *(4) Contracts between a business and a consumer cannot exclude the right of the consumer under paragraph 3.*"

The legitimacy for this has been seen in Art. 3 (2) of the Consumer Sales Directive stating that "in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement (…)" This provision of the directive indicates quite strongly that the consumer is not only forced to use the sequence of remedies in order to be able to terminate the contract, but also to enforce

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[18] Art. III.–3:302 DCFR. See M. *Schmidt-Kessel*, Remedies for Breach of Contract in European Private Law (*cit.* fn. 14), pp. 187-188.

the cure of the defective performance.[19] It indicates therefore that the *acquis communautaire* accepts at least an idea of specific performance in some cases. There are however far reaching cases – the seller can be forced to behave in a highly personal manner, such as through the repair of the defective good. It is also possible, however, to understand the mentioned provision in a different way, not as entitlement to specific performance but as the mandatory prescription of the sequence of remedies. In the light of the latter interpretation, the consumer would not be entitled, but rather would be forced to require replacement or repair of the good before he could apply the remedies of the second sequence. The Directive, according to this interpretation, would not give the consumer a right to enforce the cure of the performance. The language of the Directive, using explicitly the term "entitlement", tends to suggest the first option more strongly.[20] The second option may also have however its merit, because the possibility of cure is not a privilege of the client, but serves to the interest of the seller.

The Plenary of the Acquis Group took into account the differences of the legal systems concerning the issue of specific performance.[21] The drafting team's proposal concerning this issue has been rejected and replaced by the grey letter rule taken from the DCFR. The question of the monetary obligation (Art. 8:201) is not the issue since it is difficult to imagine a legal system preventing the enforcement of performance of the monetary claims. The adoption of Art. 8:202 concerning non-monetary claims as a grey letter rule taken from Art. III.–3:302 DCFR has faced some technical problems. According to Art. 8:301 the right to termination or reduction of performance is granted if the creditor is not entitled to performance or cure under Section 2 (the rules on performance of monetary claims and specific performance of non-monetary claims). Art. III.–3:302 (3) and (4) DCFR provides a list of circumstances which exclude the enforcement of specific performance, which includes also the case when the creditor has not requested specific performance within a reasonable time after the creditor has become, or could reasonably be expected to have become, aware of the non-performance. The adoption of this exception would not make sense if the non-existence of the right to specific performance were to become a condition for the right to terminate the contract or for reduction of its own performance. Therefore, the Acquis Group has adopted Art. III.–3:302 DCFR without paragraph 3. Unfortunately, the adopted solution does not solve the entire problem. It

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[19] *U. Magnus*, Richtlinie 1999/44/EG, Art. 3 (*cit.* fn. 6), p. 11, no. 47.

[20] See *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), p. 326.

[21] On the different concepts of specific performance in various jurisdictions see: *O. Lando, H. Beale* (eds.), Principles of European Contract Law, The Hague 2000, pp. 399-402.

happens due to the fact that Art. III.–3:302 (3) DCFR provides another exception which constitutes a fully reasonable limitation for the specific performance. According to this restriction specific performance cannot be enforced if the "performance would be of such a personal character that it would be unreasonable to enforce it". The possibility to associate this limitation with the required sequence of remedies provided in Art. 8:301 is at least doubtful. The creditor should be forced to require personal performance prior to the application of termination of the contract or reduction of the performance, even if for personal performance it is excluded to obtain a remedy of specific performance. The Acquis Group (and particularly the drafting team) will probably once again have to consider the question of the connection between specific performance and the remedies of contract termination or reduction of the performance. The reasonable way of solving this problem will be to adopt the full text of Art. III.–3:302 DCFR and redraft Art. 8:301 (1) by remodelling the concept of the sequence of remedies. The creditor should first ask for performance or cure (unless it is unreasonable) prior to application of the remedies of the second degree. The conditions for specific performance should not influence the question whether the creditor should first require the performance itself. It is a matter of the privilege of cure of performance, which is granted to the debtor from the reasons of exclusion of the right to specific performance. Some further work and improvement is also needed here.

VI. Termination and Reduction of Performance

The rules on termination and "reduction of performance" have been modelled mostly on the Consumer Sales Directive, although other sources of the *acquis communautaire* may also be named in this context. The main question arising from the methodology of the Acquis Group concerns the problem of the generalization of the provisions, which has been taken from the directive governing a specific kind of contract.[22] The most general test should be whether the remedy provided by the directive is linked specifically to the exceptional character of the legal matter covered by the directive, or whether the directive uses only a remedy, which is of a general nature and would link to fully comparable results also in other cases which are not covered by the directive's subject matter. In the event of termination of the contract it can be verified by the comparative overview of the different legal systems. In many different jurisdictions termination of the contract is a remedy which is generally applicable,

[22] On the methodology of "generalization" see G. *Dannemann*, Consolidating EC Contract Law (*cit.* fn. 2), pp. XXX – XXXII.

even if there are various differences in the particular appearance of the remedy itself.[23] The model laws as UNIDROIT Principles, PECL, Gandolfi-Draft or eventually the DCFR lay down such a general remedy.[24] The Consumer Sales Directive also uses a generally acknowledged remedy of termination of contract in its particular scope of application.[25] Thus, the way into generalization of this remedy seems to be quite a natural step.

The reduction of performance in the language of the Acquis Principles is an equivalent of the price reduction. This remedy, arising from the Roman *actio quanti minoris*,[26] is less evident from the comparative perspective.[27] There are difficulties in distinguishing this remedy from termination and right to damages; indeed, it is a mean of combining the elements of these two remedies. Price reduction is typically a remedy mentioned in parts of the codes governing specific contracts, linked mostly to the contract of sale or contract of work. Surely the generalization of such a remedy is less convincing than it is in the case of termination of the contract. The authors of the PECL and the DCFR have decided to make this step.[28] The broader application of the reduction of performance seems to be reasonable and useful. The *acquis communautaire* also uses *actio quanti minoris* not just in contracts of sale.[29] Already the Consumer Sales Directive has a broader scope of application of the reduction of performance than only to the contract of sales The Directive applies also to the contracts for supply of consumer goods to be manufactured or produced. The concept of price reduction is also used in the Package Travel Directive (Art. 4 (7)). In the latter case it proves the tendency of the broader approach to this institution and possibility of its application to different kinds of contracts.

The Acquis Principles try to determine more precisely than it has been done in the text of the Directive, that the creditor may terminate the

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[23] See *O. Lando, H. Beale* (eds.), Principles of European Contract Law (*cit.* fn. 21), p. 411. See *H. Unberath*, Die Vertragsverletzung, Tübingen 2007, pp. 363-365.

[24] Art. 7.3.1. (1) UNIDROIT Principles of International Commercial Contracts; Art. 9:301 (1) Principles of European Contract Law; Art. 114 (1) Code Européen des Contrats – Avant-projet; Art. III.–3:502 (1) DCFR.

[25] Art. 3 (5) Consumer Sales Directive.

[26] On the Roman roots of this remedy see *R. Zimmermann*, The Law of Obligations. Roman Foundations of the Civilian Tradition, Oxford 1996, p. 318.

[27] See *O. Lando, H. Beale* (eds.), Principles of European Contract Law (*cit.* fn. 21), p. 432.

[28] Art. 9:401 PECL; Art. III.–3:601 DCFR.

[29] Art. 4 (7) Package Travel Directive, Art. 4 (6) Denied Boarding Regulation. See *M. Schmidt-Kessel*, Remedies for Breach of Contract in European Private Law (*cit.* fn. 14), p. 191.

contract without asking the debtor for performance or cure, if the creditor cannot be reasonably expected to be bound by the contract, in particular because of the kind of non-performance or because of the nature of the obligation (Art. 8:301 (2)). The Directive expresses such an idea in the third clause of Art. 3 (5), although it is not sufficiently clear, that in some cases termination may be the only proper remedy because of the gravity of the violation of the contract by the debtor.[30] In the methodology of the Acquis Group it may be understood as a necessary improvement of the *acquis*. The Acquis Principles also clarify, that generally the termination concerns only this part of the contract which is affected by the non-performance, unless Art. 8:301 (2) applies (the gravity of non-performance justifies the termination of the whole contractual relationship).

Following Art. 3 (6) of the Consumer Sales Directive, Art. 8:301 states that the creditor is not entitled to terminate the contract if the debtor's failure to perform amounts to a minor non-performance. It can be assumed that the concept of the "fundamental non-performance" is not rejected by the Acquis Principles, although they use different wording in comparison to the DCFR (and PECL) which may also lead to different results in some particular cases.[31]

The Acquis Principles try to explain the possibility of application of the remedy of the "reduction of performance" also in situations of the cure executed by the debtor. According to Art. 8:301 (4) the creditor is entitled to reduce its own performance if the cure has not restored the original value of the performance. Such a result should be also admitted into Consumer Sales Directive, although the Directive remains silent in this matter. It would however be wrong to leave the buyer with the repaired good (which has often diminished in value) without the possibility of an adequate price reduction in order to restore the reciprocity of the value of performance.[32]

The generalization of the provisions on remedies based on the Consumer Sales Directive means not only that the termination and reduction of the performance should be treated as the concepts of the "general part" of the law of obligations. It indicates also that the other kinds of non-performance covered have been meant in the Consumer Sales Directive.

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[30] According to the correct view of *U. Magnus* such termination is also possible under the current text of the Consumer Sales Directive; see *U. Magnus*, Richtlinie 1999/44/EG, Art. 3 (*cit.* fn. 6), p. 6, no. 23.

[31] Compare *R. Schulze*, Die „Acquis-Grundregeln" (*cit.* fn. 3), p. 733. See *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), p. 331-332 with references to Art. 4 (5) Package Travel Directive.

[32] See *B. Heiderhoff*, Gemeinschaftsprivatrecht, 2nd ed., Munich 2007, pp. 184-185; *U. Magnus*, Richtlinie 1999/44/EG, Art. 3 (*cit.* fn. 6), pp. 14-15, no. 64.

The system provided by this Directive may also work in cases of the total lack of performance, for example in cases of traditional delay. In such situation the creditor should ask for performance (without providing an additional period for performance) and if performance would not occur within the reasonable time frame (Art. 8:301 (1)) the creditor may then terminate the contract.

VII. The Problem of Withholding Performance

The Acquis Principles have adopted Art. 8:304 on withholding the performance as the "grey letter rule" taken from the Art. III.–3:401 DCFR. It means that the Acquis Group did not find sufficient legitimacy in the *acquis communautaire* for such a rule.[33] It plays, however, a central role in the system, working together with the right to terminate the contract, hence it was necessary to provide such a rule in order to have a complete frame of the non-performance rules. The problem of the lack of sufficient legitimacy for the formulation of the rule on withholding the performance is however more complicated. Some authors argue that the right to withhold one's own performance is already apparent in the Late Payment Directive. According to Art. 3 (1) c. no. i of this Directive, the creditor may claim for interest only in so far that he has fulfilled its contractual or statutory obligations. It may be seen as an "*exceptio non adimpleti contractus*", with slightly different content from the DCFR.[34] According to Art. III.–3:401 DCFR, the performance which may be withheld is the whole, or part of the performance as may be reasonable to the circumstances. According to some authors the rule of the Late Payment Directive allows a right to withhold the performance even if the other party failed to perform a small part of its duties;[35] the Acquis Group has not followed this concept but rather contained a separate rule on interest in case of a creditor's non-performance. According to Art. 8:405 the creditor is not entitled to interest to the extent that there has been non-performance of the creditor's reciprocal obligation. This is a rule closely based on Art. 3 (1) c. of the Late Payment Directive. The position of the Acquis Principles is that the rule confining the right to claim "extraordinary" interest does not influence the other parts of the obligation. The special right to obtain higher interest, even if the monetary claim has not

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[33] See also M. *Schmidt-Kessel*, Remedies for Breach of Contract in European Private Law (*cit.* fn. 14), p. 188.

[34] See *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), pp. 272-273 (with reference to differences between the Late Payment Directive and the German Civil Code).

[35] *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), p. 273.

become due, requires absolute compliance with the obligation on the part of the entitled person. It does not yet allow for the formulation of a general rule of the *exceptio non adimpleti contractus* for the Acquis Principles.

VIII. The Right to Damages and the Principle of Fault

The formulation of the right to damages was vigorously disputed among the members of the Acquis Group. The most controversial issue which arose with reference to the right to damages, was the problem of excusing the performance on the part of the debtor. In the course of the discussions it was proposed to adopt the formula of Art. 79 (1) CISG. The final result does not however follow this advice, at least in some aspects. According to Art. 8:401 (2) non-performance is excused (which is relevant only with reference to damages and not for other remedies), if it is due to circumstances beyond the debtor's control and of any person engaged by the debtor for performance of this obligation, provided that the consequences of those circumstances could not have been avoided, even if all due care had been exercised. This formula is closer to the fault liability concept than to strict liability, although the language of the discussed provision shows the compromise between these different ideas. The *acquis communautaire* regarding the issue of the exemption of contractual liability is unclear.[36] The right to damages is formulated in the most general and unspecific way in Art. 5 (2) of the Package Travel Directive which allows inconsistent conclusions to be drawn from its formulation. In the "positive" part of the damages' formula it requires a fault on the part of the debtor.[37] However, the list of excuses enclosed to this provision provides an argument for strict liability.[38] The *acquis communautaire* contains some other hints for strict liability, for example Art. 8 (1) of the Cross-Border Credit Transfer Directive, which imposes a maximum limit of the liability. The final result expressed by Art. 8:401 (2) is based on the assumption that the concept of the content of obligation in the *acquis communautaire* is related to the idea of fairness in commercial practices. The content of the obligation is influenced by the public statements of the parties – even of the third persons – good faith, and legitimate expec-

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[36] *H. Schulte-Nölke, L. Meyer-Schwickerath,* in: H. Schulte-Nölke, Ch. Twigg-Flessner, M. Ebers, EC Consumer Law Compendium, available online at http://www.eu-consumer-law.org/consumerstudy_part1_DE.pdf, p. 309.

[37] For the fault liability Judgment of the BGH of 9 November 2004 (X ZR 119/01), Neue Juristische Wochenschrift (NJW) 2005, pp. 418-422.

[38] For the strict liability in the Package Travel Directive: *K. Riesenhuber*, Europäisches Privatrecht (*cit.* fn. 14), p. 327 and *M. Schmidt-Kessel*, Remedies for Breach of Contract in European Private Law (*cit.* fn. 14), p. 192.

tations of the creditor. Even the parties themselves do not always know the exact content of their obligation, although it has been initiated by their contract. It would be contrary to the basic requirement of "freedom" to have a very broad concept of the obligation on the one hand and very harsh liability on the other; therefore, the softer formulation was chosen by the Acquis Group.[39]

IX. The Right to Damages and non-pecuniary Losses

The *Leitner* case[40] was one of the incentives in accelerating the movement toward a "more coherent contract law" in Europe.[41] It is therefore not a surprise to have a special rule on the right to damages for non-pecuniary losses in the Acquis Principles.[42] According to Art. 8:402 damages cover non-pecuniary losses only to the extent that the purpose of the obligation includes the protection or satisfaction of non-pecuniary interest. The way in which this provision was finally drafted shows, however, the tensions and difficulties in the formulation of the right to non-pecuniary damages in cases of non-performance of obligation. These problems result from a fear of increasing uncertainty and unpredictability of the law. There are however some important arguments behind the idea that the non-pecuniary losses cannot be repaired if they have been caused solely by the non-performance of the obligation. They are based on the fear that the parties might be deprived of the possibility to assess the risks of entering into the contractual relationship. In the adopted formulation of Art. 8:402 the Acquis Group was trying to restrict the right to non-pecuniary damages to the narrow category of the obligations, which are intended to satisfy "non-pecuniary" interests. Almost every kind of non-performance also causes an immaterial harm, for example in the form of unpleasant feelings, distress, etc., for which the law cannot always provide a remedy. The Acquis Principles are trying to confine the remedy of damages for immaterial losses only to the obligations, which predominantly serve the immaterial interests, mostly related to entertainment or comfort. These are such kinds of obligations where without the remedy of

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[39] For other axiological justification see: *H. Unberath*, Die Vertragsverletzung (*cit.* fn. 23), p. 337.

[40] *ECJ* 12.3.2002, *Simone Leitner vs. TUI Deutschland GmbH & Co. KG*, C-168/00.

[41] See Communication from the Commission to the European Parliament and the Council. A More Coherent Contract Law. An Action Plan, COM(2003) 68 final, p. 8, thesis 21. *M. van Huffel*, Das Europäische Vertragsrecht zwischen Mythos und Realität, in: M. Eiselsberg, Europäisches Vertragsrecht, Vienna 2003, pp. 18-19.

[42] On ability to generalize the conclusions of the *Leitner* case – *B. Heiderhoff*, Gemeinschaftsprivatrecht (*cit.* fn. 32), p. 121.

damages for immaterial losses a creditor would be deprived of almost all possibilities to satisfy his interest. It cannot be denied that the contract law of the Acquis Group fulfills a lot of functions of tort law; the right to non-pecuniary damages constitutes a next step in this direction.

X. The Right to Interest

The Acquis Group has adopted a general rule governing the interest on delayed payment (Art. 8:404) as a grey letter rule taken from the DCFR, because it has not found the *acquis* on this issue. In particular, the Late Payment Directive cannot serve as a source in this respect. The Acquis Principles have restated this Directive in Art. 8:405-8:407 which govern the special interest in commercial transactions which should be usually more severe than the ordinary interest rate. Taking into account the differences among the Member States, Art. 8:406 (1) provides more flexibility in determining the right to interest than the Directive itself. It should allow to avoid a paradox that sometimes the statutory interest rate may be higher than the "special" interest rate serving the goal of restricting commercial credit forcefully imposed on the weaker partners in commercial transactions.

It may be disputed whether the placement of rules concerning "special" interest in commercial transactions in the non-performance part of the Acquis Principles is a good solution as there are not always provisions applicable in cases of delay of performance. The right to interest may be enforced even if the claim for payment has not become due (see Art. 8:407).[43] All these rules are, however, in the broader sense the "non-performance" rules trying to ban certain market behaviour treated as a violation of the fair commercial relationship. Technically they are also closely linked to the other non-performance provisions (see for example the reference under Art. 8:406 (1) to the excuses of the debtor under the damages' rule of Art. 8:401 (2)).

XI. Conclusion

The draft on non-performance prepared by the Acquis Group proves that the already existing rules of the *acquis communautaire* may be generalized and put into a coherent set of rules. This set of rules belongs to the family of PECL and the DCFR,[44] however maintaining its autonomy. It shows that the Member States were able to agree on many common concepts

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[43] Compare *K. Riesenhuber*, Europäisches Vertragsrecht (*cit.* fn. 14), p. 270.

[44] See *R. Schulze*, Die „Acquis-Grundregeln" (*cit.* fn. 3), p. 733.

and rules, although in specific, sometimes incidental contexts. The set of the non-performance rules of the Acquis Group may facilitate the approximation of the national legal systems and also fulfil certain "toolbox" functions.

The damages rules in the *acquis communautaire*, in the Acquis Principles and in the DCFR

Ulrich Magnus (Hamburg)

I. Damages – the most Common Remedy

If one reads the most recent edition of a wide-spread law journal of whatever country it is rare that the word damages or its linguistic equivalent is not mentioned either in articles or in reported court decisions.[1] Damages are the most common remedy where a legal obligation has been infringed. They play a particularly prominent and frequent role in daily practice. While they are almost the only remedy in tort, in contract they are one remedy amongst several others – but also here they are the most frequent remedy. It is thus no surprise that also the *acquis communautaire* has paid attention to them, though still far too little. The consequence of this reluctance is evident: it poses some difficulties to generalise the existing *acquis* in this respect and infer principles from it. To some extent the DCFR intends to remedy this shortcoming of the present *acquis*.

The following text tries, first, to give a short review of the existing *acquis* in the field of the law of damages, second, to show and discuss which conclusions the Acquis Principles draw from this state of affairs and, third and foremost, to compare the Acquis Principles on damages with those of the DCFR. Although the rules of the Acquis Principles and the DCFR are drafted for contractual (and pre-contractual) obligations they must be based not only on the relevant *acquis* in the field of contract law, but must also take notice of EU-enactments in the field of tort law. The main reason for this is that the law of damages is relevant for both contract and tort in much the same way. It would be unreasonable to draft completely different rules on damages for both fields or to do the same work twice.

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[1] For instance, a standard edition of Germany's most-read law journal, the Neue Juristische Wochenschrift (NJW) (no. 49 of 3 December 2007) reports 12 civil court decisions. Three of them deal directly with damages claims, and another one indirectly.

II. Damages in the Present *Acquis*

1. Dearth of regulation

At the outset it must be stated, and repeated,[2] that – with regard to private law – in general the *acquis* is still patchwork, that it is fragmentary and not very consistent; this is particularly true with respect to the law of damages. Here the inconsistency is in addition accompanied by a certain dearth of regulation. The remedy of damages itself is provided for only by a limited number of legislative instruments,[3] but by far not by all legislative acts where it could be expected;[4] most of the regulations and directives which grant the remedy of damages are still reluctant to impose specific rules on the assessment of damages.

2. "Effective, proportionate and dissuasive" sanctions

Rather often private law regulations and directives do not specify the remedies for a breach of an obligation they create. It is frequent that they merely prescribe that sanctions must be "effective, proportionate and dissuasive". This is for instance the case with the *Regulation on Cross-border Payments in Euro*,[5] the *Regulation on Compensation for Denied Boarding*,[6] the *Directive on Prices for Consumer Goods*,[7] with the *E-commerce Directive*,[8] the *Anti-discrimination Directive*[9] or the *Distant Financial Services Directive*.[10]

The requirement of "effective, proportionate and dissuasive" sanctions appears to transpose the *effet utile* doctrine of the European Court of Jus-

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[2] See in this sense most recently *Zimmermann*, European Contract Law: General Report, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2007, 458.

[3] See below II. 3.

[4] For examples where damages could be expected to be dealt with but are not, see below under II.2.

[5] See Art. 7 Regulation 2560/2001/EC on cross-border payments in Euro.

[6] Art. 16 (3) Regulation 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights etc.

[7] Art. 8 sent. 2 Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers.

[8] Art. 20 sent. 2 Directive 2000/31/EC on certain legal aspects of information services, in particular electronic commerce, in the internal market.

[9] Art. 17 (2) Directive 2000/78/EC against discrimination.

[10] Art. 11 Directive 2002/65/EC concerning the distant marketing of consumer financial services.

tice (*ECJ*) on the interpretation and application of Community law to the legislative level. It leaves open, however, in which way the Member States implement the required sanctions, let alone that it refrains from giving any guidance at all with respect to the particular remedy of damages and the assessment thereof. Occasionally, the *ECJ* has at least specified when a sanction is not effective, proportionate and dissuasive.[11] An award of mere symbolic damages does not satisfy the requirement.[12]

3. Detailed regulations

On the other hand there are also several legislative EU acts which address the remedy of damages in more detail. Although their number is still limited it is however steadily growing. Nonetheless, a general and coherent concept for a law of damages can be thus far inferred from them but only with rather great difficulty.

In the first place Art. 288 (2) *EC Treaty* deserves mentioning. Though the provision concerns the extra-contractual liability of the Community and refers insofar only to "the general principles common to the laws of the Member States" it has been the nucleus for the judicial development of a set of rules on damages, for instance that lost profits, as well as immaterial losses, must be compensated.[13]

The *Package Tours Directive*[14] provides that the tour organiser and/or retailer is liable for damage resulting from the failure to perform or the improper performance of the contract unless such failure is attributable to the other party, a third party or to force majeure.

The *Late Payment Directive*[15] gives a right to damages when agreed terms on the date of payment or on the consequences of late payment are grossly unfair to the creditor.

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[11] See in particular *ECJ* Case C-79/83 *Harz ./. Deutsche Tradax GmbH* [1984] ECR I-1921; *ECJ* Case C-180/95 *Draempaehl ./. Urania Immobilienservice OHG* [1997] ECR I-2195 concerning the sanctions against discrimination in labour law.

[12] See *ECJ* Case C-14/83 *von Colson ./. Kamann* [1984] ECR I-1891; *ECJ* Case C-79/83 *Harz ./. Deutsche Tradax GmbH* [1984] ECR I-1921.

[13] See for lost profits, e.g.: *ECJ* joined Cases C-64, 113/76, 176, 239/78, 27, 28, 45/79 *Dumortier Frères ./. Council* [1979] ECR I-3091; *ECJ* Case C-104/89 and C-37/90 *Mulder ./. Concil* [1992] ECR I-3061; for compensation of immaterial loss, e.g.: *ECJ* joined Cases C-169/83 and 136/84 *Leussink-Brummelhuis ./. Commission* [1986] ECR I-2801.

[14] Art. 5 (2) Directive 90/314/EEC on package travel, package holidays and package tours.

[15] Art. 3 (3) Directive 2000/35/EC on combating late payment in commercial transactions.

The *Regulation on Compensation for Denied Boarding*[16] provides for compensation if the passenger is not transported to the final destination for which he or she has a valid ticket or if the transport is delayed. The sanction – fixed sums for defined cases – resembles, however, rather a contractual penalty than the remedy of damages.

Also the *Regulation on Air Carrier Liability*[17] deals with damages though only with the case that an air passenger has been injured or killed due to the operation of an aircraft. The regulation grants a certain level of compensation but only if the air carrier is liable under the applicable law.

The *Directive on Self-employed Commercial Agents*[18] provides for an indemnification or compensation where either the principal has terminated the contract of agency without just reason or where the agent has terminated the contract with just reason.

The *Directive on Cross-border Credit Transfers*[19] (which is replaced by the *Directive on Payment Services*)[20] provides for a right to compensation in case of delayed cross-border payments unless the delay is attributable to either the originator or the beneficiary of the payment.

The most recent piece of EU-legislation relevant here is the *Regulation on Rail Passengers' Rights and Obligations*[21] which provides for standardised compensation in case of delayed rail transport of passengers.[22]

Although being outside the contractual sphere the *Product Liability Directive*[23] must also be mentioned. It provides for a damages claim in case of damage caused by a defective product and categorises different kinds of damage:[24] damage to the person (death or injury) can be recovered;[25]

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16 Artt. 6 and 7 Regulation 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights etc.

17 Regulation 2027/1997/EC on air carrier liability in the event of accidents; amended by Regulation 889/2002 of 13 May 2002.

18 Artt. 17 and 18 Directive 86/653/EEC on the co-ordination of the laws of the Member States relating to self-employed commercial agents.

19 Art. 6 paras. 1, 2 and 3 Directive 97/5/EC on cross-border credit transfers.

20 Directive on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

21 Regulation 1371/2007/EC on rail passengers' rights and obligations.

22 See Art. 17 Regulation 1371/2007/EC on rail passengers' rights and obligations.

23 Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

24 See Art. 9 Product Liability Directive.

25 However, the Product Liability Directive does not provide for compensation of immaterial loss. It only allows the Member States to maintain or introduce such a rule (Art. 9 sent. 2); compare *Taschner/Frietsch*, Produkthaftungsgesetz und EG-

damage to property can also be recovered if the loss exceeds € 500 and concerns privately used or consumed property; compensation for pure economic loss is excluded.[26]

Astonishingly, the *Consumer Sales Directive*[27] – where one would primarily expect rules on damages – does, on the contrary, not deal with this matter at all, but leaves the remedy of damages entirely to the applicable national law.

Alongside the legislative *acquis* a judicial *acquis* is developing even on damages which goes much further than applying the general principles referred to in Art. 288 (2) EC. It is primarily the *Francovich* decision and its followers which belong to this category. But the European Courts have also acknowledged the possibility of nominal damages[28] or have denied punitive damages, though only with respect to anti-trust cases.[29]

4. Inferral of general principles

The short review confirms the particular patchwork structure of the *acquis* on damages. In some instances general conclusions can only be drawn from few, and sometimes single, provisions. Nonetheless, even in the field of the law of damages it seems possible, though with some difficulty, to infer general principles from the present *acquis*.

III. General Considerations

1. The functions of the law of damages

When framing principles on damages from the present *acquis communautaire* certain general considerations must precede their formulation. A first such consideration concerns the question which aim damages should serve or, in other words, which function this remedy exercises. This basic starting point steers to a large extent towards the concretization of principles on damages.

Produkthaftungsrichtlinie, 2nd ed. Munich 1990, Art. 9 note 16 (*Taschner* was the responsible EU official for the Products Liability Directive).

[26] *Taschner/Frietsch*, Produkthaftungsgesetz und EG-Produkthaftungsrichtlinie (*cit.* fn. 25), Art. 9 note 12.

[27] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

[28] *ECJ* Case C-34/87 *Culin ./. Commission* [1990] ECR I-225.

[29] *ECJ* joined Cases C-295/04 to 298/04 *Manfredi ./. Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

It is rather commonly accepted by the national laws of the EU-Member States that damages primarily serve the aim of providing compensation.[30] Damages shall make good the loss which has been caused. It is inherent to this aim that damages must compensate the entire loss but generally also nothing more than that. Accordingly not only the national laws of the EU-Member States follow this principle of *restitutio in integrum* but it appears that it is also underlying the present *acquis*, though this principle is rarely directly expressed.[31]

Further aims of the law of damages are much more controversial; this is particularly true for a punitive function. In contrast to the United States, punitive damages which serve as a civil fine have few proponents in Europe although English common law knows of a related remedy in the form of aggravated or examplary damages which, however, are only granted under very restricted conditions.[32] Thus far, neither the legislative nor the judicial *acquis* has adopted rules which allow punitive damages.[33]

Less controversial, but by no means undisputed, is the recognition of a general preventive function of damages as well as the function of satisfaction. Both may play a secondary role limited to specific situations.[34]

2. Damages in contract and tort

As already mentioned, the remedy of damages arises both in contract and in tort. Although the conditions under which damages are owed vary for both fields, the consequences of contractual or tortious liability often result in the payment of damages. Moreover, the aim of damages is similar, if not identical for both fields of law; therefore, the assessment of damages

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30 For a comparative survey see *Magnus*, in Magnus (ed.), Unification of Tort Law: Damages, The Hague et al. 2001, 185.

31 The principle can be inferred from the Recitals of the Products Liability Directive which state that "the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property".

32 See *Rookes v. Barnard* [1964] A.C. 1129; *Kuddus v. Chief Constable of Leistershire* [2002] 2 A.C. 122; see further *Markesinis/Deakin*, Tort Law, 6th ed., Oxford 2008, 944 et seq.; *H. V. Rogers* (ed.), Winfield and Jolowicz on Tort, 17th ed., London 2006 n. 22-8 et seq.

33 See *ECJ* joined Cases C-295/04 to 298/04 *Manfredi ./. Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

34 In particular but not only in environmental law, see Art. 174 (2) EC Treaty; from a general perspective compare *Alemanno*, The Shaping of the Precautionary Principle by the European Courts, in: Cuocolo/Luparia (eds.), Valori costituzionali e nuove politiche des diritto, http://issm.com/abstract=1007404, 2000.

should also not differ very much. In fact, a set of rules on damages should be appropriate for both contract and tort.

3. Contents and density of regulation

European Principles on damages should not merely copy the existing *acquis* but formulate a coherent set of rules on damages. Such a set of rules must contain the basic policy decisions on the conditions under which damages are owed and the main general rules on the assessment of damages. On the other hand, it is unnecessary that all possible details should also be included which could perhaps be inferred with more or less difficulty from one or the other single provision or decision of the *acquis*.

IV. The Acquis Principles on Damages

1. Review

The chapter on damages in the Acquis Principles contains seven provisions, two of which deal with the actual law of damages, namely one provision concerning the conditions of damages and the other concerned with the assessment. A further provision of the damages chapter concerns contributory negligence, and four provisions deal with interest. This evidences also a policy choice: the Acquis Principles treat interest as a particular kind of – liquidated – damages and not as a separate category.[35]

2. Entitlement to damages

a) General requirements

Art. 8:401 is the basic norm which introduces the section on damages and lays down the conditions under which a creditor is entitled to damages. The *acquis communautaire* is clear insofar that the entitlement to damages for a breach of a contractual duty requires at least: non-performance of an obligation, damage and its causation through the non-performance. These requirements can be inferred from the Package Travel Directive, the Late Payment Directive, the Regulation on Compensation for Denied Boarding, the Regulation on Air Carrier Liability, the Directive on Self-employed Commercial Agents, the Directive on Cross-border Credit Transfers and the Regulation on Rail Passengers'

[35] As for instance the CISG (Art. 78) which strictly separates interest from damages.

Rights and Obligations. All these instruments provide the creditor with a remedy – damages or a kind of liquidated damages – if at least the following conditions are met: a breach of an obligation by the debtor, a loss suffered by the creditor (a loss is partly presumed in case of delayed transportation) and a causal link between the breach and the loss. These requirements are mirrored in Art. 8:401 (1). The question is whether these conditions suffice.

b) Fault or guaranty principle

A further requirement is disputed: does the *acquis* require fault as additional condition of a claim for contractual damages? Or does the *acquis* follow the principle of strict liability with the possibility that the debtor may be excused under certain circumstances? The *acquis* is less clear in that respect but nonetheless seems to rather militate in favour of a guaranty principle. Therefore, Art. 8:401 also follows the principle of strict liability with certain grounds of exoneration. Art. 8:401 (2) specifies when non-performance is excused. Grounds of exoneration are unforseeable and unavoidable circumstances which are outside the control of the debtor or his assistants and whose risks the debtor has not accepted and which could not have been avoided despite the exercise of all due care. A ground for exoneration is in particular force majeure, but also an unforeseeable and unavoidable act of a third person. If those circumstances have caused the debtor's inability to perform the obligation owed then the debtor is not liable for losses which result from the non-performance. This rule can be, though not undisputedly,[36] inferred from the Package Tour Directive[37] and the Cross-border Credit Transfers Directive;[38] the principle is also in line with the CISG.[39]

An example may demonstrate the application of the principle: A enters into a package tour contract with tour organiser B. Shortly before the start of the tour a hurricane destroys the booked hotel and B cannot offer any equivalent accomodation. B's non-performance is excused because circumstances beyond his control are responsible for the non-performance which could not have been avoided even if B exercised all due care.

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[36] See thereto also *Zoll*, The Remedies for Non-Performance in the System of the Acquis Group, in part IV of this volume.

[37] But compare the contrary decision of the German Federal Court, NJW 2005, 418, 419 et seq. The Court held there that the Package Tour Directive were based on the principle of presumed fault. To clarify the question the Court should have referred the question to the ECJ.

[38] Art. 9 Cross-border Credit Transfers Directive.

[39] Art. 79 CISG.

However, the principle of strict liability may be subject to certain exceptions where the nature of the contract may require proven fault or where fault is only presumed. An exception to the rule may, for example, arise where the contract obliges the debtor not to achieve a certain result but only to use his best efforts (for instance in most contracts for medical treatment).[40]

c) The further requirements

The other requirements – non-performance, damage, causation – need little discussion. The ensemble of those regulations and directives already mentioned allows for the rather clear inferral of these requirements.

The – contractual or pre-contractual – duty whose violation Art. 8:401 (1) presupposes may be provided for by law – see Chapters 2 and 7 of these Principles – but may also be inferred from the nature of the respective contract. Under the present article mere non-performance suffices. In general it is neither necessary that the breach is of a specific nature or weight nor that the aggrieved party has given prior notice of the breach or such-like. This does not exclude the possibility to provide for specific requirements for specific situations, for instance for a requirement of notice in the case of delivery of non-conforming goods or in similar situations.

Furthermore, the *acquis* generally requires damage as pre-condition for damages as shown for instance, in the Package Tours Directive;[41] this requirement can also be found in Art. 8:401 (1) of the Acquis Principles. In principle no damages are owed where no loss has been suffered. But the *ECJ* has also acknowledged the possibility of nominal damages – a symbolic sum – where the claimant had suffered a wrong without a loss or cannot prove the precise amount of a loss.[42] As mentioned, punitive damages have thus far not been recognised in the *acquis*.[43] On the other hand, damages have often a certain general and special deterrent effect. This

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[40] For the same solution under the Lando Principles see *Lando/Beale* (ed.), Principles of European Contract Law I and II, The Hague 2000, 434 et seq.

[41] See Art. 5 (2) Package Tour Directive: "damage resulting …". See also the decisions of the *ECJ* on the liability of the Community under Art. 288 (ex Art. 215) EC Treaty cited supra. Most clearly in this respect, though in the tort field the Product Liability Directive requires damage for a damages claim (Art. 1 and 9).

[42] See *ECJ* Case C-34/87 *Culin ./. Commission* [1990] ECR I-225 (symbolique Franc).

[43] See *ECJ* joined Cases C-295/04 to 298/04 *Manfredi ./. Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

preventive function should be activated in appropriate cases, for instance in discrimination cases.[44]

The final requirement is the causal link between the creditor's loss and the debtor's non-performance. This is a more or less self-evident principle of the *acquis*[45] and it has been repeatedly stated by the *ECJ*.[46] If causation with respect to the damage claimed cannot be established then no damages are to be awarded. The same rule has to be adopted in cases of breach of contract. Thus far, the requirement of causation has not yet been further elaborated by EU-legislation. The *ECJ* requires that at least the *conditio sine qua non* test is met.[47]

d) Cumulation of damages with other remedies

Though the *acquis* is not really explicit on this matter it yet appears to favour the principle that damages can be claimed in conjunction with any other remedy in order to recover any remaining loss. Both the Consumer Sales Directive and the Package Tour Directive evidently do not exclude the aggrieved party's right to damages if, for instance, this party justifiedly terminates the contract at the same time. The CISG[48] has also adopted the very same rule with the Acquis Principles also following this approach (Art. 8:302 (5)). Yet it is clear that damages in combination with other remedies are only available insofar as there is still a loss not compensated by the other remedy.

3. Assessment of damages

a) The guiding principle

The Acquis Principles contain only one provision which deals with the assessment of damages (Art. 8:402). This provision is also based on the compensation principle, namely to reinstate the aggrieved person, as far as money can do, to the state it would have been in had the obligation been correctly fulfilled (principle of *restitutio in integrum*). The provision

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[44] See also Art. 3:202 (2) Acquis Principles.

[45] See for instance Art. 5 (2) Package Tour Directive: "damage *resulting* (…) from the failure to perform".

[46] See for instance *ECJ* Case C-140/97 *Rechberger ./. Austria* [1999] ECR I-3499.

[47] Compare for instance *ECJ* Case C-358/90 *Compagnia italiana alcool ./. Commission* [1992] ECR I-2457 (2505); *CFI*, Case T-572/93 *Odigitria ./. Council and Commission* [1995] ECR II-2025 (2050).

[48] Art. 45 (2) and Art. 61 (2) CISG.

further details which kinds of losses are to be compensated. It clarifies that damages must not only compensate an ensued damage (*damnum emergens*) but also lost profits (*lucrum cessans*) as well as costs reasonably incurred to enforce the infringed obligation and, where appropriate, non-pecuniary losses. The compensation principle of the article also gives some guidance on the more specific assessment of damages which is generally a monetary payment and has to make good the entire loss. At the same time nothing more than the loss has to be compensated. By *argumentum e contrario* it has therefore to be inferred that damages shall not enrich the aggrieved party. Yet, the formulated principle does not exclude nominal damages;[49] as already indicated it does, however, not allow for punitive damages.

The legislative *acquis* is thus far not very excplicit with respect to which losses are to be compensated and how damages are to be assessed. But from the whole ensemble of EU-legislation it can be inferred that generally the entire damage has to be compensated.[50] The *ECJ* has also made clear on various occasions that damages should cover the entire loss including future profits[51] and including compensation for immaterial harm.[52]

b) General measure of damages

The general measure of damages is the amount necessary to reinstate the creditor to the position which would have existed had the obligation been correctly performed (Art. 8:402 (1)). The creditor is entitled to what he could expect under the contract and this expectation interest has to be compensated.

The amount of damages need not only compensate any emerging loss but also a sufficiently likely gain of which the creditor was deprived

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[49] See *ECJ* Case C-34/87 *Culin ./. Commission* [1990] ECR I-225 (symbolique Franc).

[50] See for instance Art. 4 para. 7 Package Tours Directive; also Art. 17 para. 3 Commercial Agents Directive ("The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal."). Also the CISG (Art. 74) has adopted the principle of compensation of the entire loss. On the other hand, the Product Liability Directive dealing, however, only with tort excludes other than personal and property damage (see Art. 9).

[51] See for instance *ECJ* Case C-308/87 *Grifoni ./. European Atomic Energy Community* [1994] ECR I-341 (Grifoni II).

[52] *ECJ* Case C-308/87 *Grifoni ./. European Atomic Energy Community* [1994] ECR I-341 (Grifoni II); *ECJ* Case C-168/00 *Leitner ./. TUI Deutschland* [2002] ECR I-2631.

(Art. 8:402 (2)). Where, however, the breach of the obligation resulted in damage to the integrity of the creditor's person or property then this integrity interest also has to be compensated.[53] In cases of personal injury these are the costs which are in particular required for recovery, but also includes lost earnings. In case of damage to property it is regularly the costs for repair or for a substitute. In appropriate cases the compensation principle may also require that the loss of use has to be compensated for.

Art. 8:402 (3) states further that damages also include costs for the enforcement of an obligation. This covers, in particular, costs for legal advice etc., but is however subject to two conditions: firstly, these costs must be reasonable, meaning that the enforcement costs were necessary and that their amount complied with the generally usual amount. Secondly, that no specific rules exist, as for instance with respect to the costs of legal proceedings; however if specific rules exist, then these rules prevail.

The article does not explicitly define the yardstick according to which infringed interests, in particular mere economic interests, are to be assessed in monetary terms. The compensation principle has, however, the consequence that generally a sum of money is owed which is necessary to provide an identical good available on the market in order to reinstate the creditor. The regular measure of damages is therefore the market value of the position infringed.

c) Pecuniary and non-pecuniary damage

Art. 8.402 (4) specifically addresses non-pecuniary losses: "(W)here the purpose of the obligation includes the protection or satisfaction of non-pecuniary interests", non-pecuniary losses must also be compensated. Thus, the nature of the obligation must allow and require that damages for immaterial harm are granted, for instance, if the non-performance of a debtor's duty caused bodily harm, combined with pain and suffering, to the creditor. In most cases the loss caused by a breach of contract or of a pre-contractual duty will, however, be of a pecuniary nature, namely a diminution of the aggrieved person's partimony either because this person lost profits or because its tangible and intangible property rights were damaged or destroyed, or because this person had to spend money for the recovery of the damage.

But as the *ECJ* held in the *Leitner ./. TUI* decision[54] in appropriate contract cases non-pecuniary damage such as pain and suffering also has to be compensated. In order to be compensable this kind of damage must

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[53] As an example see the decision of the *ECJ* in *Leitner ./. TUI* (*cit.* fn. 52).

[54] *ECJ* Case *Leitner ./. TUI* (*cit.* fn. 52).

be covered by the protective scope of the contract; the contract must intend to prevent such loss. A package tour contract which, due to incorrect performance, results in an injury sustained by a protected person (as was the case in *Leitner ./. TUI)* provides a good example of a contract which intends to prevent discomfort or injury to the traveller.

4. Contributory negligence

It is a widely accepted principle which most of the aforementioned EU-instruments explicitly recognise that the creditor's contributory negligence reduces or even excludes an otherwise well-founded claim. A creditor cannot claim damages insofar as, and to the extent that, he neglected to avoid the creation of damage or to reduce the consequences after damage had occurred. The reduction or even exclusion of a claim for damages because of contributory negligence or omitted mitigation however requires that the creditor neglected a duty in his own interest to protect his own goods and interests from damage.

Yet, the formulations by which the present *acquis* expresses this principle are not very coherent.[55] The Package Travel Directive uses the expression that the non-performance must be "attributable" to the creditor.[56] The Air Carrier Liability Regulation requires that the damage be "caused by, or contributed to by, negligence of the injured or deceased passenger."[57] The Product Liability Directive partly or wholly relieves the producer from liability where "the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible."[58] The Cross-border Credit Transfer Directive excludes any compensation in case that a delay is attributable to the creditor.[59] But despite the differing formulations the underlying general principle is rather clear and can be expressed as formulated by Art. 8:403 of the Acquis Principles.

The present article is also based on the more general principle that a creditor should not profit from own misdoings (Art. 8:403 must also be seen in conjunction with Art. 8:102. While Art. 8:403 addresses the phase and the creditor's duties when a damage occurred, Art. 8:102 expresses the same idea for the phase of non-performance of an obligation which need not necessarily result in a loss).

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[55] See also the comment to Art. 8:102 ACQP.

[56] Art. 5 (2) first indent Package Travel Directive; Art. 6 (3) Cross-Border Credit Transfer Directive.

[57] Art. 3 (3) Air Carrier Liability Regulation.

[58] Art. 8 (2) Product Liability Directive.

[59] Art. 6 para. 3 Cross-Border Credit Transfer Directive.

Under Art. 8:403 it does not matter whether the creditor's contributory negligence refers to the creation of the damage or to the later mitigation of its effects. In both phases the creditor is obliged to avoid damage as far as this is reasonable. If the creditor neglects this duty this results in a reduction of the amount of damages to the extent to which the creditor could have avoided the damage. In extreme cases the reduction may even fully exclude a claim; but generally contributory negligence will result in an apportionment of the loss.

Thus far, the regulations and directives do not state which factors have to be taken into account for the eventual reduction or exclusion of the creditor's claim for damages. It is however necessary that the creditor has negligently violated the duty to protect his own goods and interests.

5. Interest

a) Review

Astonishingly, full four articles of the damages section of the Acquis Principles (Artt. 8:404-407) are concerned with interest. This seems to overstress the regulation of this issue. But on the one hand, the *acquis communautaire* does not thus far provide a general basic rule on interest (therefore the so-called grey letter rule of Art. 8:404 of the Acquis Principles which formulates the basic principle and is taken entirely from Art. III.–3:708 DCFR).[60] On the other hand, the *acquis* is very explicit on specific matters concerning interest and leaves hardly any room for deviations. The Artt. 8:405-407 of the Acquis Principles are more or less literally taken from the Late Payment Directive which in turn is part of the Community's strategy to combat late payment, something which is regarded as a serious threat, particularly to small and medium-sized enterprises.[61] The *ECJ* has also recognised in several decisions that interest has to be paid on sums which are due,[62] and has held that, at least from the day of the judgment onwards, interest is due.[63]

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[60] The DCFR-rule (Art. III.–3:708) is, however, not fully in line with the present Acquis. The DCFR-rule grants interest irrespective whether or not the debtor's non-payment is excused while Art. 3 (1) (c) (ii) Late Payment Directive entitles the creditor to interest only "unless the debtor is not responsible for the delay."

[61] See Recitals 1 and 7 et seq. Late Payment Directive.

[62] See *ECJ* joined Cases C-104/89 and C-37/90 *Mulder a.o. ./. Council and Commission* [1992] ECR I-3061; *CFI* Case T-231/97 *New Europe Consulting Ltd a.o. ./. Commission* [1999] ECR II-2403.

[63] See references in preceding note.

b) The single provisions

The general principle on interest is contained in Art. 8:404. Interest is due on any sum whose payment is delayed. This rule can be hardly attacked. But it is open to debate whether or not an excuse for the debtor's delay should exclude the obligation to pay interest.[64] The decision depends on whether the obligation to pay interest is regarded rather as a claim for damages (which can be excused) or as a claim for restitution (which has to retransfer the benefit the debtor had through the excused as well as the unexcused use of the money owed). In the present *acquis* the former view prevails.[65] Art. 8:404 also provides for the 'normal' starting date and rate of interest.

Art. 8:405 Acquis Principles formulates a qualification to the general principle on interest restricting the creditor's right. Art. 8:405 excludes the creditor's right to interest if, and to the extent that, the creditor has not fulfilled his own reciprocal obligation. In that event the debtor is entitled to withhold his own performance and should also not be obliged to pay any interest. The *acquis* contains a similar rule in Art. 3 (1)(c)(i) of the Late Payment Directive according to which "the creditor shall be entitled to interest for late payment to the extent […] that he has fulfilled his contractual and legal obligations …". Art. 8:405 prevails also over Art. 8:406 on the rate and date of interest.

Art. 8:406 states specific rules for payment of interest if a business delays payment. The provision precisely follows the Late Payment Directive which details the obligation to pay interest between businesses if a payment has been delayed.[66] In contrast to Art. 8:404 the interest duty under Art. 8:406 accrues only if the business is not excused from delayed payment by circumstances beyond its control.[67] Art. 8:406 (2) and (3) define when interest starts to run; (4) fixes the rate of interest. Art. 8:406 (5) reserves the creditor's right to recover damages for any further loss under Art. 8:401.

Art. 8:407 is also based on the Late Payment Directive[68] and follows it quite closely. The article invalidates certain clauses concerning interest and late payment between businesses when these clauses are grossly unfair to the creditor. The Late Payment Directive allows the option either to invalidate unfair clauses on interest or deferred payment or, to grant a

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64 See also fn. 60.

65 See Art. 3 (1)(c)(ii) Late Payment Directive.

66 Art. 3 (1) Late Payment Directive.

67 See also fn. 60.

68 Art. 3 (3) Directive 2000/35/EC on combating late payment in commercial transactions.

claim for damages instead. The present provision opts for the first alternative but in addition also allows for the recovery of any damage.

Art. 8:407 (1) invalidates a clause under which the date or rate of interest deviates from the legally fixed standard, if in the light of all the circumstances the clause is grossly unfair to the creditor. The term 'clause' does not require a standard contract term; individually negotiated clauses are also covered.[69] However, the purpose of the provision requires that the clause must be proposed by, and agreed upon on the initiative of, the debtor. If the creditor voluntarily proposed the clause it cannot be regarded as being grossly unfair to him.

Whether a clause is grossly unfair depends upon all the circumstances and must be objectively assessed also with respect to good commercial practice (e.g. the usual date and rate of interest in the specific branch) and the nature of the goods or services involved. It has also to be taken into account whether the debtor has any objective reason to deviate from the prescribed interest parameters.[70]

Art. 8:407 (2) orders that the creditor does not lose his entitlement to interest if a clause extends the time for payment over the period from which interest would normally start running and if such extension is grossly unfair to the creditor. The question of gross unfairness has to be answered in the same way as under (1).

If a clause is grossly unfair it is unenforceable;[71] the debtor cannot rely on it and the legally prescribed terms apply instead.[72]

V. The DCFR on Damages and Interest

The DCFR also contains a separate section on damages and interest.[73] The DCFR's provisions on the entitlement to, and assessment of, damages and on contributory negligence are very similar to those of the corresponding articles in the Acquis Principles.[74] Although the wording differs in certain respects, the substance is more or less identical.

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[69] Art. 3 (3) Late Payment Directive uses the notion "agreement" and thus comprises also individually negotiated terms.

[70] See particularly Art. 3 (3) Late Payment Directive.

[71] Art. 3 (3) Late Payment Directive.

[72] So explicitly Art. 3 (3) Late Payment Directive which however allows that the national courts may determine differing fair conditions.

[73] Book III, Chapter 3, Section 7 DCFR: Artt. III-3:701-3:711. Further provisions on damages are to be found in Book VI, Chapter 6, Section 1 and 2: Artt. VI-6:101 et seq.

[74] This is not by chance. A prior version of the Acquis Principles influenced the DCFR.

However, the provisions on interest differ much more in the sense that they supplement one another. While the Acquis Principles have implemented the main provisions of the Late Payment Directive, the DCFR only provides for a general basic rule on the entitlement to interest[75] and further orders that interest is added every 12 months to the outstanding capital;[76] in principle compound interest is thereby allowed for. The rules on interest contained in the Late Payment Directive are not reflected by the DCFR.

A number of DCFR provisions have no equivalent at all in the Acquis Principles. These are the provisions on forseeability,[77] on abstract assessment of damages in certain cases,[78] on the currency of damages[79] and on penalties.[80] They have no, or no sufficient basis, in the present *acquis* although some of them are for instance enshrined in the CISG.[81] They are not inconsistent with the provisions of the Acquis Principles but can be seen as their supplement. It is clear that they are desirable and serve a useful purpose in order to form a comprehensive set of rules on damages.

VI. Comparison

1. The rules on entitlement to and assessment of damages, and on contributory negligence

Both sets of rules – the Acquis Principles and the DCFR – provide for entitlement to damages under the same conditions: non-performance of a duty, a loss, a causal link between both and no excuse for the non-performance. The grounds of exoneration are also essentially the same,[82] namely unavoidable circumstances beyond the debtor's control, although the Acquis Principles add that the exemption takes place if the exercise of all due care had not avoided the consequences of those circumstances.[83]

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75 See the already discussed Art. III.–3:708 DCFR = Art. 8:404 Acquis Principles.

76 Art. III.–3:709 DCFR.

77 Art. III.–3:703 DCFR.

78 Artt. III.–3.706 and 707 DCFR.

79 Art. III.–3:711 DCFR.

80 Art. III.–3:710 DCFR.

81 See Artt. 74-76 CISG from which they – with the exception of the currency rule – are taken.

82 Compare Art. 8:401 (2) Acquis Principles and Art. III.–3:103(1) DCFR. Both provisions are very much drafted after the model of Art. 79 CISG.

83 See Art. 8:401 (2) Acquis Principles.

Both the provisions of the Acquis Principles and DCFR are primarily based on the compensation principle and state that damages shall put the creditor into the position which the creditor would have been in if the obligation had been duly performed.[84] The preventive effect of damages is mainly recognised under specific circumstances.[85] But the DCFR also generally entitles the creditor to compensation for costs of reasonable preventive measures.[86]

The provisions of both sets of rules on recoverable losses and on the assessment of damages are also rather similar.[87] Both include the loss suffered and the loss of profits,[88] and both extend compensation to non-pecuniary or non-economic losses.[89] The Acquis Principles allow recovery of non-pecuniary damage, however, only to the extent that the contract is aimed at the protection or satisfaction of non-pecuniary interests.[90] On the other hand the DCFR already provides that such future loss is recoverable which is reasonably likely to occur.[91] Moreover, the Acquis Principles expressly grant compensation for reasonable costs for the enforcement of an obligation as far as they are not covered by more specific rules in judicial proceedings,[92] although the DCFR does not provide for such a rule it also does not exclude the compensation of such costs.

With respect to contributory negligence, both the Acquis Principles and the DCFR recognise the general principle that the amount of damages has to be reduced – even to nil in extreme cases – if the creditor has to some extent contributed to the creation of his own loss.[93] The formulation varies, however, although the difference need not necessarily mean that the substance also differs. The Acquis Principles stress that the creditor must have acted wilfully or negligently[94] whilst the DCFR under-

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84 Art. 8:402 (1) Acquis Principles and Art. III.–3:701(1) DCFR.

85 See in particular Art. 3:202 (2) Acquis Principles which provides that the amount of damages for non-pecuniary losses caused by discrimination may take account of the deterrent effect of the remedy but must still be proportionate to the injury (thereby excluding punitive damages which are not related to the extent of the loss but to the character of the conduct of the debtor).

86 Art. III.–3:705 (2) DCFR.

87 Compare Art. 8:402 Acquis Principles with Art. III.–3:701 (2) and (3) and Art. III.–3:702 DCFR.

88 Art. 8:402 (2) Acquis Principles; Art. III.–3:701 (3) and Art. II.–3:702 sent. 2 DCFR.

89 Art. 8:402 (4) Acquis Principles; Art. III.–3:701 (3) DCFR.

90 See Art. 8:402 (4) Acquis Principles.

91 Art. III.–3:701 (2) DCFR.

92 Art. 8:402 (3) Acquis Principles.

93 See Art. 8:403 Acquis Principles and Artt. III.–3:704 and 705 DCFR.

94 Art. 8:403 Acquis Principles.

lines that the creditor must have omitted to take reasonable steps to reduce the loss.[95] Both formulations should indicate that the creditor must have neglected a duty to protect his own goods and interests. Art. III.–3:704 DCFR provides further that "(t)he debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects." This provision which resembles Art. 80 CISG can be understood to exempt the debtor from liability insofar as the creditor caused the own loss. Mere causation in the sense of the *conditio sine qua non* requirement should, however, not suffice to reduce or exclude the debtor's liability. Some further element, either of fault or violation of good faith,[96] is needed on the part of the creditor. Otherwise, the mere presence of the creditor or his or her goods would exclude a claim for damages because it could always be argued that the loss would not have occurred without that presence.

2. The rules on interest

As already mentioned, the rules of the Acquis Principles and the DCFR on interest supplement each other to a large and desirable extent. The special *acquis* rules on interest between businesses[97] can be regarded as a reasonable addition to the general duty to pay interest for any delayed payment which in turn is only foreseen in the DCFR.[98] Also the Acquis Principle (Art. 8:405: that the creditor is only entitled to interest as far has he or she has performed the reciprocal obligation) appears as a useful addition to a full set of provisions on interest. The only evident discrepancy between the interest provisions of the Acquis Principles and the DCFR is the question whether the general exoneration rule extends to the interest duty.[99] The model of Art. 78 CISG[100] and the requirement that the creditor must have performed his or her own reciprocal obligation which protects the debtor sufficiently militate for the DCFR solution which does not allow for any excuse.

Under policy considerations it is more than doubtful whether compound interest should be admitted as provided by Art. III.–3:709 (1) DCFR. Interest is a 'punishment' for withholding payment; interest for

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[95] Art. III.–3:705 (1) DCFR.

[96] The rule that compensation of self-induced loss cannot be claimed from others is a specific application of the good faith principle, namely to avoid contradicting conduct.

[97] Art. 8:406 and 407 Acquis Principles.

[98] See Art. III.–3:708 (1) DCFR.

[99] See supra under IV. 5. b).

[100] The provision allows no exemption.

withholding interest would be a kind of 'double punishment'. In particular, if interest is due irrespective of any excuse then compound interest appears as irreconcilable with considerations of consumer protection. But even for commercial transactions, for instance under the CISG, the overwhelming view of the majority denies a duty to pay compound interest.[101]

3. The additional DCFR rules

Those further rules on damages which are only provided for by the DCFR but which are not contained in the Acquis Principles also appear as a useful supplement to the present *acquis*. The forseeability restriction[102] which – except in cases of intent or gross negligence – limits the debtor's liability to the loss which was, or could be reasonably, foreseen at the time when the obligation was incurred corresponds to the same rule in the CISG.[103] This rule takes account of the contractual risk which a debtor should be able to assess and calculate when the obligation is undertaken.

The possibility to measure the damage in an abstract way – either by reference to the price of a cover transaction[104] or by reference to the market price[105] – again copies the CISG[106] but corresponds also with commercial needs and practice.

The further damages provisions in the DCFR – on the currency in which damages are to be paid[107] and on penalty clauses[108] and also some

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101 Compare *Stoll/Gruber*, in: Schlechtriem/Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf – CISG – Kommentar, 4th ed., Munich 2004, Art. 78 n. 40; *Magnus*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen – Wiener UN-Kaufrecht (CISG), Berlin 2005, Art. 78 n. 5.

102 Art. III.–3 :703 DCFR.

103 See Art. 74 CISG.

104 Art. III.–3:706 DCFR.

105 Art. III.–3:707 DCFR.

106 See Artt. 75 and 76 CISG.

107 Art. III.–3:711 DCFR: it is the currency which most appropriately reflects the creditor's loss.

108 Art. III.–3:710 DCFR: the provision entitles the creditor in general to a stipulated penalty irrespective of the actual loss but allows on the other hand the resonable reduction of grossly excessive penalties.

damages provisions of the tort part of the DCFR[109] – also constitute useful additions. They provide rules for situations which are not unfrequent and where solutions are needed because the parties usually do not solve the respective problem in their contract.

VII. Concluding Remarks

The Acquis Principles and the DCFR provisions on damages are partly almost identical. Their greater part has, however, the character of two complementary colours: they supplement each other in a rather ideal way. The DCFR provides what is still lacking in the Acquis Principles and vice versa. Only in very few respects do both sets of provisions contradict each other or do the underlying policy considerations fail to convince: namely the possibility to excuse the duty to pay interest[110] and the possibility of compound interest.[111] A combination of the Acquis Principles and the DCFR rules on damages would provide a comprehensive and consistent system of rules for this important area of law and would satisfy the aim of all law, namely the aim of practical reasonableness.

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[109] Artt. VI.–6:101 et seq. DCFR; see in particular Art. VI.–6:102 ["(t)rivial damage is to be disregarded"] and Art. VI.–6:103 [benefits caused by a damaging event shall be taken into account only if this is fair and reasonable in particular with a view to the purpose of the benefit].

[110] Contradiction between Art. 8:406 (1) Acquis Principles and Art. III.–3:708 (1) DCFR which should be removed in favour of the DCFR solution.

[111] Art. III.–3:709 (1) DCFR which should be replaced by a provision which disallows compound interest.

Part V
Further Main Aspects

The Common Frame of Reference (CFR) of European Insurance Contract Law*

Helmut Heiss (Zürich)

I. The Common Frame of Reference Project

1. The Project and its purposes

The European Commission announced in its Action Plan of 12 December 2003 (the "Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan")[1] and in its Communication on 'European Contract Law and the revision of the acquis: the way forward' of 11 October 2004[2] to set up a Common Frame of Reference of European Contract Law. According to the Commission's Action Plan of 12 December 2003 the CFR shall comprise definitions and rules. Both shall be accompanied by comments and notes. The comments will contain explanations and illustrations to the proposed rules. The notes will give reference to the *status quo* of contract law in the Member States as well as the existing *acquis communautaire*.

The CFR will be drafted in order to establish a set of rules giving definitions, structure and contents of European contract law developed through a comparative legal analysis of national contract laws.[3] Strictly speaking, these definitions and principles will not be of a binding nature since they will not be enacted as a regulation or directive.[4] However, the

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* This article is based on previous publications such as *Heiss*, European Insurance Contract Law: Restatement – Common Frame of Reference – Optional Instrument, IJVO (Internationale Juristenvereinigung Osnabrück) 13/2006, 1; *Clarke/Heiss*, Towards a European Insurance Contract Law? Recent Developments in Brussels, Journal of Business Law (JBL) 2006, 600; *Heiss*, Principles of European Insurance Contract Law, in Hendrikse/Rinkes (eds.), Insurance and Europe, Paris (2007), 41-59.

1 COM(2003) 68 final; in more detail *Schulze*, Gemeinsamer Referenzrahmen und *acquis communautaire*, Zeitschrift für Europäisches Privatrecht (ZEuP) 2007, 130.

2 COM(2004) 651 final.

3 COM(2004) 651 final, no. 2.2.1 and 3.1.; see also *Schulze*, Gemeinsamer Referenzrahmen und *acquis communautaire*, ZEuP 2007, 130 (135).

4 COM(2004) 651 final, no. 2.1.3.

Commission has clearly set out to adhere to the terminology and system of the CFR in any later legislation concerning contracts.[5] Furthermore, the CFR could become an important aid for the European Court of Justice in procedures for preliminary rulings[6] and also for national courts for an autonomous interpretation of the existing *acquis communautaire*. Not the least, international academic discussion in Europe could be based on common rules provided by the CFR. In a way, this instrument would give Europe a common legal language – as was the case with Latin until national codifications replaced the *ius commune*. It would allow law faculties to teach contract law with a European and comparative perspective. National legislatures could also contribute to harmonisation by adopting the rules of the CFR on future reforms of national contract law; this applies in particular to former socialist countries which are revising their contract law.[7] Ultimately, one may regard the CFR as a European *lex mercatoria*[8] and as such it may find application in arbitration proceedings.[9]

2. The role of the "CoPECL Network"

Following an initiative taken by the European Commission, a "CoPECL Network of Excellence" was founded in May 2005. The Network elaborates a proposal for the "Common Frame of Reference" (CFR) of Euro-

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5 COM(2004) 651 final, no. 2.1.2.

6 *Trstenjak*, Die Auslegung privatrechtlicher Richtlinien durch den EuGH: Ein Rechtsprechungsbericht unter Berücksichtigung des Common Frame of Reference, ZEuP 2007, 145; the PECL and the DCFR have recently been quoted by Advocate-General *Poiares Maduro* in his opinion of 21 November 2007 on Case C-412/06 (Annelore Hamilton v. Volksbank Filder eG) in support of his interpretation of Art. 4 para. 3 of the doorstep selling directive.

7 With a view to insurance contract law see also the opinion of the EESC, CESE 1626/2004, no. 4.3.1.; as to the overall topic *Heiss* (ed.), An Internal Insurance Market in an Enlarged European Union, Karlsruhe (2002); as to the transformation of the market cf. *Münchener Rück*, Die mittel-osteuropäischen Versicherungsmärkte auf dem Weg zur EU, available on http://www.munichre.com (2000); *Bayerische Rück*, Primary insurance market Central and Eastern Europe – Overview (2000).

8 Cf. *Blaurock*, *Lex mercatoria* und Common Frame of Reference, ZEuP 2007, 118.

9 See also Art. 1:101 PECL (Application of the Principles):
"(…)
(3) These Principles may be applied when the parties:
(a) have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; …".

pean contract law as proposed by the European Commission.[10] A first draft of the CFR was presented to the European Commission at the end of 2007.[11] The final draft is expected by the end of 2008.

The CoPECL Network comprises universities, institutions and other organisations with more than 150 researchers operating in all EU Member States. The following groups participate in the Network: The Study Group on a European Civil Code; The Research Group on the Existing EC Private Law, or "Acquis Group"; The Project Group on a Restatement of European Insurance Contract Law, or "Insurance Group"; The Association Henri Capitant together with the Société de Législation Comparée and the Conseil Supérieur du Notariat; The Common Core Group; The Research Group on the Economic Assessment of Contract Law Rules, or "Economic Impact Group" (TILEC – Tilburg Law and Economics Center); The "Database Group"; and The Academy of European Law (ERA).[12]

II. Insurance Contract Law within the CFR

Insurance contract law plays an important role in the European Commission's 2003 Action Plan. The Plan repeatedly refers to the necessity of harmonizing the law on insurance contracts. The Commission argues that "firms are unable to offer, or are deterred from offering, financial services across borders, because products are designed in accordance with local legal requirements"[13] and points out that "the same problems occur particularly with insurance contracts".[14]

The position of the European Commission is supported by an (own-initiative) Opinion of the European Economic and Social Committee (EESC) on the topic "The European Insurance Contract" which was delivered on 15 December 2004.[15] In this Opinion the EESC considers the shortcomings of the existing internal insurance market. It confirms the view that there must be some kind of a European insurance contract law

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[10] In this process the Network is involved in an ongoing dialogue with so called "stakeholders"; as to their role and views cf. *Brödermann*, Betrachtungen zur Arbeit am Common Frame of Reference aus der Sicht eines Stakeholders: Der weite Weg zu einem europäischen Vertragsrecht, ZEuP 2007, 304.

[11] See www.copecl.org; the draft on insurance contracts is published at www.restatement.info.

[12] Further informations are provided by the CoPECL network at www.copecl.org.

[13] COM(2003) 68 final, no. 47.

[14] COM(2003) 68 final, no. 48.

[15] CESE 1626/2004; as to this Opinion *Heiss*, Europäischer Versicherungsvertrag, Versicherungsrecht (VersR) 2005, 1.

in order to allow a cross-border provision of insurance services; therefore, the EESC encourages the Commission to take steps towards a unification of insurance contract law in the EU. The endeavour to create a Common Frame of Reference of European Contract Law which includes special rules on insurance is at least a first step taken by the European Commission to comply with the request of the EESC.

Both the European Commission's Action Plan, as well as the EESC opinion, are backed by the results of academic research work confirming the need for a European insurance contract law for the functioning of the internal market in the insurance sector. As has been pointed out by *Fritz Reichert-Facilides* the attempt by the European legislature to make the internal market work only through a harmonisation of the conflict of law rules on insurance contracts has failed.[16] An analysis by *Jürgen Basedow* shows that harmonisation of private international law of insurance contracts was in fact an inadequate means for the creation of an internal insurance market.[17] For the sake of policyholder protection, which is held to be a "general good" by the *ECJ*,[18] the pertinent rules of private international law are to a large extent mandatory. According to Art. 9 (1) (b) Brussels I a policyholder, an insured or a beneficiary may bring an action against an insurer at the court for the place where the plaintiff is domiciled. According to the pertinent rules of private international law as laid down in the directives[19] the law applicable to the insurance contract will regularly be the law of the state in which the policyholder has his habitual residence. It follows, that litigation in matters relating to (mass risk) insurance will usually take place in the policyholder's home country and will also be subject to the law of this country.[20] As a consequence, insurers must be – and actually are aware of – the fact that any product they sell cross-border will be subjected to a law different to that in their home country. Insurers must therefore adapt their products to the legal envi-

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[16] *Reichert-Facilides*, Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick, in Reichert-Facilides/Schnyder (eds.), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, Zeitschrift für Schweizerisches Recht (ZSR) 2000, Beiheft 34, 1 (10); *idem*., Europäisches Versicherungsvertragsrecht, in Basedow/Hopt/Kötz (eds.), Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag, Tübingen (1998), 119.

[17] *Basedow*, Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik, in Reichert-Facilides/Schnyder (*cit*. fn. 16), 13.

[18] *ECJ* 4 December 1986 Rec 1986, 3755 (*Commission ./. FRG*).

[19] As to the directives' law see *Wandt*, Internationales Privatrecht der Versicherungsverträge, in Reichert-Facilides/Schnyder (eds.), (*cit*. fn. 16), 85.

[20] Cf. e.g. *Heiss*, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG, Karlsruhe (2005), 8 et seq.

ronment, especially to the mandatory rules of (insurance) contract law, in which their products are sold.

The impact of foreign mandatory rules on an insurance product can be severe.[21] If, for example, an insurance product which is lawfully marketed in England is sold cross-border to a German customer, German courts might submit the contract terms of the English insurer to a control under §§ 305 et seq. BGB. A particular exception contained in the contract terms which is, in principle, exempt from control under the English "Unfair Terms in Consumer Contracts Regulation" 1999[22] may be subject to control under German law and could be held to be invalid according to § 307 BGB. If so, the scope of cover of one and the same particular insurance product will turn out to be broader in Germany than in England due to the differences in the applicable (mandatory) law. It follows that insurers will be reluctant to provide cross-border services.[23]

In fact, statistics show that cross-border provision of insurance services plays a minor role in the internal European market at least with a view to insurances of mass risks.[24] The European Commission has repeatedly acknowledged this fact.[25] Insurers perform their international business predominantly through subsidiaries or daughter companies. Even though such international activities are widely observed in the EU they are insufficient to establish an internal market for insurance products. The products sold by foreign subsidiaries or daughter companies are not the same as the products sold by the insurer in the country where it is domiciled. Products in the country of the subsidiary or daughter company are either developed completely independently from the products sold in the insurer's home market or at least adapted to the legal regime of the state where the insurance product is sold. As a consequence customers do not have access to foreign insurance products.

Summing up this analysis one could state as a (of course simplified) result: there are insurance companies selling insurance products abroad through subsidiaries or daughter companies. There are, however, no foreign (mass) insurance products sold abroad as they are sold at the place of

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[21] *Basedow*, Insurance Contract Law as Part of an Optional European Contract Act, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) 2003, 500; as to further obstacles deriving from the nature of insurance contracts see *Comité Européen des Assurances*, CEA Policy Report on 'The European Retail Insurance Market(s)' (2004), http://www.cea.assur.org/cea/download/publ/article192.pdf.

[22] For details see *Clarke*, The Law of Insurance Contract, London (2006) 590 et seq.

[23] For further examples cf. *Heiss*, Mobilität und Versicherung, VersR 2006, 448.

[24] See *Basedow*, Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik, in: Reichert-Facilides/Schnyder (eds.), (*cit.* fn. 16), 13 (17) referring to data provided by EUROSTAT.

[25] See *supra* II.

origin. As a result, the competition between creative insurance solutions throughout Europe remains rather restricted. The insurance enterprises are neither in a position to compete with their innovative products throughout Europe, nor are the customers in a position where they get full access to various national insurance solutions. The internal market of insurance products has not been completed.

It may be argued that the shortcomings of the internal insurance market in its current condition could be overcome by a shift in European international insurance contract law allowing parties to choose the law of the insurer´s home country as the law applicable to the insurance contract. However, the argument turns out to be wrong. First of all, the approach would deprive the policyholder of his private international legal protection which appears not to be acceptable as a matter of legal policy. Secondly, the mentioned shift in the rules of private international law would be followed by a change in behaviour of insurers and policyholders. Whereas under the current regime of private international law it is the insurer who hesitates to provide cross-border services, it would be the policyholder who would be reluctant to acquire foreign insurance products under a reversed regime of private international law because he will object to the application of foreign law. The internal market would remain incompleted.[26]

It follows that insurance contract law is one of the predominant areas of contract law in which a European codification is necessary to overcome the existing barriers to the internal market. The European Commission reflects this need in its 2004 Communication in which it says with a view to the structure of a Common Frame of Reference: "Two types of contract which were concretely specified were (…) consumer and insurance contracts. The Commission expects that in the development of the common reference framework these two areas should receive special attention".[27] This predominant position of the insurance contract within the CFR is also reflected in the tentative survey provided by the European Commission in Appendix I ("Possible structure of the CFR") to the 2004 Communication. Accordingly the insurance contract forms a part of chapter III, section IX of the Common Frame of Reference and – along with sales contracts – the only type of contract, which will be treated specifically.

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[26] See in more detail *Basedow*, Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik, in: Reichert-Facilides/Schnyder (eds.), (*cit.* fn. 16), 13 (20 et seq.); *Heiss*, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG, (*cit.* fn. 20), 13 et seq.

[27] COM(2004) 651 final, no. 3.1.3.

III. The CFR of European Insurance Contract Law

1. Responsibility of the "Insurance Group"

Within the CoPECL network the Project Group "Restatement of European Insurance Contract Law" (the "Insurance Group"), which was set up by the late Professor *Fritz Reichert-Facilides* in 1999, is in charge of drafting the CFR of insurance contract law. In fact, the Project Group has drafted Principles of European Insurance Contract Law (PEICL) since it was established in 1999. The PEICL are drafted as rules, followed by comments giving the reasons for the rule and illustrating its proper application by giving examples, as well as notes reproducing the *status quo* of insurance contract law in the Member States and in the *acquis communautaire*. The Group completed its Principles (except the rules on specific branches of insurance) in a workshop held in Paris in October 2007 and the Drafting Committee of the Group, headed by *Malcolm Clarke*, finished revising the text during its meeting in Innsbruck in December 2007. The finalised PEICL were submitted to the European Commission as a Draft CFR of European Insurance Contract Law on 17 December 2007.

The work of the Project Group will of course go beyond this point. As of 2008 it will start drafting special rules for individual branches of insurance, beginning with life assurance (including collective agreements) and liability insurance.

2. The approach

a) Scope of application

The Insurance Group first of all provides general rules of insurance contract law. Therefore, the substantive scope of application of the PEICL stretches to all insurances except reinsurance.[28] Insurances of special risks (e.g. marine and aviation insurance) as well as large risks are covered by the PEICL, notwithstanding the fact that Art. 1:103 (2) 2nd sentence PEICL grants parties freedom of contract in those cases.

b) Matters not regulated in the PEICL

In spite of their broad scope of application, the PEICL do not rule every aspect which may become relevant in matters concerning insurance contracts. Quite the contrary, they abstain, in principle, from regulating is-

[28] See Art. 1:101 PEICL.

sues of general contract law. The resulting gap must be filled in a way that takes as little recourse to national law as possible. As a consequence Art. 1:105 (1) 1st sentence PEICL prohibits any recourse to national law when applying the PEICL. Instead, Art. 1:105 (2) provides for an application of the Principles of European Contract Law (PECL) drafted by the so-called *Lando*-Commission.[29] By this reference the PECL become the *lex generalis* to the PEICL. In fact, the Project Group has consistently drafted the PEICL with a view towards the PECL, not only as far as terminology is concerned, but also in order to avoid duplications in the regulations. Whenever a rule of the PECL appeared to be appropriate also in the context of insurance, the Project Group abstained from regulating the matter in the PEICL. Nevertheless, some provisions were more or less "copied" from the PECL into the PEICL. The reason for this is rather simple: the provisions of the PECL are, in principle, non-mandatory. However, the Project Group thought that some of these non-mandatory provisions should be mandatory in the context of insurance. This goal was to be reached by copying these provisions into the PEICL and thereby making them mandatory according to Art. 1:103 (2) 1st sentence PEICL.

Whenever an issue is neither regulated in the PEICL nor in the PECL, Art. 1:105 (2) PEICL refers to the principles common to the laws of the Member State. Clearly, Art. 1:105 (2) PEICL instructs the judge to use methods of comparative law to fill any gaps.

It has been mentioned that the PEICL do not (yet) regulate individual branches of insurance. However, some types of insurance contracts such as life or health insurance are strongly regulated by mandatory provisions in national laws. It therefore seems inconceivable to apply the PEICL to such branches without recourse to the (otherwise applicable) national provisions of law because the protection of the policyholder would be undermined. As such, Art. 1:105 (1) 2nd sentence PEICL provides for the application of the mandatory rules of the applicable national law which regulate special types of insurance contracts. This application of national law is, however, limited to the period of time in which the PEICL do not provide for special branch rules themselves. In this context it is worth mentioning again that the Project Group will start drafting rules on life assurance and liability insurance in 2008.

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[29] *Lando/Beale* (eds.), Principles of European Contract Law, Parts I and II, The Hague (2000); *Lando/Clive/Prüm/Zimmermann* (eds.), Principles of European Contract Law, Part III, The Hague (2003).

c) Mandatory rules

As has been pointed out earlier, it is the mandatory rules of national insurance contract law which form a barrier to the proper functioning of the internal insurance market. This is why the Insurance Group restricts its work to the drafting of European principles which are mandatory and therefore able to substitute national mandatory law.

The mandatory character of the Rules can be twofold. On the one hand there are Rules which must not be derogated from by parties´ agreement at all. Such "absolutely" mandatory rules are mentioned in Art. 1:103 (1) PEICL which reads: "Articles (…) are mandatory". Art. 1:103 (1) PEICL was drafted as a framework provision which would be filled with references to specific provisions that should be absolutely mandatory in the course of the drafting of the PEICL. However, up until today none of the provisions of the PEICL have been made absolutely mandatory by the Project Group and for the time being Art. 1:103 remains an empty framework provision.

The mandatory character of the PEICL so far is of a different kind and may be called "semi-mandatory". Art. 1:103 (2) 1st sentence PEICL states: "The contract may derogate from all other provisions of the PEICL as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary."

It has already been mentioned that the mandatory character of the PEICL is limited to mass risk insurance. Since mandatory rules of insurance law purport the protection of the policyholder as the weaker party, the mandatory character must be abolished when there is no need for protection as is the case with special and large risk insurances. Mass risks are differentiated from special or large risks by a statutory definition which is in line with the existing *acquis communautaire*, in particular in the field of international procedural law ("Brussels I"[30]) as well as conflict of laws (currently contained in the EC directives on insurance law[31] which will be substituted by the forthcoming "Rome I" regulation[32]). This definition of special and large risks is adopted by Art. 1:103 (2) 2nd sentence PEICL.

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[30] See Art. 13 no. 5 *Brussels I* (Council Regulation [EC] No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1) referring to the relevant definitions in the Directives.

[31] The definition of large risks is given by Art. 5 of the *First Non-Life Directive* (Directive 73/239/EEC as amended).

[32] Political agreement on the future *Rome I* Regulation is already reached; see Note of the Council of 3 December 2007, File no. 15832/07.

Thus, the protection granted to the policyholder under the PEICL is not restricted to consumer contracts but applies to all mass risks including insurance contracts concluded by small or medium size enterprises.

d) The PEICL and the existing *acquis communautaire*

It has been mentioned that the definition of special and large risks in Art. 1:103 (2) 2nd sentence PEICL follows the sample found in the existing insurance *acquis*. This shows that the Group tries to stick to the existing *acquis communautaire* as closely as possible unless shortcomings indicate that deviation is appropriate. Alongside the insurance *acquis* several Directives on consumer contract law[33] providing for information duties of the entrepreneur, withdrawal rights of the consumer;[34] a control of unfair contract terms[35] as well as injunctions[36] were implemented by the PEICL. The PEICL also transpose the Directive on non-discrimination which contains a special provision for insurance contracts.[37]

The PEICL do not transpose the Directive on insurance intermediaries[38] because they do not deal with professional duties of intermediaries at all.[39] However, the directive has been considered and has given some inspiration to the Group for regulating the insurer's duties to provide precontractual information and advice.

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[33] As to the relevance of the consumer *acquis* in the field of insurance see *Heiss/Schnyder*, Versicherungsvertrag, in: Kronke/Schnyder/Melis (eds.), Handbuch Internationales Wirtschaftsrecht, Cologne (2005) 195.

[34] See in particular Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271/16).

[35] See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29).

[36] See Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51.

[37] See Art. 5 of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37; equal treatment is regulated in Art. 1:207 PEICL.

[38] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9/3).

[39] As to the reason for not regulating the professional duties of the intermediaries see *infra* III. 2. h.

e) Language and Terminology

The PEICL have been drafted in English. Currently they have been translated into various other languages, however English will remain the language in which the Insurance Group advances its work. Accordingly the PEICL use English terminology. However, that does not necessarily mean that the Group has used national English legal terminology. Quite the contrary, in order to avoid the impression that a particular provision merely codifies a concept of English common law the Group has departed from English legal terminology on many occasions, e.g. the PEICL do not speak of "promissory warranties" but of "precautionary measures"[40] in order to avoid the misleading impression that the PEICL have implemented the English concept of "warranties". At the same time the Insurance Group tried to use as much international legal terminology as was available. First of all the Group adhered as far as possible to the terminology in the PECL as well as the existing *acquis communautaire*. Secondly it had recourse to terminology found in international transport conventions, for example, to the phrase "with intent to cause the loss or recklessly and with knowledge that the loss would probably result", which is used in several instances throughout the PEICL.

f) Uniform interpretation and application

The effectiveness of a European insurance contract law cannot be guaranteed by the uniform text of the PEICL itself but depends to a large degree on its uniform application by national courts; therefore, Art. 1:104 PEICL states general criteria by which the PEICL should be interpreted. Among these criteria the "uniformity of application" plays a significant role.[41] In spite of this rule on interpretation it would clearly be desirable for the sake of a uniform application of the PEICL that the *ECJ* could give preliminary rulings on the interpretation of the PEICL. Following Art. 234 EC this would, however, require that the European legislature enacts the PEICL as (secondary) EU law.

g) Enforcement

In principle, the policyholder, the insured and the beneficiary have to enforce their rights by bringing an action before court. The PEICL themselves do not provide for an out-of-court complaint and redress mecha-

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[40] See the heading of Section One of Chapter Four of the PEICL.

[41] A similar rule can be found in Art. 7 CISG.

nism. They do, however, also not interfere with existing mechanisms of alternative dispute resolution such as ombudsmen bureaus. In fact, the insurer is under a duty to inform the policyholder about such mechanisms according to Art. 2:201 (1)(k) and Art. 2:501 (k) PEICL.

Moreover, the PEICL allow qualified entities to seize a competent national court or authority and seek an order prohibiting or requiring the cessation of infringements of the PEICL.[42] The "qualified entity" is defined by reference to the list drawn up by the European Commission in pursuance of Art. 4 of the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.[43]

h) Optionality

The PEICL are drafted as an optional instrument. Thus they only want to be applied if they are chosen by the parties to the contract. The pertinent Art. 1:102 PEICL reads as follows:

> "*Article 1:102:*
> *Optional Application*
>
> *The PEICL shall apply when the parties, notwithstanding any limitations of choice of law rules under private international law, have agreed that their contract shall be governed by it. In that event, subject to Article 1:103, the parties shall apply the PEICL as a whole and shall not exclude the application of particular provisions.*"

The main function of this rule is to provide a choice which will be unrestricted by the applicable rules of private international law in the Rome Convention and in the Directives on insurance law as well as the forthcoming rules in the "Rome I" Regulation. The choice is granted for international, as well as purely national contracts. At the same time the second sentence of Art. 1:102 PEICL rules out a partial choice of the PEICL. As a consequence parties may only opt for an application of all or none of the PEICL but no "law mix" is allowed.

The optional character of the PEICL is of influence also on their contents. Since the choice is given to the parties of the insurance contract,

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[42] Art. 1:301 para. 1 PEICL.

[43] See Art. 1:301 para. 2 PEICL referring to the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51; Art. 1:301 PEICL is the only provision of the PEICL which applies only to insurance contracts taken out by consumers.

i.e. the insurer and the policyholder, its effects must be restricted to the parties themselves but including the beneficiary and the insured because their rights depend on the parties´ agreement. Third parties must, however, not be adversely affected by a choice of the parties. This applies, amongst others, to intermediaries who are not parties to the insurance contract. The choosing of PEICL by the parties will not affect the legal position of intermediaries. This is why the PEICL do not regulate the duties of the insurance intermediaries but only the liability of the insurer for its agents and apparent brokers.[44]

3. Practical impact of the CFR of European (Insurance) Contract Law

The CFR could considerably boost the development of European contract law in general, and insurance contract law in particular. It will, first and foremost, be a helpful tool for the interpretation as well as a revision of the existing consumer *acquis*. However, in spite of these advancements the CFR will by itself not be sufficient to complete the internal insurance market.[45] Since it will only provide non-binding rules the CFR will not be available to the parties as a choice of an applicable insurance law and insurance contracts will still be submitted to national law. The obstacles to the functioning of the internal insurance market presented by the diversity of national mandatory insurance contract law will not be abolished and cross-border sales will remain an exception. This is why it has been argued that a functioning internal insurance market will need more, i.e. an optional instrument of European insurance contract law.[46]

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[44] See Artt. 3:101 and 3:102 PEICL.

[45] See *Basedow*, Der Gemeinsame Referenzrahmen und das Versicherungsvertragsrecht, ZEuP 2007, 280 (283).

[46] See *Basedow*, Der Gemeinsame Referenzrahmen und das Versicherungsvertragsrecht, (*cit.* fn. 45), 285; concerning the relationship of the CFR to a possible future optional instrument see *Flessner*, Der Gemeinsame Referenzrahmen im Verhältnis zu anderen Regelwerken, ZEuP 2007, 112.

IV. The PEICL as a Future Optional Instrument of European Insurance Contract Law?

1. What is an optional instrument?

An optional instrument of European contract law is characterized by the fact that its application depends on a choice by the parties to the contract.[47] It would therefore not replace national contract law but would provide the parties with an alternative,[48] this is why a possible future optional instrument has been called the 28th regime of contract law in Europe.[49] In general terms it may be compared to the UN-Convention on Contracts for the International Sale of Goods (CISG) which allows parties to opt-out in Art 6 thereof, i.e. to agree that the Convention will not apply to their contract.[50] However, in a European optional instrument it is quite likely that an opt-in-approach will be used by the European legislature as opposed to the opt-out-approach in Art. 6 CISG.[51]

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47 *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, European Review of Private Law (ERPL) 2005, 693 (695); *Clarke/Heiss*, Towards a European Insurance Contract Law? Recent Developments in Brussels, JBL 2006, 600 (605); some authors also mention a choice of the Member State, see e.g. *Grundmann/Kerber*, European System of Contract Law – A Map for Combining the Advantages of Centralised and Decentralised Rule-making, in Grundmann/Stuyck (eds.), An Academic Green Paper on European Contract Law, The Hague (2002), 295 (310); this alternative will not be discussed in this article; as to yet another way of understanding 'optional' see *Lando*, Optional or Mandatory Europeanisation of Contract Law, ERPL 2002, 59.

48 *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 695; see *Staudenmayer*, Ein optionelles Instrument im Europäischen Vertragsrecht?, ZEuP 2003, 828 (832).

49 About the optional European Contract Law in general *Staudenmayer*, Ein optionelles Instrument im Europäischen Vertragsrecht?, (*cit.* fn. 48); regarding insurance contract law *Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, in Wandt et al. (eds.), Kontinuität und Wandel des Versicherungsrechts, Festschrift Egon Lorenz zum 70. Geburtstag, Karlsruhe (2004), 93 (100 et seq).

50 *Schlechtriem*, Internationales UN-Kaufrecht, 3rd ed., Tübingen (2005), 15 et seq.

51 *Basedow*, Ein optionales Europäisches Vertragsgesetz – Opt-in, Opt-out, wozu überhaupt?, ZEuP 2004, 1.

2. Advantages of an optional instrument

An optional instrument would allow parties to conclude their contract on the basis of European law instead of national law. This choice would offer advantages particularly to "multiple players" such as entrepreneurs doing business in the European internal market, who would not have to be concerned with the impact of diverging national contract law regimes on their transactions. The costs of legal research and adaptation of the contract to each national system of contract law would disappear. Overall, a European optional instrument would facilitate transactions.

However, the aforementioned advantages are not specific to an optional instrument. They could also be achieved by a non-optional European contract law replacing national systems. The predominant reasons in favour of an optional instrument are to be found elsewhere. First of all, an optional instrument has far better chances to find political approval than a non-optional instrument. National legislatures, encouraged by national representatives of the legal profession, would be more inclined to resist an instrument which would replace national contract law. They would, however, have no reason to resent to a 28th regime of contract law which leaves national law untouched.[52] Secondly, an optional instrument appears to be economically more efficient because it does not force parties to alter their traditional ways of doing business but only provides them with an additional choice. Entrepreneurs acting internationally will be more inclined to take that chance than others acting only locally. In other words, there is no need to submit an everyday contract such as the sale of bread concluded between the owner of a bakery in London and his neighbour to the rules of European contract law. Replacing the English common law of contract would only impose costs on the baker as well as his customer, since they would be forced to adapt their way of contracting with each other to new European rules without any advantage. On the other hand, the producer of electronic devices who sells cross-border has a substantial interest to conclude all contracts on the basis of one and the same (i.e. European) set of rules of contract law, no matter whether he sells to an English, German or French customer.

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[52] *Heiss*, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG, (*cit.* fn. 20), 36; as to the aspect of competition between legal orders see *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 696 and fn. 11.

3. The option

a) Choice of general principles of European contract law by the parties?

It has been held that under the current European regime of international contract law – Art. 3 Rome Convention – the parties may not only choose the law of a country but also "General Principles of Contract Law", such as the *Lando*-Principles (PECL) or the UNIDROIT-Principles, as the law applicable to the contract.[53] This means that through a choice of the parties of these non-binding rules would become the law applicable to a contract replacing the national legal regime which would have been applicable in the absence of a choice. Of course, this view is still heavily disputed in legal literature[54] and, so far, it has not been confirmed by any court decision. The question will further be left in an uncertain state by the future "Rome I" regulation. The latest version of the proposal, which comprises the political compromise of the Commission, the European Parliament and the Council,[55] contains a recital (number 15) which does not positively confirm the possibility of a choice of non-binding rules but only negatively points out that the "Rome I" Regulation will not preclude any incorporation of "non-State body of law" by choice of the parties. Recital 15 may be read as an encouragement to judges to accept a choice of general principles of contract law by the parties but does not guarantee such choice.

In any case a choice of non-binding rules implies structural deficiencies, partly frustrating the purposes of an optional instrument.[56] This would occur mainly because a choice of law under Art. 3 Rome Convention would be subjected to several exclusions and restrictions. In purely domestic cases national mandatory rules must not be derogated from.[57] The choice of the parties would be restricted in consumer[58] and labour contracts.[59] National courts would be allowed to enforce internationally

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[53] As to the pertinent discussion see *Martiny*, CFR und internationales Vertragsrecht, ZEuP 2007, 212 (217); *Reithmann/Martiny*, Internationales Vertragsrecht, 6th ed., Cologne (2004), no. 71 et seq.; *Looschelders*, Internationales Privatrecht – Art. 3-46 EGBGB, Berlin (2004), Art. 27 EGBGB no. 12.

[54] See also *Martiny*, CFR und internationales Vertragsrecht, ZEuP 2007, 212 (217).

[55] Note of the Council of 3 December 2007, File no. 15832/07.

[56] *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 701 et seq.

[57] Art. 3 para. 3 Rome Convention.

[58] Art. 5 Rome Convention.

[59] Art. 6 Rome Convention.

mandatory laws even if the optional instrument were to be chosen.[60] It follows that national law would still have a high impact on contracts concluded within the Community.[61]

b) EC-regulation

Another way to provide the parties with a choice of the PECL and/or PEICL as optional instruments would be to enact them as EC-regulations making them immediately applicable in every Member State.[62] As a result, the PECL and the PEICL would not represent a 28th regime of (insurance) contract law in Europe but a 2nd regime of (insurance) contract law in each Member State.[63] The EC-regulations could at the same time grant an option to the parties by way of a unilateral conflict rule allowing them to replace the applicable national (insurance) contract law with the PECL and/or the PEICL. This approach is a preferable solution because it avoids the structural deficiencies mentioned in the context of Art. 3 Rome Convention. Indeed, recital 16 of the proposed "Rome I" Regulation specifically mentions the possibility to enact such an optional instrument in the future. Recital 16 may be read as an announcement of future legislative activities but it does not guarantee that an optional instrument will be adopted.

4. The Optional Instrument and European Insurance Contract Law

a) Option must be also open to purely domestic contracts

The facilitation of insurance transactions in the single European market will only take full effect if all of the contracts from a particular insurer may be subject to the optional instrument. Parties must therefore be given that option even in purely domestic contracts, i.e. insurance contracts between policyholders and insurers having their seat or habitual

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60 Art. 7 Rome Convention.

61 See also *Schnyder*, Parteiautonomie im europäischen Versicherungskollisionsrecht, in *Reichert-Facilides* (ed.), Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum, Tübingen (1994), 49 (66 et. seq.) favouring a greater freedom of choice.

62 *Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, (*cit.* fn. 49), 109; *Clarke/Heiss*, Towards a European Insurance Contract Law? Recent Developments in Brussels, JBL 2006, 600 (605 et seq).

63 See *Heiss*, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG (*cit.* fn. 20), 38.

place of residence in the same Member State and concerning a risk situated also in this Member State.[64] Otherwise, domestic insurance contracts – which usually represent the biggest share of the business of an insurer – would have to be designed and calculated according to national law and only cross-border insurance services could be subject to the optional instrument. As a consequence the pooling of risks would be more burdensome and many insurers would probably not enter into cross-border transactions. For this reason, as far as insurance is concerned, restrictions of the scope of application of an optional instrument of European contract law to cross-border transactions, as proposed by some authors, must be rejected.[65]

b) Comprehensive instead of minimum standard regulation

Insurance law is similar to consumer law in that it protects the weaker party.[66] Several EC Directives have been enacted in the field of consumer contract law and most of them contain so called minimum standard clauses which allow national legislators to provide consumers with a higher standard of protection than required, as long as such national rules do not violate the fundamental economic freedoms of the EC-Treaty.[67] It is worth mentioning that lately, in the Directive concerning the distance selling of financial services to consumers, the EC did not enact a general minimum standard clause, which may indicate a shift in Community legal

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[64] *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 702 et seq.; see also *Martiny*, CFR und internationales Vertragsrecht, (*cit.* fn. 53), 221.

[65] See *Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, (*cit.* fn. 49), 108 et seq.

[66] *Reichert-Facilides*, Gesetzgebung in Versicherungsvertragsrechtssachen: Stand und Ausblick, in: Reichert-Facilides/Schnyder (eds.), (*cit.* fn. 16), 1 (6 et seq).

[67] See Art. 8 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29); Art. 11 of the Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280/83); Art. 14 of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144/19); Art. 8 para. 2 of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171/12).

policy.[68] Be that as it may, in the case of an optional instrument in the insurance sector, a minimum standard clause would seriously jeopardize its fundamental purpose, i.e. to allow the insurer to sell and the policyholder to buy insurance anywhere in Europe based on one legal regime only. That objective would be frustrated if national legislatures could impose higher levels of protection of policyholders.[69] The optional instrument must regulate the insurance contract comprehensively.[70] This is not to say that a partial or minimum standard regulation would not help at all. It just would not be sufficient to achieve completion of the internal insurance market, which is, after all, what should be aspired towards.

c) Optional instrument and mandatory insurance contract law

In order to achieve its aims, an optional instrument must allow parties to opt-out not only of non-mandatory but also of mandatory rules of national insurance contract law.[71] The choice must be freed from any restriction imposed by current private international law. It follows that the optional instrument must provide appropriate mandatory rules of insurance contract law, effectively substituting the protection of the policyholder under national law. It is particularly important that the European legislature will apply a high level of protection in the optional instrument, just as it must do with other Community acts according to Art. 95 (3) EC-Treaty.[72]

It may appear to be contradictory to ask for an optional instrument which would only be applicable if parties opt in favour of it and at the same time to request a comprehensive regulation of mandatory rules on

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[68] See Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271/16); see *Reich*, Der Common Frame of Reference und Sonderprivatrechte im "Europäischen Vertragsrecht", ZEuP 2007, 161 (171).

[69] See *Heiss*, Stand und Perspektiven der Harmonisierung des Versicherungsvertragsrechts in der EG (*cit.* fn. 20), 32 et seq; *Weber-Rey*, Harmonisation of European Insurance Contract Law, in Vogenauer/Weatherill (eds.), The harmonisation of European contract law: implications for European private laws, business and legal practice, Oxford (2006), 207 (220); European Commission, Green Paper on Financial Services Policy, COM(2005) 177 final; EESC, CESE 1626/2004, no. 6.3.1.

[70] *Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, (*cit.* fn. 49), 104.

[71] See with a view to mandatory law in general *Martiny*, CFR und internationales Vertragsrecht, (*cit.* fn. 53), 215 et seq.

[72] See *EESC*, CESE 1626/2004, no. 6.2.

insurance contract law in such an optional instrument.[73] However, the apparent contradiction disappears when the parties' option is restricted to choosing the instrument as a whole or not at all.[74] Thereby a national system with a high protection of the policyholder would be replaced by a European system offering a different kind although just as high a level of protection.[75] Since a partial choice would be excluded, the insurers would not be allowed to pick and choose parts of each system to their own benefit.

5. The PEICL as an optional instrument

It has been demonstrated that the PEICL are drafted not only as a Common Frame of Reference of European Insurance Contract Law but in the same time as an Optional Instrument.[76] The option granted in Art. 1:102 PEICL complies with all the requirements which have been discussed above. The PEICL therefore also serve as a model optional instrument to the European legislature.

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[73] As to mandatory rules in optional contract law in general see *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 697, 699.

[74] *Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, (*cit.* fn. 49), 105; *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 709 et seq.

[75] *Heiss/Downes*, Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective, (*cit.* fn. 47), 699.

[76] See *supra* III.2.h.

DCFR and Property Law: the need for consistency and coherence

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I. Introductory Remarks

This short contribution to the discussion focuses on whether the final version of the CFR should include (aspects of) property law or whether it should be limited to contract law.[1] I will first of all make a few remarks on what is meant by "property law". We will see that the meaning of property law varies according to the legal tradition in which the term is used. This will be followed by holding the structure of the DCFR as it has been presented to stakeholders against the light of these varying meanings of property law. To show the inseparable relationship between contract law and property law, particularly from a comparative and a European viewpoint, examples will be given as to how contract law may affect property law. As an example at the European level the development of a European type of mortgage ("euromortgage") will be discussed. Finally, a conclusion will be drawn, taking as a starting point that the final CFR is to function as an autonomous European model, independent from the laws of the Member States which were its inspiration. Only if the CFR is perceived and applied as such an autonomous European model it will fulfil the needs, expressed by the European Commission in its communications on the CFR.[2]

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[1] This is an elaborated version of my intervention during the conference "CFR and Existing EC Contract Law". I am grateful to Prof. Dr. R. Schulze for offering me an opportunity to put forward my views on the position of property law in the CFR.

[2] Here, I only refer to the latest Communication: European Contract Law and the revision of the acquis: the way forward. Communication from the Commission to the European Parliament and the Council, Brussels, 11.10.2004, COM(2004) 651 final. See: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

II. What is meant by "property law"?

The meaning of "property law" depends upon the legal tradition in which the term is used.[3] In the German legal tradition property law is "Sachenrecht": according to paragraph 90 of the German Civil Code this is the law relating to physical objects. In this narrow conception of property law, the law relating to claims (rules concerning transfer and the use of claims as security) is not a part of property law and belongs to the law of obligations. Furthermore, German law – at least this is one of its doctrinal starting points – separates the law of property strictly from the law of obligations.[4] This distinction was strengthened by the separation between contracts obliging to transfer ownership and the transfer of ownership itself: "Verpflichtungsgeschäft" vs. "Verfügungsgeschäft". The German transfer system is, for that reason, a delivery system, in which a separate legal act is necessary for the transfer of ownership. The culminating point is the theory of abstraction under which an invalid underlying agreement does not make the transfer invalid. It could thus be said that German property law is characterised by a triple layered theory of abstraction. Did the DCFR already make a choice for such an abstract transfer system and, as a consequence, for the same strict separation between the law of property (in a narrow sense) and the law of obligations? Art. III.–5:104 of the DCFR states that "(1) The requirements for an assignment of a right to performance are that: (a) the right exists; (b) the right is assignable; (c) there is a valid act of assignment of the right; and (d) the person purporting to assign the right is entitled to transfer it. (2) Neither notice to the debtor nor the consent of the debtor to the assignment is required." In other words: the requirement of a valid underlying agreement is not mentioned and it seems that a choice for the abstract transfer system has been made.[5] Of course, this can be a choice limited to transfer of claims, but given that the final CFR is aimed at creating a coherent private law framework it would be remarkable if an abstract system of transfer would be chosen here and a causal system of transfer with regard to corporeal property.

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[3] Cf. *G. L. Gretton*, Ownership and its objects, in: Rabels Zeitschrift für ausländisches und internationals Privatrecht 2007, pp. 802 et seq.

[4] For a further analysis see: *J. Th. Füller*, Eigenständiges Sachenrecht?, Tübingen 2006, pp. 8 et seq.

[5] See also *D. Busch, E. Hondius, H. van Kooten* & *H. Schelhaas* (eds.), The Principles of European Contract Law (Part III) and Dutch law. A Commentary II, The Hague 2006, pp. 80 et seq.; *J.M. Milo, B. Lurger*, Assignment, in: J.M. Smits (ed.), Elgar Encyclopedia of Comparative Law, Cheltenham/Northampton 2006, pp. 91 et seq., esp. p. 97 (PECL did not make a choice concerning the transfer system).

In French law "property law" has a far broader meaning. It is the "droit des biens", which includes claims. Furthermore French law does not know a delivery system, but a consensual system of transfer under which ownership is transferred immediately as a result of the contract obliging to transfer ownership. French law is therefore far less inclined towards the acceptance of a general theory of abstraction, let alone a triple layered theory of abstraction. Contract is seen as one of the ways "dont on acquiert la propriété", a contract of sale will also transfer ownership and invalidity of the underlying agreement will lead to invalidity of the transfer. We can really see a difference here between the German and the French legal tradition, also with regard to legal mentality. It seems to me that the impression should be avoided that the CFR, in the light of its structure and terminology, belongs more to one European legal tradition than to another. I am convinced that the drafters did not make a conscious choice for one legal tradition as the overall intellectual framework, but no one – and this consequently includes the drafters of the DCFR – can escape completely from his own ideas (either gained by experience or having been taught).[6]

We should try to avoid that the final CFR is considered to be a *corpus alienum* from the perspective of a Member State or, even worse, a whole European legal tradition. This will be vital to acceptance of the CFR by common lawyers. In English law "property law" does not seem to have a clearly defined meaning. Sometimes "property law" means only land law, but sometimes it also includes personal property and claims. English law does not know a unified and integrated system of property law in which certain basic rules apply irrespective of the object (land, personal property, claims) concerned. No general concept of "ownership" exists, as is there no general theory with regard to the applicable transfer system.[7] It is therefore somewhat worrying that the DCFR in its Annex 1 already contains definitions of such terms as ownership and property.[8] Ownership is being defined in a traditional civil law way as the "most absolute right a

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[6] A magnificent study to show this is still *J. Esser*, Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis, Frankfurt a.M. 1972.

[7] See *W. Swadling*, Property: General Principles, in: P. Birks (ed.), English Private Law, Vol. I, Oxford 2000, pp. 203 et seq.

[8] See Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), interim Outline Edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law edited by *Chr. von Bar, E. Clive* and *H. Schulte-Nölke* and *H. Beale, J. Herre, J. Huet, P. Schlechtriem, M. Storme, S. Swann, P. Varul, A. Veneziano* and *F. Zoll*, Munich 2008, Annex 1.

person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property." The DCFR defines property as meaning "anything which can be owned: it may be movable or immovable, corporeal or incorporeal." In other words: ownership includes owning incorporeal objects, which would fit far better in the French model than the German model. I wonder if a certain inconsistency can be detected here in the light of my earlier remarks that, from a property law viewpoint, the DCFR seems to be more rooted in the German than in the French Legal tradition. The Annex would then contradict the policy choices implicit in the DCFR.

III. How does the DCFR in its interim version look at "property law"?

When looking at the DCFR it can only be concluded that the draft must have been inspired to a large degree by German law, as Book III on "Obligations and corresponding rights" contains rules on transfer of rights and obligations. The final CFR will also give rules on matters of property law in a strict sense: corporeal objects (movables and immovables). According to the draft table of contents of the complete CFR, Book VIII will contain rules on transfer of movables, Book IX will deal with security rights in movables and Book X will give rules on trust law.[9] According to the structure of the CFR as presented to stakeholders also "related matters in property law" will be part of the final CFR, but so far no further information has been given as to what these matters are or could be. From a property law viewpoint it is interesting to see that one of the special contracts on which the DCFR gives rules is lease. Within the framework of this short contribution I can only say that lease is a legal area on the borderline of contract and property. This can also be seen in the draft CFR on lease of goods. Art. IV.B.–1:101 DCFR under (3) provides that "(t)his Part of Book IV does not apply to contracts where the parties have agreed that ownership will be transferred after a period with right of use even if the parties have described the contract as a lease" and under (5) that "(t)his Part of Book IV regulates only the contractual relationship arising

[9] See Draft Common Frame of Reference (DCFR), interim Outline Edition, Munich 2008. On p. 19 the following statement can be found on the position of property law in the CFR: "39. Matters of movable property law. In its full and final edition the DCFR will also cover some matters of movable property law, such as transfer of ownership, proprietary security, and trust law." Cf. also *Chr. von Bar*, Coverage and structure of the academic Common Frame of Reference, in: European Review of Contract Law (ERCL) 2007, pp. 350 et seq.

from a contract for lease". Nevertheless Art. IV.B.–7:101 DCFR states: "(1) Where ownership passes from the lessor to a new owner, the new owner of the goods is substituted as a party to the lease if the lessee has possession of the goods at the time ownership passes." In other words: lease does have certain proprietary effects, in spite of its contractual nature. Another area where contract law and property law meet is the part on withdrawal. The contribution to this conference by Evelyn Terryn has made this very clear. Withdrawal means the right to terminate a contract.[10] According to Art. II.–5:105 (1) DCFR withdrawal "terminates the contractual relationship and the obligations of both parties under the contract." Under (2) it is then added that the "restitutionary effects of such termination are governed by the rules in Book III, Chapter 3, Section 5, Sub-section 4 (Restitution) as modified by this article, unless the contract provides otherwise in favour of the withdrawing party. Any payment made by the withdrawing party must be returned without undue delay, and in any case not later than thirty days after the withdrawal becomes effective. (…)". In the part on restitution to which Art. II.–5:105 DCFR refers Art. III.–3:511 DCFR is of particular relevance. That article states: "(1) On termination under this Section a party (the recipient) who has received any benefit by the other's performance of obligations under the contract is obliged to return it. Where both parties have obligations to return, the obligations are reciprocal. (2) If the performance was a payment of money, the amount received is to be repaid. (3) To the extent that the benefit (not being money) is transferable, it is to be returned by transferring it. However, if a transfer would cause unreasonable effort or expense, the benefit may be returned by paying its value. (4) To the extent that the benefit is not transferable it is to be returned by paying its value in accordance with Art. III.–3:513 DCFR (Payment of value of benefit). (5) The obligation to return a benefit extends to any natural or legal fruits received from the benefit." In order to understand the effect of termination, the definition of termination as can be found in Annex 1 to the DCFR has to be considered. According to Annex 1 "(t)ermination, in relation to an existing right, obligation or legal relationship, means bringing it to an end with prospective effect except in so far as otherwise

[10] See the definition of "withdraw" in Annex 1 to the DCFR, interim Outline Edition: "A right to "withdraw" from a contract or other juridical act is a right to terminate the legal relationship arising from the contract or other juridical act, without having to give any reason for so doing and without incurring any liability for non-performance of the obligations arising from that contract or juridical act. The right is exercisable only within a limited period (in these rules, normally 14 days) and is designed to give the entitled party (normally a consumer) an additional time for reflection. The restitutionary and other effects of exercising the right are determined by the rules regulating it."

provided". In other words, termination of the contract resulting from withdrawal does not have any proprietary effect as regards any object already delivered or payment made, unless such prospective effect is being deviated from. If, also in the latter situation, upon withdrawal from a contract, the benefit received has to be transferred back, does not the DCFR then, albeit implicitly, choose for an abstract system of transfer?

It has been argued during this conference by Hans Schulte-Nölke that, in order to facilitate the political acceptance of the DCFR, property law should be excluded from its ambit. Several comments can be made here. First of all, even in a "recontractualised" CFR Schulte-Nölke includes transfer of rights and obligations. From the perspective of the German legal tradition this does not contradict the choice to limit the CFR to contract law, but from the perspective of, for example, French or Dutch law it means that a substantial part of property law would still be included instead of being excluded. Secondly, hidden (in the sense of being implicit) in the CFR, even in a recontractualised version, are various choices which directly or indirectly affect property law. I refer to what I remarked on assignment of rights and on withdrawal. Contract law and property law cannot be separated, not even in German law which took this separation as its cornerstone for the construction of private law. Property law is too important to remain implicit!

IV. Contract law and property law cannot be completely separated

In an excellent study, Drobnig and von Bar have shown how difficult it is to separate property law from attempts to unify contract law. I refer to their study on property law and non-contractual liability law as they relate to contract law".[11]

In the so-called "consensual" transfer systems, as can be found in for example France, the starting point is that a contract of sale not only obliges the seller to transfer ownership, but that such a contract by itself already transfers ownership. I refer to Artt. 1138 and 1583 French C.C. Art. 1138 states: "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne

[11] *Chr. von Bar* and *U. Drobnig*, Study on Property Law and Non-contractual Liability Law as they relate to Contract Law Submitted to the European Commission – Health and Consumer Protection Directorate-General – SANCO B5-1000/02/000574, to be found electronically at: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_ law/study.pdf.

soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier." Art. 1583 adds that the contract of sale "est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé". Such a direct effect of contract law on property law is not found in the so-called "delivery" systems in which a contract only creates rights and duties between the parties, but does not have any proprietary effect. Given the proprietary effect of a contract in consensual transfer systems, rules on formation, non-existence, nullity, avoidance, rescission and withdrawal will also have to be looked at from a property law viewpoint.

Delivery transfer systems can be divided into two groups, the so-called "causal" and "abstract" transfer systems. In the causal transfer systems the starting point is that invalidity of the agreement underlying the transfer will also invalidate the validity of the transfer itself. This same effect can be seen in the consensual systems, mentioned above. In abstract transfer systems, the delivery is considered to be a separate legal act and as such a ground in itself for the validity of the transfer. This means that invalidity of the underlying agreement will not invalidate the transfer. Again, as we already saw when looking at the consensual transfer systems, in causal delivery systems the rules on formation, non-existence, nullity, avoidance, rescission and withdrawal will have an immediate impact on the property relations between the parties.

A final aspect, which shows how intimately contract law and property law are connected, concerns the so-called principle of accessoriness, which can be found in the law on personal and real security. According to this principle the existence of a security right depends upon the existence of an underlying credit agreement. If, to give an example from the law on personal guarantees, the main debtor under a surety agreement pays off his loan, the surety agreement no longer exists and the surety is freed from his obligations. See for example Art. IV.G.–1:101 DCFR on dependent personal security. This principle also applies to real security: if the underlying loan has been paid, the property right (hypothec, pledge) which secures the repayment of this loan will terminate.

It is obvious that where problems in contractual relations affect property relations these problems will have to be analysed also from a property law perspective. For that reason questions concerning nullity or voidability of contracts may have to be revisited to see if any limitation of the effects of nullity or avoidance may be needed; partial invalidity might suffice. Total invalidity of a contract may not be an adequate sanction from a property perspective and for that reason only partial invalidity of the contract could be a better solution, without affecting the policy choice underlying the sanction of nullity or avoidance. Also rescission or withdrawal will have to be held against the light of their property conse-

quences. In the Netherlands new C.C., to give but one example, the retroactive effect of rescission because of non-performance of a contract has been abandoned.[12] Under Dutch law rescission, therefore, only has prospective effect. As a consequence, in spite of the causal delivery system to which the Dutch Civil Code generally adheres, any transfer which took place before the rescission is not directly affected by it and will have to be undone by a retransfer. The Dutch legislature was very well aware of the property consequences of the causal delivery system and consciously chose this non-retroactivity with regard to rescission of contracts. Such balanced choices, taking into account private law as a whole, must also be made within the CFR.

V. European property law already exists: why not include it in the CFR?

Not only for systematic reasons should property law be a part of the CFR, but also for more pragmatic reasons. In several areas some European property law already exists.[13] The most far reaching example is the Directive on Financial Collateral Arrangements (transfer of ownership for security purposes and pledge of securities and cash).[14] Case-law developed by the European Court of Justice is also influencing property law more and more. Austrian land registry law was affected by the ruling in *Trummer v. Mayer*, share holdings by a Member State were affected by the *Golden Share* cases and recently even a transfer of an immovable was declared invalid by the *ECJ* because of violation of European anti-terrorism law in the *Möllendorf* case.[15] In that case an immovable located in Germany had been sold as well as been paid and the deed of transfer had been signed. The only formal step to be taken before ownership could pass to the buyer was registration in the land registry. During that final step it was discov-

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[12] Cf. articles 6:269 and 6:271 Netherlands C.C.

[13] *S. van Erp*, European and National Property Law. Osmosis or Growing Antagonism? Sixth Walter van Gerven Lecture, Groningen 2006.

[14] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements, OJ 2002, L. 168, pp. 43 et seq.

[15] *ECJ* 16 March 1999, Case C-222/97 (*Trummer v. Mayer*). As to the *Golden Share* cases and the relevance of Art. 295 EC ("This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.") cf. the opinion of Advocate General Ruiz-Jarabo Colomer, delivered 13 February 2007, Case C-112/05 (*Commission of the European Communities v. Federal Republic of Germany*), decided by the *ECJ* on 23 October 2007 (*Volkswagengesetz*). The *Möllendorf* case was decided by the *ECJ* on 11 October 2007, Case C-117/06. All the decisions can be found electronically at: www.curia.eu.

ered that one of the buyers was on a black list of people suspected of terrorist activities, as laid down in Annex 1 to Regulation No 881/2002.[16] The *ECJ* ruled that registration was not allowed.[17] The *ECJ* does not hesitate when it comes to entering the field of property law. I refer to the following paragraphs from its judgment:

> "74. Lastly, the sellers and the notary submitted at the hearing that the application, in the proceedings before the referring court, of the prohibition laid down in Art. 2(3) of Regulation No 881/2002 is incompatible with the fundamental right of disposal enjoyed by the owners of property.
> 75. In that regard, it should be stated that there is no question in this case of an alleged disproportionate infringement of the right to property of a person listed in Annex I to Regulation No 881/2002 as a result of the restrictive measures provided for in that regulation in respect of such a person.
> 76. The alleged infringement of the right to property concerns indirect effects, on the property rights of persons other than those so listed, brought about by the obligation to repay which may arise, in accordance with the applicable national law, as a result of the fact that, pursuant to Art. 2(3) of Regulation No 881/2002 it is not possible to proceed with final registration of the transfer of ownership of the immovable property in the Land Register.
> 77. Consequently, the question whether, in view of the special features of the case before the referring court, such an obligation to make repayment is a disproportionate infringement of the right to property cannot have any effect on the question whether Art. 2(3) of Regulation No 881/2002 applies to a situation such as that in the case before

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16 OJ 2002, L 139, pp. 9 et seq.

17 The *ECJ*'s final ruling was as follows: "In a situation where both the contract for the sale of immovable property and the agreement on transfer of ownership of that property have been concluded before the date on which the buyer is included in the list in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, as amended by Council Regulation (EC) No 561/2003 of 27 March 2003, and where the sale price has also been paid before that date, Article 2(3) of that regulation, as amended by Regulation No 561/2003, must be interpreted as prohibiting the final registration, in performance of that contract, of the transfer of ownership in the Land Register subsequent to that date."

> the referring court. That question is therefore a matter of national law and cannot be examined in the context of the present reference for a preliminary ruling.
> 78. However, as regards the application of Regulation No 881/2002, it should also be pointed out that, in accordance with settled case-law, the requirements flowing from the protection of fundamental rights within the Community legal order are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements (see, inter alia, Joined Cases C-20/00 and C-64/00, Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 88 and case-law cited there).
> 79. Accordingly, it is for the referring court to determine whether, in view of the special features of the case before it, repayment of the sums received by the sellers would constitute a disproportionate infringement of their right to property and, if that is the case, to apply the national legislation in question, so far as is possible, in such a way that the requirements flowing from Community law are not infringed."

To conclude: the area of existing European property law is expanding at a fast pace. Next to the growing area of European secondary law, property law is also affected more and more by *ECJ* case-law. Such case-law is sometimes the result of interpretation of EU primary law (the four freedoms: free movement of goods, persons, services and capital) and sometimes of EU secondary law. In other words, existing European law already has a profound effect on property law.

VI. Future European property law with an enormous impact for consumers: the euromortgage

From the perspective of the future CFR it is perhaps even more important that future European property law is developed completely outside the CFR project. In my view these developments should be included. A major project is the so-called euromortgage.[18] In a recent white paper the European Commission made clear that a directive in this area still is a serious option.[19] The ideas behind the euromortgage are manifold. A uniform euromortgage would enable banks to do cross-border mortgage business more easily, as it would allow them to lend money secured by a European

[18] More information on the euromortgage can be found on: http://ec.europa.eu/internal_market/finservices-retail/home-loans/integration_en.htm.

[19] White paper on the Integration of EU Mortgage Credit Markets (presented by the Commission), Brussels, 18.12.2007, COM(2007) 807 final.

model type of mortgage and, consequently, they would no longer have to worry about diverging national mortgage laws with which they might be unfamiliar. It would also be cost saving for consumers, as the euromortgage would be based on the German "Grundschuld", which is not dependent upon the existence of an underlying debt, therefore does not terminate upon repayment of a loan and can be used again – without having to pay costs for its re-establishment – as security for a new loan. Finally, the euromortgage would facilitate the development of a secondary mortgage market. Its non-accessory nature makes the mortgage easily transferable to so-called "special purpose vehicles". These "vehicles" would pay the bank for the transfer of its mortgage portfolio and thus make it possible to further extend the primary mortgage market, as banks would again have money to lend to consumers.

This project clearly is consumer related and concerns the, undoubtedly, most expensive contract any consumer will conclude in his or her lifetime: buying a house and getting a loan to finance the transaction. Given the consumer protection aspect involved and also given that a major aim of the CFR is to streamline the existing European law (*acquis communautaire*) in the area of consumer law, there is no good reason why mortgage law should not be included in the final CFR. Furthermore, in several legal systems the rules concerning transfer of ownership are essentially the same as the rules on establishing property rights, such as pledge or hypothec (mortgage). The reason is that in both situations (transfer of ownership and establishing property rights) the same principles apply. In each case the transferor/person establishing a property right must have the power to dispose, an underlying agreement has to be concluded and formalities have to be fulfilled. From the perspective of legal systems with such an integrated system of property law it would be incoherent if the CFR were to deal with transfer of movables and proprietary security regarding movables, but not with the creation of a mortgage on an immovable.

Also aspects of consumer protection should be looked at closely. The euromortgage is, as already remarked, based upon the German model of the "Grundschuld".[20] In this model the mortgage exists independent from the existence of an underlying loan. What can be seen here is a further (in fact: fourth) layer of abstraction in German property law, next to the three layers already discussed above. The mortgage is laid down in a tradable document and the holder of that document is the mortgagee. To protect the consumer against wrongful use of the mortgage rights in the hands of the mortgagee, the bank/mortgagee and the consumer/mortgagor conclude a contract in which they specify the conditions under which the

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[20] See also *F. Baur*, *J. F. Baur* and *R. Stürner*, Sachenrecht, Munich, 1999, pp. 526 et seq.

mortgagee is allowed to use its rights under the mortgage. A major problem is the protection of the consumer when the mortgage is transferred to a new mortgagee. The consumer is then not automatically protected against the holder of the mortgage right, as the contract between him and the original mortgagee is not binding upon third parties: privity of contract. So far, in German legal practice that did not create any problems, but as a result of the sub-prime mortgage market crisis, the resulting credit crunch and the activities of non-German hedgefunds, problems in Germany do seem to arise at present. This gap in consumer protection should be remedied before the euromortgage proposals can be finalised.[21] A problem will be how to balance consumer protection interests with the needs of players on the capital markets to be able to transfer mortgages easily to special purpose vehicles. In my view an independent study group, such as the Study Group on a European Civil Code, could do very beneficial work here.

VII. Conclusion

The law of contract, the law of tort and the law of property are inseparable. Rules on contract law, even if these rules would be limited to consumer contracts, will inevitably affect property law. For that reason the final CFR, even though the interim outline edition of the DCFR does not contain any of the books on property law, already in its present state will have an enormous impact on property law. This short contribution to the discussion is not the place for an in-depth analysis of the present DCFR to discover its (implicit) property law choices and how to integrate property law further and more explicit in the final CFR. What should happen is that the, still to be published, books VIII, IX and X on property law (transfer of movables, proprietary security and trust law) are fully integrated into the parts of the DCFR which are already available, that any

[21] Cf. C. *Clemente*, Verwertung der nicht akzessorischen Grundschuld im Rahmen eines Forderungsverkaufs, in: Zeitschrift für Immobilienrecht 2007, pp. 737 et seq. Clemente writes on p. 741: "Die Bestellung einer Grundschuld sicherungshalber ist daher Vertrauenssache. Sie birgt zahlreiche Risiken. Ein Abtretungsausschluss wird empfohlen. In der Vergangenheit wurde hiervon lediglich bei der Bestellung von Grundschulden für "vertrauenswürdige" Gläubiger abgesehen, wozu durchgängig alle inländischen Banken zählten. Vor der Bestellung einer Grundschuld für andere Gläubiger wurde gewarnt. Selbst von der Bestellung einer Grundschuld für eine ausländische Bank wurde abgeraten, weil Klage auf Rückgewähr der Grundschuld im Ausland zu erheben ist, falls nicht der für einen Verbrauchervertrag maßgebende Gerichtsstand des Art.16 Abs.1 EuGVO oder andere inländische Gerichtsstände greifen."

implicit choices are being made explicit and that the property law areas chosen are extended to also include mortgages on immovable property.[22] If the final CFR will ever result in an optional model, which can be chosen by the parties in both European cross border as well as national cases, numerous questions will arise on how the CFR solutions in the area of property law can be fitted into the national legal systems. Given the mandatory nature of the rules on property law and the general applicability of the *lex rei sitae* in property law matters, a contractual choice for the CFR/optional model will not discard – at least not completely – the national rules on property law which, without such a choice, would be applicable. Freedom to choose the applicable law still is not generally accepted in property law. Consequently, national property law will function as the default system against which background the CFR rules on property will have to be seen as a contractual deviation. I refer to what was said by Paul Lagarde during the conference. Also these private international law questions will have to be faced if the CFR is ever to function as an efficient toolbox to be used for the evolution of European private law.

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[22] Cf. the critical remarks by *N. Jansen* and *R. Zimmermann*, Grundregeln des bestehenden Gemeinschaftsprivatrechts?, in: Juristenzeitung 2007, pp. 1113 et seq., esp. pp. 1124 et seq.

Cadre commun de réference et droit international privé

Paul Lagarde (Paris)

A. Introduction

La principale difficulté qu'il y a à traiter ce sujet tient à l'incertitude actuelle sur ce qu'est ou ce que sera le cadre commun de référence (CFR). Ce que l'on sait, c'est qu'il s'agit d'une initiative lancée il y a quelques années par la Commission européenne pour apporter une solution à la diversité des droits des Etats membres en matière de contrats. Mais la réalisation peut prendre les formes les plus diverses, autant en ce qui concerne son contenu que relativement à son statut.

Pour l'instant, on comprend que le CFR peut évoluer dans deux directions différentes.[1] La première couvrirait l'ensemble du droit des contrats, théorie générale et contrats spéciaux les plus importants, et son statut serait, au mieux, un instrument optionnel ouvert au choix des parties, à défaut, une « boîte à outils » dans laquelle les législateurs des Etats membres et le législateur communautaire pourraient ou seraient invités à puiser.

L'autre direction, plus limitée dans son domaine, est davantage axée sur l'acquis communautaire en matière contractuelle, pour la rédaction duquel a été constitué le groupe Acquis communautaire[2] et elle a été renforcée par la publication du livre vert sur la révision de l'acquis communautaire en matière de protection des consommateurs.[3] La révision de cet acquis est destinée, selon les deux rapports de la Commission de 2005[4] et 2007[5] sur l'état d'avancement du CFR, à alimenter le développement du CFR dans son ensemble. La Commission, en tout cas la Commission actuelle, ne parle plus d'instrument optionnel dans ce deuxième rapport. Elle écarte même toute vue selon laquelle le CFR serait « destiné à assurer

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1 V. notamment *Schulze*, Gemeinsamer Referenzrahmen und acquis communautaire, ZEuP 2007, p. 131 et s.; *Aubert de Vincelles, Fauvarque-Cosson, Mazeaud et Rochfeld*, Droit européen des contrats: évolutions et circonvolutions, à paraître dans Droit et Patrimoine, décembre 2007.

2 European Research Group on Existing EC Private Law.

3 COM (2006) 744 final du 8.2.2007.

4 COM (2005) 456 final du 23.9.2005.

5 COM (2007) 447 final du 25.7.2007.

une harmonisation à grande échelle du droit privé ou à se transformer en un code civil européen ».[6] Cette réduction de la voilure a déçu de nombreuses personnalités impliquées directement ou indirectement dans l'aventure du CFR.[7]

Toutefois, si l'instrument optionnel ne figure plus dans les perspectives immédiates, il ne peut être écarté de notre réflexion. Le groupe d'études sur un code civil européen (groupe von Bar) poursuit ses travaux et son projet se présente comme le CFR.[8] De plus, un instrument optionnel plus modeste est envisagé pour le commerce électronique,[9] qui existerait à côté des droits nationaux pour les contrats transfrontières. Le contrat d'assurances pourrait lui aussi faire l'objet d'un instrument optionnel.[10] Le statut définitif du CFR est encore incertain. A juste titre, on a pu écrire que le fait que la Commission propose de l'utiliser comme une boîte à outils lui confèrera déjà une grande autorité et qu'il pourra être immédiatement changé en instrument optionnel le jour où il apparaîtrait désirable de disposer d'un tel instrument.[11]

Une autre difficulté pour cerner le sujet est que le droit international privé communautaire des contrats[12] est actuellement en pleine mutation. Nous avons certes, pour encore peu de temps, la convention de Rome du 19 juin 1980, nous avons aussi la proposition de règlement Rome I de décembre 2005 et nous connaissons maintenant le texte définitif adopté par le Conseil le 7 décembre 2007, mais il n'est pas encore publié.[13] Précisé-

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6 Page 12.

7 V. par ex. *Beale*, The Common Frame of Reference in general – a resumé of the current status, in: Schulze (ed.), New Features in Contract Law, 2007, p. 343 et s., 355; *Zimmermann*, European Contract Law: General Report, EuZW 2007, p. 455 et s., 462.

8 DCFR, article 1 :101: « This Common Frame of Reference (CFR) is intended to be … ».

9 *Schulte-Nölke*, interview in Droit et Patrimoine, décembre 2007.

10 V. M*üller*, Vers un droit européen du contrat d'assurances. Le « Project Group Restatement of European Insurance Contract Law », ERPL 2007, p. 59 et s., 99.

11 *Zimmermann*, European Contract Law: General Report, EuZW 2007, p. 455 et s., 461.

12 Entendu au sens limité des conflits de lois. Les questions de compétence judiciaire et de reconnaissance des décisions ont leur place dans le règlement 44/2001 du 22 décembre 2000.

13 Il le sera très probablement lorsque le présent volume sera publié. V. déjà le texte joint à la note du Secrétariat général au Comité des représentants permanents/ Conseil sur la proposition de règlement Rome I, Bruxelles, 3 décembre 2007 (04.12), Dossier interinstitutionnel: 2005/0261 (COD) 15832/07 CODEC 1357 JUSTCIV 320, en anglais: http://register.consilium.europa.eu/pdf/en07.st15832.

ment, sur la disposition clé concernant la possibilité de choisir un droit non étatique, il y a discordance, comme nous le verrons, entre la version initiale et celle qui semble devoir être retenue. A ces incertitudes s'ajoutent celles liées, pour les contrats de consommation, aux règles unilatérales d'applicabilité des directives, pas toujours cohérentes et transposées en ordre dispersé, sans compter, pour les aspects non contractuels du CFR, les dispositions du règlement Rome II.

Les rapports du CFR avec le droit international privé doivent être envisagés en fonction des différentes formes que le CFR peut prendre. Je laisse de côté l'hypothèse dans laquelle le CFR n'aurait que le statut d'une simple boîte à outils. Là dessus, le droit international privé n'a rien à dire, sinon peut-être que la boîte à outils pourrait servir à l'interprétation du droit national désigné par la règle de conflit, s'il s'agit de la loi d'un Etat membre, un peu comme les directives servent à l'interprétation des lois nationales des Etats membres selon la jurisprudence de la Cour de justice des communautés européennes.[14] Ce n'est d'ailleurs même pas sûr, car, à la différence d'une directive, une boîte à outils n'est pas en soi un acte de la Communauté. Je distinguerai principalement selon que le CFR est élevé au rang d'un instrument optionnel général ou reste limité à une simple révision de l'acquis en matière de contrats de consommation.

B. L'hypothèse d'un CFR, instrument optionnel

La question est de savoir comment le droit international privé peut rendre applicable le CFR. Pour y répondre il est bon d'avoir en mémoire quelques précédents qui peuvent nous servir de guide ou de repoussoir.

I. Les précédents

Nous avons deux séries de précédents, les conventions d'unification du droit de la vente internationale de marchandises, d'une part, les principes UNIDROIT et les Principes de droit européen des contrats (PECL), d'autre part.

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en07.pdf et la traduction en français: http://register.consilium.europa.eu/pdf/fr/07/st15/st15832.fr07.pdf

[14] Aff. C-397-406/01, Pfeiffer; C-144/04, Mangold.

1. Conventions sur la vente internationale

Un premier modèle – ou contre-modèle – est fourni par la convention signée à La Haye le 1er juillet 1964 portant loi uniforme sur la vente internationale des objets mobiliers corporels (LUVI).[15] L'article 2 de la loi uniforme disposait: « Les règles de droit international privé sont exclues pour l'application de la présente convention ». Cette solution radicale signifiait que le tribunal d'un Etat contractant devait appliquer la LUVI de façon universelle dès lors qu'il était saisi d'un litige portant sur une vente internationale, même sans point de contact avec un Etat contractant.[16] Une disposition de cet ordre dans le CFR aurait été impensable, car elle aurait rendu sans objet la convention de Rome et le règlement Rome I en voie d'achèvement et elle aurait manifesté de façon inopportune un impérialisme démesuré du droit européen.

Le modèle de la Convention de Vienne du 11 avril 1980 (CISG) est plus raisonnable. La convention se déclare applicable, comme on sait, lorsque les parties sont établies dans des Etats différents si ces Etats sont des Etats contractants ou si les règles de droit international privé mènent à la loi d'un Etat contractant,[17] le tout assorti d'une clause d'*opt out* permettant aux parties d'exclure tout ou partie de la convention.[18]

On peut faire deux remarques à ce sujet. D'abord, le droit international privé n'est envisagé que dans la mesure où il désigne la loi d'un Etat contractant, et non directement la convention.[19] Ensuite les dispositions sur l'applicabilité de la convention s'imposent aux Etats contractants en raison de la force obligatoire de la convention, dont serait vraisemblablement privé l'instrument optionnel. A cet égard, celui-ci se rapproche davantage des principes UNIDROIT et des Principes du droit européen des contrats (PECL).

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15 V. texte in RCDIP 1965, p. 205 et s.

16 Il est vrai que l'article 3 de la loi uniforme prévoyait la possibilité pour les parties d'exclure, expressément ou tacitement, tout ou partie de ladite loi et que l'article 4, par une disposition difficile à interpréter au regard de l'article 2, déclarait la loi uniforme applicable lorsqu'elle avait été choisie par les parties, « dans la mesure où elle ne porte pas atteinte aux dispositions impératives qui auraient été applicables si les parties n'avaient pas choisi la loi uniforme ».

17 Article 1er.

18 Article 6.

19 La convention ne comporte pas de clause d'*opt in* permettant son choix direct. Un tel choix ne serait donc efficace que dans les limites permises par la loi objectivement applicable, c'est-à-dire, le plus souvent, de la loi du vendeur.

2. Principes UNIDROIT et PECL[20]

Les Principes UNIDROIT définissent unilatéralement leur champ d'application. Selon le Préambule:

> « Ils s'appliquent lorsque les parties acceptent d'y soumettre leur contrat.
> Ils peuvent s'appliquer lorsque les parties acceptent que leur contrat soit régi par les 'Principes généraux du droit', la '*lex mercatoria*' ou autre formule similaire.
> Ils peuvent apporter une solution lorsqu'il est impossible d'établir la règle pertinente de la loi applicable.
> Ils peuvent être utilisés afin d'interpréter ou de compléter d'autres instruments du droit international uniforme.
> Ils peuvent servir de modèle aux législateurs nationaux et internationaux[21] ».

L'article 1.5 comporte une clause permettant l'exclusion des Principes ou la dérogation à l'une de leurs dispositions, « à moins que ces Principes n'en disposent autrement ». L'article 1.6 prévoit le comblement des lacunes « conformément aux principes généraux dont ils s'inspirent ».

Les auteurs des Principes sont cependant conscients que leur œuvre est dépourvue de force contraignante, comme le reconnaît l'article 1.4: « Ces principes ne limitent pas l'application des règles impératives, d'origine nationale, internationale ou supranationale, applicables selon les règles pertinentes du droit international privé ». Et le commentaire annexé aux Principes recommande aux parties qui souhaitent choisir les Principes comme loi régissant leur contrat de combiner une telle clause de conflit de lois avec une clause compromissoire. Celle-ci liera les arbitres, tandis qu'un juge étatique ne verra dans le choix des Principes qu'un simple accord visant à les incorporer au contrat, donc dans les limites permises par la loi objectivement applicable au contrat.

Des observations comparables peuvent être faites à propos des PECL. Selon l'article 1.101:

> « 2. Ils s'appliquent lorsque les parties sont convenues de les incorporer à leur contrat ou d'y soumettre celui-ci ».

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[20] Sur leur valeur de précédent, v. *Fauvarque-Cosson*, Droit européen et international des contrats: l'apport des codifications doctrinales, D. 2007, p. 96 et s.

[21] Ce en quoi ils jouent le rôle d'une boîte à outils comparable au CFR dans une de ses fonctions possibles.

L'incorporation des PECL dans le contrat ne fait pas problème. Prévoir la soumission du contrat aux PECL va plus loin, mais cette possibilité est nuancée par l'article 1.103, intitulé « Règles impératives » et aux termes duquel:

> « 1. Lorsque le droit applicable le permet, les parties peuvent choisir de soumettre leur contrat aux Principes de telle sorte que les règles impératives nationales ne s'appliquent pas.
> 2. Elles doivent toutefois respecter les règles impératives du droit national, international ou supranational qui, selon les règles pertinentes du droit international privé, s'appliquent indépendamment du droit qui régit le contrat ».

Il s'agit ici bien évidemment des lois de police au sens de l'article 7 de la convention de Rome. Comme pour les Principes UNIDROIT, les PECL n'ont pas de force contraignante par eux-mêmes et sont dans la dépendance du droit applicable.

En quoi ces précédents peuvent-ils nous aider à déterminer les règles d'applicabilité d'un futur instrument communautaire optionnel?

II. L'applicabilité de l'instrument optionnel

La question se dédouble. On peut s'interroger d'abord sur le domaine que l'instrument s'assignera à lui-même. S'appliquera-t-il à tous les contrats transfrontières ou seulement aux contrats transfrontières intracommunautaires? S'appliquera-t-il également aux contrats internes, doublant ainsi les droits internes de chacun des Etats membres? Il faut ensuite se demander quel sera le mode d'application de cet instrument, en d'autres termes comment l'autonomie de la volonté s'exercera pour le rendre applicable. Bien sûr, en posant cette dernière question, on présuppose que cet instrument sera suffisamment attractif pour être effectivement choisi par les parties contractantes. Certains en ont douté. Ils ont fait valoir que pour des raisons de sécurité, les contractants seront tentés de préférer à ce « droit alternatif inexpérimenté » un droit national rôdé depuis longtemps et accompagné d'un corpus jurisprudentiel important.[22]

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[22] *Sonnenberger*, L'harmonisation ou l'uniformisation européenne du droit des contrats sont-elles nécessaires? Quels problèmes suscitent-elles? – Réflexions sur la Communication de la Commission de la CE du 11 juillet 2001 et la Résolution du Parlement européen du 15 novembre 2001, RCDIP 2002, p. 405 et s., 429.

1. Domaine d'application de l'instrument optionnel

A la différence des Principes UNIDROIT mais un peu comme les PECL dont il est le prolongement, ce qu'on connaît aujourd'hui du CFR ne permet pas de savoir s'il est destiné à s'appliquer aux contrats transfrontières, aux contrats transfrontières intracommunautaires, ou également aux contrats internes.

a) Dans l'hypothèse où le CFR s'appliquerait aux contrats internationaux, il conviendrait évidemment de définir la notion de contrat international ou de contrat transfrontière, mais le problème n'est pas nouveau et il n'est pas insoluble. La principale difficulté est ailleurs. Elle est dans les rapports que le CFR entretiendrait avec la Convention de Vienne.[23]

Est-il possible d'imaginer que, dans le domaine matériel de la convention de Vienne, en gros les ventes internationales de marchandises entre professionnels, puissent coexister deux ensembles de règles, la CISG et le CFR? Des discordances existent entre les deux textes. Par exemple, selon l'article 15 § 2 de la CISG: « Une offre, même si elle est irrévocable, peut être rétractée si la rétractation parvient au destinataire avant ou en même temps que l'offre ». Tandis que, selon l'article 3.202 (3) DCFR, la révocation d'une offre est sans effet si « *the offer indicates that it is irrevocable* ». Et en comparant de près la CISG et les cinq chapitres sur la vente figurant au livre IV du DCFR, on pourrait trouver des nuances entre les deux textes.

Si tel devait être le cas, il faudrait des dispositions pour indiquer dans quels cas c'est l'un ou l'autre texte qui doit recevoir application. Comme la CISG est applicable de plein droit dans les cas indiqués par son article 1er,[24] sauf *opting out*, le CFR ne pourrait lui être préféré que s'il a fait l'objet d'un *opting in* de la part des parties au contrat de vente. Cet *opting in* vaudrait *opting out* de la CISG.

b) Des problèmes du même ordre se poseraient si le CFR était limité aux contrats transfrontières intracommunautaires. La CISG est en effet applicable à des contrats de vente intracommunautaires. Mais il serait possible d'imaginer que le CFR, limité aux contrats intracommunautaires, supplante la CISG. Ce serait le cas si les parties, comme dans le cas précédent, choisissaient le CFR et excluaient de ce fait la CISG. Indépendamment d'un tel choix, l'article 90 CISG réserve la possibilité d'un accord international dérogeant à la convention, pourvu que les parties au contrat aient leur établissement dans des Etats parties à cet accord. Il fau-

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[23] V. *Huber*, European Private International Law, Uniform Law and the Optional Instrument, ERA-Forum 2003, scripta iuris europaei, p. 85 et s.

[24] V. *supra*, B, I, 1.

drait donc supposer que le CFR prenne la forme d'un accord – et non plus d'un instrument optionnel, pour parvenir à ce résultat. Un tel résultat ne paraît d'ailleurs pas souhaitable. Il isolerait le droit communautaire de la vente du droit mondial et les entreprises européennes ayant une activité internationale seraient soumises à deux régimes internationaux différents de la vente, selon que celle-ci dépasse ou non les limites de l'Union européenne.

c) Il se pourrait enfin que le CFR soit applicable aux contrats internes. Ce serait le cas s'il devait devenir un véritable code civil européen, hypothèse pour l'instant rejetée par la Commission. Admettons-la pourtant le temps du raisonnement.

Si le CFR restait à l'état d'instrument optionnel dont l'application relèverait d'un *opting in*, il coexisterait avec chacun des droits nationaux des Etats membres. Il pourrait être choisi pour un contrat interne, dans la mesure où le problème posé par des règles impératives concurrentes de ces droits nationaux et du CFR aurait été réglé dans chaque Etat membre. Il pourrait l'être également dans un contrat international, et il faudrait considérer ce choix comme une exclusion tacite de la CISG.

Si – hypothèse extrême – le CFR devait périmer et supplanter le droit national antérieur, il devrait à son tour être supplanté par la CISG en cas de vente internationale, sauf exclusion de celle-ci par les parties. En effet, le CFR ne serait plus que le droit d'un Etat partie à la CISG, applicable selon les dispositions de son article 1er.

La conclusion qui s'impose est que le CFR serait bien avisé de préciser son champ d'application. Son mode d'application dépend aussi largement du domaine qui lui sera reconnu.

2. Mode d'application de l'instrument optionnel

Par définition, un instrument optionnel doit pouvoir être choisi. Il faut donc que le droit positif permette ce choix. Ce n'est pas assuré aujourd'hui et il faut être attentif au très prochain règlement Rome I. Encore celui-ci ne pourra-t-il donner qu'une orientation de principe et des problèmes subsisteront pour le cas de choix partiel de l'instrument ou pour les aspects non contractuels dudit instrument.

a) La question de principe

L'instrument optionnel pourrait se déclarer lui-même applicable comme le font les principes UNIDROIT et les PECL, lorsqu'il serait choisi par les parties. Ce serait en quelque sorte un instrument optionnel autoproclamé. Quelle serait la valeur de cette autoproclamation? Les règles générales de conflit de lois permettent-elles de donner effet à un tel choix des parties?

La convention de Rome du 19 juin 1980, dont les jours sont désormais comptés, ne permet pas aux parties de faire choix d'un droit anational, sauf par incorporation de celui-ci dans le contrat, soumis à la loi étatique objectivement applicable, donc aux lois impératives de celle-ci.[25] En d'autres termes, le choix d'un droit anational est un choix de droit matériel, ce n'est pas un choix de droit international privé.

La proposition de la Commission, présentée le 15 décembre 2005, d'un règlement Rome I destiné à se substituer à la convention de Rome prévoyait au contraire la possibilité de choisir des « principes et règles de droit matériel des contrats, reconnus au niveau international ou communautaire ». Et elle ajoutait, en reprenant les termes de l'article 7 § 2 de la CISG, que « les questions concernant les matières régies par ces principes ou règles et qui ne sont pas expressément tranchées par eux seront réglées selon les principes généraux dont ils s'inspirent ou, à défaut de ces principes, conformément à la loi applicable à défaut de choix en vertu du présent règlement »[26]. Selon l'exposé des motifs introduisant la proposition de la Commission, cette formulation visait à « autoriser notamment le choix des Principes UNIDROIT, des *Principles of European Contract Law* ou d'un éventuel futur instrument communautaire optionnel, tout en interdisant le choix de la *lex mercatoria,* insuffisamment précise, ou de codifications privées qui ne seraient pas suffisamment reconnues par la communauté internationale ».

Cette proposition, que certains appelaient de leurs vœux[27] a soulevé des objections, moins de principe que de formulation. On a pu lui reprocher de laisser dans l'incertitude le critère qui permettrait d'affirmer que les principes ou règles de droit matériel choisis sont reconnus par la communauté internationale, ainsi que l'autorité qui en décidera.[28] Dans la

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[25] Article 3. L'interprétation indiquée au texte est très généralement acceptée. V. *Lagarde*, Le nouveau droit international privé des contrats après l'entrée en vigueur de la convention de Rome du 19 juin 1980, RCDIP 1991.287 et s., n° 19, p. 300; *Kassis*, Le nouveau droit européen des contrats internationaux, Paris, LGDJ 1993, p. 373 et s.; *Kropholler*, Internationales Privatrecht, 6ème éd., Tübingen 2006, § 52 II 2 e ; *Collins* et al. (eds.), Dicey, Morris, Collins on the Conflict of Laws, T. II, 14ème éd., London 2006, T. II § 32-081.

[26] Article 3 § 2 de la proposition.

[27] V. notamment en France, *Béraudo*, Faut-il avoir peur du contrat sans loi? Mélanges en l'honneur de *Paul Lagarde*, Paris 2005, p. 93 et s. Cet auteur faisait valoir notamment que le choix d'un droit non étatique était admis dans l'arbitrage international et que refuser au juge étatique ce qui est permis à l'arbitre condamnerait à brève échéance la justice étatique à l'archaïsme.

[28] *Lagarde*, Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I), RCDIP, 2006, p. 331

version finale du règlement Rome I, cet article 3 § 2 a disparu et avec lui la faculté pour les parties de choisir un droit non étatique. Sur ce point, le texte du règlement est identique à celui de la convention et l'on peut difficilement imaginer qu'il puisse avoir un sens différent. Il ne permet que le choix d'un droit étatique. Cependant, les auteurs du règlement ont souhaité, assez maladroitement, réserver la possibilité de choisir l'éventuel futur instrument optionnel.

En effet, selon les considérations du règlement:[29]

> « Le présent règlement n'interdit pas aux parties d'incorporer dans leur contrat une référence à un droit non étatique ou à une convention internationale. – Si la Communauté adoptait dans un instrument juridique approprié des règles de droit matériel des contrats, y compris des clauses et des conditions-types, cet instrument pourrait prévoir que les parties puissent choisir d'appliquer ces règles ».[30]

Ce considérant renvoie donc au CFR optionnel le soin de se proclamer loi du contrat s'il est choisi par les parties, mais il ne précise pas quel serait cet « instrument juridique approprié » qui donnerait sa force juridique au choix des parties. Il ne peut s'agir à mon sens que d'un instrument ayant la même force que le règlement Rome I, donc d'un règlement. Ce que le règlement Rome I a fait, un autre règlement peut évidemment le défaire. Mais si, par exemple, le CFR optionnel était publié par la Commission dans la série C du *Journal officiel de l'Union européenne*, cette publication n'aurait qu'une valeur d'information et le texte ainsi publié n'aurait pas de force juridique. Même s'il se disait applicable quand il est choisi par les parties, cette disposition ne pourrait l'emporter sur le texte précis de l'article 3 § 1 du règlement Rome I. En revanche, si le CFR est publié par un règlement, et que ce règlement précise que, par dérogation à

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et s., 336; *Mankowski*, Der Vorschlag für die Rom-Verordnung, IPRax 2006, p. 101 et s., 102.

[29] Points 15 et 16.

[30] La première phrase ne fait qu'exprimer une évidence. La possibilité d'incorporer dans le contrat un droit non étatique est admise sans difficulté, puisqu'elle n'est pas un choix de droit international privé et qu'elle respecte les règles impératives de la loi objectivement applicable au contrat. La seconde phrase concerne exclusivement l'éventuel futur instrument optionnel et habilite celui-ci à se déclarer éligible par les parties. On ne voit pas comment le règlement Rome I pourrait le lui interdire ou le lui permettre. Ce règlement ne permet pas un choix direct de cet instrument optionnel comme choix de droit international privé. Et il ne mentionne plus non plus les Principes UNIDROIT ni les PECL. Il appartiendrait donc à un règlement publiant le CFR optionnel de s'écarter du règlement Rome I ou de le compléter en prévoyant cette possibilité de choix.

l'article 3 § 1 du règlement Rome I, le CFR peut être choisi directement par les parties, il n'y aurait pas de difficulté à donner son plein effet à ce choix des parties.

Pour que l'instrument optionnel puisse devenir effectivement la loi applicable au contrat, il faudrait donc, d'une part, que cet instrument comporte lui-même une disposition selon laquelle il s'applique lorsque les parties acceptent que leur contrat y soit soumis, d'autre part, qu'un règlement communautaire, confère force obligatoire à cette disposition d'applicabilité. Les PECL subordonnent cette force obligatoire à la permission du droit applicable,[31] car ils n'ont par eux-mêmes aucune valeur légale, mais l'instrument optionnel pourrait tirer la sienne d'un règlement communautaire.

On peut supposer que ce choix, une fois autorisé par l'acte communautaire et faute d'autre précision de celui-ci, serait régi par l'article 3 du règlement Rome I, par exemple pour les questions relatives au dépeçage du contrat, au choix tardif, au consentement etc. Des précisions seraient également utiles sur la portée du choix par les parties de l'instrument optionnel.

b) Etendue de la faculté de choix

aa) Quid *d'un choix partiel du CFR?*

L'hypothèse ici envisagée n'est pas celle du dépeçage du contrat. Il se peut que les parties choisissent le CFR pour une partie de leur contrat et la loi de l'Etat de New York pour telle autre partie. Ce dépeçage du contrat est prévu par l'article 3 § 1, 3ème phrase de la convention de Rome et se retrouve à la même place dans le règlement Rome I.

Mais il se peut aussi que les parties déclarent soumettre leur contrat à tel ou tel chapitre du CFR, à l'exclusion des autres. Il s'agit alors d'un dépeçage du CFR lui-même. Les Principes UNIDROIT et les PECL autorisent en principe une telle exclusion partielle « à moins que les Principes n'en disposent autrement ».[32] Le DCFR fait de même, en permettant l'exclusion partielle, sauf disposition contraire.[33] Les parties sont libres de se soumettre ou non au CFR, mais si elles décident de s'y soumettre, elles sont liées par les dispositions de cet instrument auxquelles il interdit de déroger. On peut faire le rapprochement avec la clause *paramount*, par laquelle les parties à un contrat de transport maritime peuvent choisir l'application de la convention de Bruxelles non révisée du 25 août 1924 pour l'unification de certaines règles en matière de connaissement, en de-

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[31] Article 1.103.

[32] Principes UNIDROIT, article 1.5 ; PECL, article 1.102 (2).

[33] DCFR, article 1.102 (2).

hors des cas d'application qu'elle prévoit, mais sans pouvoir exclure ses dispositions impératives sur le montant de la responsabilité du transporteur.[34]

bb) La faculté de choix de l'instrument optionnel porte-t-elle sur ses dispositions de nature non contractuelle?

Il suffit de parcourir le DCFR pour constater qu'il comporte, même dans ses premiers livres consacrés aux contrats, un certain nombre de dispositions qui ne sont pas de nature contractuelle. Il en est ainsi, par exemple, de l'article II. 2.307 relatif à la réparation du dommage subi par suite d'une information incorrecte donnée lors de la phase précontractuelle,[35] exclue du champ d'application du règlement Rome I.[36] On peut également citer le chapitre IV du Livre III relatif à l'application des règles dudit livre aux obligations non contractuelles, notamment les responsabilités encourues. Et surtout les livres VI et VII respectivement consacrés à la responsabilité non contractuelle et à l'enrichissement sans cause.

Si l'acte communautaire accompagnant la publication de l'instrument optionnel indique que cet instrument peut être choisi par les parties, on ne pourra pas se référer à l'article 3 du règlement Rome I pour déterminer le régime de ce choix. Il faudra se référer au règlement Rome II, particulièrement à son article 14, qui ne valide le choix de loi fait avant la survenance du fait générateur du dommage que si les parties exercent toutes une activité commerciale et à la condition que ce choix ne porte pas préjudice aux droits des tiers.

Le résultat sera assez curieux. Le choix de l'instrument optionnel par des parties dont l'une n'est pas commerçante ne sera valable que pour les dispositions de nature contractuelle de cet instrument. Pour les éléments non contractuels, il faudra se reporter à la loi objectivement applicable

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[34] V. Cass. com. 4.2.1992, RCDIP 1992, 495, note *Lagarde*.

[35] DCFR, article II.–2:307: Liability for loss caused by reliance on incorrect information (PECL 4:106)

(1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information:

(a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and

(b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms.

(2) This Article applies even if there is no right to avoid the contract.

[36] Article 1er § 2 f: « 2. Sont exclus du champ d'application du présent règlement: […] i) les obligations découlant de tractations menées avant la conclusion d'un contrat ».

selon le règlement Rome II. Ce ne sera pas trop grave pour la *culpa in contrahendo*, puisque la loi applicable est alors « la loi qui s'applique au contrat ou qui aurait été applicable si le contrat avait été conclu ».[37] Pour la responsabilité non contractuelle, ce sera normalement la loi de l'Etat du lieu du dommage, mais la clause d'exception figurant à l'article 4 § 3 pourra permettre de revenir à la loi du contrat et il faudrait admettre que l'instrument optionnel peut constituer au sens du règlement Rome II la loi du contrat dès lors qu'il a été choisi.[38]

Une complémentarité devrait donc s'établir entre l'acte communautaire qui permettrait aux parties de choisir l'instrument optionnel et les grands règlements communautaires sur les conflits de lois, Rome I et Rome II. Cet emprunt aux règlements ne se limiterait d'ailleurs pas au régime de *l'optio juris*. Par exemple, le DCFR comporte des dispositions détaillées sur la cession de créance[39] et sur la compensation[40]. Le sort de ces institutions ne peut dépendre seulement du choix par les parties de la loi applicable, ici du choix de l'instrument optionnel, car elles peuvent affecter les droits de tiers. Il faudra donc faire appel aux règles de conflit figurant dans le règlement Rome I.[41]

Le DCFR élaboré par le groupe von Bar comporte aussi des dispositions sur les consommateurs. Elles ne pourraient être choisies, à défaut de clause contraire dans le règlement de publication, que dans les conditions de l'article 5 de la convention de Rome, devenu article 6 du règlement Rome I, donc dans la mesure seulement où elles ne seraient pas contraires aux dispositions impératives protectrices de la loi de l'Etat de la résidence habituelle du consommateur. Qu'en serait-il d'un CFR limité à l'acquis communautaire en matière de protection du consommateur?

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37 Règlement Rome II, article 12 § 1.

38 Une autre solution serait que le règlement publiant l'instrument optionnel, en cohérence avec les règlements Rome I et Rome II, en reprenne les dispositions et précise que les parties exerçant toutes deux une activité commerciale peuvent choisir le CFR dans son intégralité, c'est-à-dire à la fois ses dispositions de nature contractuelle et ses dispositions de nature non contractuelle. Cette solution permettrait également de surmonter la difficulté constituée par le fait que le règlement Rome II ne permet lui aussi, selon toute probabilité, que le choix d'un droit étatique.

39 Livre III, chapitre 7 et article VI.6.106.

40 Livre III, chapitre 8.

41 Articles 14 et 17.

B. L'hypothèse d'un CFR limité à l'acquis en matière de contrats de consommation

Je voudrais indiquer d'abord les données d'une telle situation, avant de proposer des solutions aux problèmes de droit international privé qu'elle va poser.

I. Les données de la situation

1. Du coté du droit matériel

En cette matière, il existe actuellement un certain désordre ou, si l'on préfère, une certaine profusion dans les travaux en cours. D'un côté, le DCFR, à la différence des Principes UNIDROIT, n'exclut pas de son champ les contrats de consommation et comporte même de nombreuses dispositions qui leur sont spécialement consacrées, comme le droit de rétractation[42] ou la garantie des biens de consommation.[43] D'un autre côté, le groupe Acquis communautaire a élaboré des Principes sur le droit communautaire actuel des contrats (ACQP), qui concernent presque exclusivement les contrats conclus par les consommateurs. Ce dernier document paraît répondre aux préoccupations actuelles de la Commission, exprimées dans le livre vert sur la révision de l'acquis communautaire en matière de protection des consommateurs.[44] Et l'idée d'un code optionnel du commerce électronique transfrontière reste vivante.[45]

Il semble qu'on s'achemine vers un instrument horizontal et obligatoire. La grande majorité des réponses à la question A1 du livre vert est en faveur d'une approche horizontale regroupant dans un même instrument les questions de droit contractuel communes à toutes les directives existantes en la matière, combinée, là où les problèmes sont spécifiques, avec quelques règles « verticales », par exemple pour les contrats de *time sharing*. L'ACQP est dans cette ligne.

Le même document se présente comme un instrument impératif. Son article 1.203 prive d'effet obligatoire à l'encontre du consommateur les dispositions du contrat contraires aux règles spécifiquement applicables dans les relations B2C. La problématique est donc totalement différente de celle retenue dans la perspective d'un instrument optionnel, où la règle principale était celle de l'autonomie de la volonté. Si l'on devait avoir un instrument optionnel pour les rapports de consommation, comme on l'a

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42 Livre II, chapitre 4.

43 Livre IV, chapitre 6.

44 Journal officiel de L'Union européenne, C. 61 du 15 mars 2007.

45 V. *supra*, note 9.

suggéré pour le commerce électronique, il faudrait qu'il consacre un niveau maximal de protection, pour qu'il puisse être choisi en bloc, en toute sécurité. Mais ce n'est pas pour demain et je retiens pour la suite de l'exposé l'hypothèse d'un instrument impératif.[46]

La grande majorité des réponses est également d'avis de ne pas distinguer entre les contrats transfrontières et les contrats purement internes (question A2). Cette solution, qui est déjà celle retenue par les directives Protection des consommateurs existantes, évite le problème de la définition du contrat transfrontière et contribue à élever le niveau général de protection du consommateur dans les Etats membres, en obligeant les Etats membres les plus en retard sur ce terrain à suivre le mouvement.

Les réponses se divisent sur le degré d'harmonisation et sur le recours au principe de reconnaissance mutuelle ou du pays d'origine au cas où l'harmonisation ne serait pas totale. Et cette division n'est pas sans affecter les règles de droit international privé à adopter. Si l'unification est totale, la question de droit international privé se limite à déterminer le champ d'application du corpus communautaire par rapport au droit des Etats tiers. Si l'unification est partielle et permet aux Etats membres d'adopter, chacun pour son compte, des dispositions plus protectrices, il faudra également délimiter le champ d'application respectif du droit de chacun des Etats membres.

2. Du coté du droit international privé

A l'heure actuelle, il existe deux sources différentes du droit international privé en matière de protection des consommateurs. La première est constituée par la convention de Rome, bientôt relayée par le règlement Rome I. Cette convention et, semble-t-il, également le règlement retient en principe la loi de l'Etat de résidence habituelle du consommateur et n'autorise le choix d'une autre loi que dans la mesure où ce choix n'a pas pour résultat de priver le consommateur de la protection que lui accordent les dispositions impératives de la loi de sa résidence habituelle (article 5). La seconde source jaillit des directives elles-mêmes, qui comportent presque toutes une disposition selon laquelle: « Les Etats membres prennent les mesures nécessaires pour que le consommateur ne soit pas privé de la protection accordée par la présente directive du fait du choix du droit d'un pays tiers comme droit applicable au contrat, lorsque le con-

[46] On peut donc supposer que le DCFR élaboré par le groupe von Bar, s'il devient un acte communautaire, sera amputé de ses dispositions relatives aux consommateurs, car elles ne pourraient coexister avec celles élaborées par le groupe Acquis communautaire.

trat présente un lien étroit avec le territoire des Etats membres ».[47] Ainsi, à la règle de conflit bilatérale de Rome I s'ajoutent des règles unilatérales d'applicabilité des directives reposant sur la notion imprécise et volontairement souple de « lien étroit » avec le territoire des Etats membres.

Le livre vert affirme que « la révision [de l'acquis en matière de protection des consommateurs] n'aura pas d'incidence sur les règles communautaires relatives aux conflits de lois ». Si c'était vrai, ce serait regrettable, car les inconvénients de la situation actuelle sont dénoncés depuis longtemps.[48] Ils tiennent à une triple discordance bien connue, d'abord entre la règle de conflit de la convention de Rome et les règles unilatérales des directives, ensuite entre les règles unilatérales des directives elles-mêmes, enfin entre les lois de transposition de ces directives dans les Etats membres. Mais ce n'est pas tout à fait vrai.

II. Les problèmes de droit international dans ce nouveau cadre

1. Une première question est de définir le champ d'application de l'ACQP par rapport au droit des Etats tiers. Il faut éviter la pluralité des sources actuelles. Cette multiplicité tenait pour partie à l'approche verticale, c'est-à-dire sectorielle, des directives Protection des consommateurs, chacune cherchant à délimiter son propre domaine. Dans une approche horizontale, il serait concevable d'avoir encore une règle d'applicabilité commune s'ajoutant au règlement Rome I. Mais il serait plus satisfaisant de n'avoir qu'une seule règle de conflit, dont la place serait dans le règlement Rome I qui est pour l'essentiel satisfaisant.[49]

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[47] Directive 93/13 du 5 avril 1993 concernant les clauses abusives dans les contrats conclus avec les consommateurs, article 6 § 2 (JOCE L 95 du 21 avr. 1993, p. 29). Les textes correspondants des directives sur les contrats à distance et sur certains aspects de la vente et des garanties des biens de consommation sont pratiquement identiques.

[48] *Lagarde*, Heurs et malheurs de la protection internationale des consommateurs dans l'Union européenne, in Le contrat au début du XXI[ème] siècle, Etudes offertes à Jacques Ghestin, 2001, p. 511 et s. V. déjà, prémonitoire, *Jayme et Kohler*, L'interaction des règles de conflit dans le droit dérivé de la Communauté européenne et des conventions de Bruxelles et de Rome, RCDIP 1995 p. 1 et s., 15 et s.; sur l'ensemble, *S. Francq*, L'applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé, Bruxelles et Paris, 2005. V. aussi la réponse du GEDIP au livre vert de la Commission.

[49] La dualité de règles se comprenait sous l'empire de la convention de Rome, l'article 5 de celle-ci, qui ne protégeait le consommateur que dans les trois circonstances qu'il mentionnait, pouvant paraître insuffisant. Ce n'est plus le cas dans le règlement Rome I.

Le règlement Rome I conserve, comme on l'a dit, le système de comparaison des législations de la convention de Rome, mais il comporte quelques innovations importantes. Tout d'abord, l'article 3 § 4, qui est un texte général, réserve, en cas de choix par les parties de la loi d'un Etat tiers, l'application des dispositions impératives du droit communautaire lorsque tous les éléments de la situation sont localisés sur le territoire d'un ou de plusieurs Etats membres. Cela veut dire qu'un contrat intracommunautaire est considéré comme un contrat interne au regard du droit communautaire. Donc, si les deux parties sont établies dans deux Etats membres différents, elles ne peuvent se soustraire aux règles communautaires impératives, notamment aux règles protectrices du consommateur. Ensuite, si le contrat est un contrat international en ce sens qu'il comporte des éléments localisés hors du territoire des Etats membres, le consommateur sera protégé par le droit communautaire impératif s'il a sa résidence habituelle dans un Etat membre. C'est la règle générale de l'article 6 (ex-article 5 de la convention), dont le champ d'application matériel est élargi par le règlement en ce qu'elle protège le consommateur vers le pays duquel le professionnel dirige son activité, ce qui couvre une grande part des contrats conclus par internet. Ces dispositions paraissent amplement suffisantes et l'on pourrait se passer d'une règle d'applicabilité comme celle des directives.

2. La deuxième question est de délimiter le champ d'application des droits des Etats membres les uns par rapport aux autres. L'intérêt de la question est accru si l'harmonisation communautaire n'est pas complète et laisse la possibilité aux Etats membres d'aller au delà de la protection minimale imposée par l'ACQP.

La question se déplace du terrain des conflits de lois à celui du droit communautaire et particulièrement des exigences de la libre circulation des marchandises et des services. Sur le terrain des conflits de lois, rien n'empêche d'utiliser le règlement Rome I pour déterminer l'Etat membre dont le droit des contrats de consommation sera applicable au contrat. Ce sera, comme dans le cas précédent, l'Etat membre de la résidence habituelle du consommateur. Aucun problème particulier ne se pose si ce droit s'en est tenu à la protection minimale exigée par l'ACQP. La question de droit communautaire surgit si ce droit impose une protection du consommateur plus forte que la protection minimale, et elle se répercute immédiatement sur le droit applicable.

Si les Etats membres sont libres de mettre en place sur leur territoire la protection supplémentaire qu'ils estiment souhaitable, peuvent-ils imposer l'application de cette protection aux fournisseurs des autres Etats membres lorsque ces fournisseurs concluent des contrats avec des consommateurs ayant leur résidence habituelle dans le pays le plus protecteur? Dans le but de concilier le principe de libre circulation des mar-

chandises et l'objectif de protection des consommateurs, le livre vert avait suggéré de combiner un système d'harmonisation minimale avec une clause de reconnaissance mutuelle ou le principe du pays d'origine.[50]

La clause de reconnaissance mutuelle repose sur la même idée que les clauses « marché intérieur » qu'on trouve dans de nombreuses directives.[51] Les exigences supplémentaires de protection imposées par un Etat membre ne seraient pas opposables aux fournisseurs établis dans un autre Etat membre dans la mesure où elles constitueraient des restrictions injustifiées à la libre circulation des biens et des services. En somme, le respect par la loi du fournisseur du seuil minimal de protection imposé par les directives communautaires devrait le mettre à l'abri des surprises et lui garantir la libre circulation de ses produits et services. Certes, les directives n'interdisent pas aux Etats membres d'aller au delà de ce seuil minimal de protection, mais elles ne considèreraient pas ce surplus de protection comme un obstacle légitime à la libre circulation à l'intérieur de l'Union.[52]

Cette thèse se heurte à de graves objections.[53] Certes les fournisseurs trouveraient avantage à ne devoir se plier qu'aux règles minimales prévues par l'ACQP sans avoir à consulter les lois des 27 Etats membres, mais est-ce une raison suffisante pour fausser la concurrence dans un autre Etat membre où la protection est renforcée, en donnant un avantage aux fournisseurs étrangers par rapport aux fournisseurs locaux, ce qui conduirait évidemment à terme à un nivellement par le bas de la protection? De plus, a-t-on remarqué, l'application de la protection renforcée de la loi du consommateur ne peut être qualifiée de restriction à la libre circulation

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[50] Question A3.

[51] Par exemple directive 2000/31 du 17 juillet 2000 sur le commerce électronique, article 3.

[52] Thèse soutenue par *Quinones Escamez*, Marché intérieur, harmonisation minimale et contrats de consommation (proposition de modification de l'article 5 de la Convention de Rome, 1980), 2001 (réponse à la 1ère communication de la Commission sur un éventuel code civil européen des contrats), (http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.13.pdf). Dans le même sens, *Reich*, A Common Frame of Reference (CFR) – Ghost or host for integration?, ZERP-Diskussionspapier 2006, p. 39-40; *Staudenmayer*, The Way Forward in European Contract Law, ERPL 2005, p. 95 et s., 103-104.

[53] Voir *Wilderspine* et *Lewis*, Les relations entre le droit communautaire et les règles de conflit de lois des Etats membres, RCDIP 2002. 1 et s., 36-37; v. aussi la réponse de l'Atelier français intégré aux recherches du Groupe européen « Acquis communautaire » (UMR de droit comparé n° 803, CNRS – Université de Paris I – Panthéon-Sorbonne) au livre vert sur la révision de l'acquis communautaire en matière de protection des consommateurs.

comme le serait par exemple l'exigence d'une autorisation administrative ou des normes de conditionnement des produits. Si par exemple, a-t-on dit,[54] le délai de rétractation prévu par la loi de l'Etat du consommateur est plus long que celui prévu par l'ACQP, il ne constitue pas une entrave à la libre circulation, car il ne fera pas double emploi avec le délai prévu dans l'Etat du fournisseur. Il le prolongera simplement de quelques jours. Si le « business » veut encourager le consommateur à acheter hors de ses frontières, il faut lui donner la garantie de l'application des règles protectrices de son environnement.[55]

Les objections sont encore plus graves à l'encontre de la suggestion de compléter une harmonisation minimale par le principe du pays d'origine. Aux inconvénients précités s'ajouterait l'incohérence. Comment concilier en effet la règle de l'application quasiment impérative de la loi de l'Etat de résidence habituelle du consommateur, posée par l'article 5 de la convention de Rome et du règlement Rome I, avec le principe du pays d'origine qui conduit inéluctablement à la loi de l'Etat d'établissement du fournisseur?

C. Conclusions

1. S'agissant des contrats B2B et des dispositions de nature contractuelle de l'instrument optionnel, l'impossibilité pour les parties, résultant du règlement Rome I, de choisir un tel instrument comme loi du contrat, du fait de son caractère non étatique, pourrait être levée, si l'instrument optionnel était publié par un règlement prévoyant cette possibilité. Le contrat de choix de cet instrument devrait être régi par l'article 3 du règlement Rome I. Le choix de l'instrument emporterait, pour la vente, exclusion tacite de la CISG.

2. Pour les dispositions de nature extracontractuelle, le choix de l'instrument optionnel ne pourrait être admis que dans les limites prévues par le règlement Rome II.

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[54] Réponse de l'Atelier précité (note précédente), p. 19.

[55] Certains ont objecté à cette position la considération pratique que les professionnels n'accepteront pas de vendre à des consommateurs d'un autre Etat membre, s'ils doivent être astreints aux règles protectrices de l'Etat de la résidence habituelle du consommateur. C'est oublier que la protection donnée par le règlement Rome I au consommateur s'applique seulement dans le cas d'un professionnel actif qui dirige son activité dans l'Etat du consommateur. Personne ne l'y oblige, mais s'il le fait, il est logique qu'il se soumette à la loi du marché qu'il prospecte.

3. Pour les contrats B2C, un instrument horizontal tel que l'ACQP devrait être régi par l'article 6 du règlement Rome I, tant pour délimiter son champ d'application par rapport au droit des Etats tiers que pour déterminer, à l'intérieur de l'Union, l'Etat membre dont le droit serait applicable, sans clause de reconnaissance mutuelle. Il conviendrait, sauf exception dûment justifiée, de renoncer aux règles d'applicabilité figurant dans les directives en vigueur.

Part VI
Member States' Aspects

Europäisches Vertragsrecht – Österreichische Haltung

Georg Kathrein (Wien)

I. Einleitung

Nach einem Dank für die Möglichkeit, einen Beitrag zu dem Symposium und diesem Tagungsband leisten zu dürfen,[1] soll hier auch die Gelegenheit ergriffen werden, die Perspektive, aus der sich der folgende Beitrag mit der Thematik des Europäischen Vertragsrechts befasst, vorzustellen.

Ich bin im Bundesministerium für Justiz in Wien in der Gesetzesvorbereitung tätig, u.a. in den Bereichen Schuldrecht, Sachenrecht, Verbraucherrecht, Versicherungsrecht und Persönlichkeitsrechte. Meine berufliche Tätigkeit umfasst einerseits die Vorbereitung, Verhandlung und Ausarbeitung von Gesetzesentwürfen für die österreichische Bundesregierung und das Parlament. Andererseits obliegt mir auch die Betreuung der Richtlinienvorschläge der Kommission im Rat bzw. den zuständigen Arbeitsgruppen im Rat. Nebenbei bin ich auch am Institut für Zivilrecht der Universität Wien tätig. Meine Hauptaufgabe liegt aber in der – wie wir das nennen – „Legistik", also der fachlichen Vorbereitung von Gesetzesentwürfen. Ich habe in den vergangenen zwölf Jahren die Gelegenheit und das Glück gehabt, wichtige zivilrechtliche Reformvorhaben auf europäischer und innerstaatlicher Ebene mit zu gestalten.[2] Seit den Anfängen und den ersten Sitzungen im Rat begleite ich auch die Vorbereitung des Gemeinsamen Referenzrahmens und die Revision des Verbraucherrechts-Acquis.

Österreich spielt aus vielerlei Gründen nur einen kleineren Part im europäischen Orchester. Es mag vielfach wichtiger sein, was „die Großen" denken und wie sie sich politisch zu dem Gemeinsamen Referenzrahmen

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1 Beitrag wurde weitgehend im Stil des Vortrags belassen.

2 Etwa die Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz, ABl. Nr. L 144 vom 20.5.1997, 19, die Richtlinie 1999/44/EG zu bestimmten Aspekten des Verbrauchsgüterkaufs und der Garantien für Verbrauchsgüter, ABl. Nr. L 171 vom 7.7.1999, 12, die Richtlinie 2000/35/EG zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr, ABl. Nr. L 200 vom 8.8.2000, 35, oder die Richtlinie 2002/65/EG über den Fernabsatz von Finanzdienstleistungen an Verbraucher, ABl. 2002, Nr. L 271 vom 9.10.2002, 16.

und der Revision des Verbraucherrechts stellen. Umso mehr hat es mich gefreut, dass auf dem Symposium auch die leiseren Stimmen zu Wort kamen. Es hat vielleicht damit zu tun, dass sich das österreichische Bundesministerium für Justiz für die europäische Rechtsentwicklung sehr interessiert und diese auch fördert, wo und wie es kann, etwa mit der Unterstützung des European Centre of Tort and Insurance Law in Wien oder der Mithilfe bei der Ausrichtung des 4. Europäischen Juristentags in Wien im Jahr 2007.[3] Nicht von ungefähr hat sich dieses Veranstaltung in der zivilrechtlichen Abteilung mit dem Thema „Europäisches Vertragsrecht" befasst.

II. Stand des österreichischen Zivilrechts

1. Allgemeines

Thema des Symposiums ist die Entwicklung des Europäischen Vertragsrechts und des gemeinschaftlichen Verbraucherrechts. Dennoch möchte ich Sie paradoxer Weise zunächst ganz kurz über den Stand des österreichischen Zivilrechts informieren. Das mag für Sie auf den ersten Blick nur von beschränktem Interesse sein. Es ist aber wichtig, die Verhältnisse in den einzelnen Ländern zu kennen und das europäische Recht in seiner Gesamtheit zu sehen. Selbst im Zivilrecht, das ja nicht in die eigentliche Zuständigkeit der Gemeinschaft fällt, sind die europäische und die nationale Ebene nämlich eng miteinander verwoben. Auch lassen sich nur durch eine kurze Darstellung des rechtlichen Ist-Stands Missverständnisse vermeiden. Ich habe in den bisherigen Diskussionen über den Referenzrahmen und die Revision des gemeinschaftsrechtlichen Verbraucherrechts den Eindruck gewonnen, dass die Teilnehmer vielfach aneinander vorbeireden, weil sie über die realen Rechtsverhältnisse in den Mitgliedstaaten nicht ausreichend informiert sind. Erklärt man etwa einem Vertreter des Common Law, dass das österreichische Zivilrecht auf einem Zivilrechtskodex beruht, so assoziiert er damit zwangsläufig die Vorstellung von einem allumfassenden Regelungssystem. Das dem aber nicht so ist, kann leicht untergehen. Und letztlich kann ich mein Thema, nämlich die österreichische Haltung zu den europäischen Vorhaben, nur dann umfassend abhandeln, wenn ich die dahinter stehenden Interessen darlege. Das bedingt aber eben wieder einen kurzen Blick auf den eigenen Rechtszustand.

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[3] Vgl. dazu die Tagungsberichte von *Gasser/Korom/Lemanska*, Europäischer Juristentag, Österreichische Juristenzeitung (ÖJZ) 2007, 55; *Winsauer*, Der 4. Europäische Juristentag vom 3. bis 5. Mai 2007 im Hofburg-Kongresszentrum Wien, Nova & Varia (NetV) 2007, 99.

2. Gesetzesrecht – allgemeines bürgerliches Gesetzbuch

Das österreichische Zivilrecht beruht im Wesentlichen auf drei Säulen: Erstes Standbein ist das Gesetzesrecht und hier wieder das aus dem Jahr 1811 stammende allgemeine bürgerliche Gesetzbuch.[4] Im Schuldrecht gab es im Gesetzbuch selbst die letzte umfangreiche Revision im Jahr 1916,[5] weniger umfangreiche Änderungen datieren aus dem Jahre 1979 mit der Einführung bestimmter allgemein gültiger Regelungen durch das Konsumentenschutzgesetz.[6] Seither sind die Dinge in diesem Bereich im Wesentlichen unverändert geblieben. Das Gesetzbuch, seinerzeit eine Großleistung des aufstrebenden Bürgertums in den Wirren der Napoleonischen Kriege, ist im Schuldrecht denn auch in die Jahre gekommen. Das Vertragsrecht hat sich in anderen Gesetzen weiter entwickelt. Vor allem ist hier das im Jahr 1979 in Kraft getretene Konsumentenschutzgesetz zu nennen, das umfassende Regelungen für das Verbrauchergeschäft enthält. Auch dieses Bundesgesetz weist aber wieder gewisse Schwächen auf: Es ist bislang nicht weniger als achtzehn Mal geändert worden, auch aufgrund des Gemeinschaftsrechts.[7] Es zählt mittlerweile mehr als 80 Paragraphen. Es ist uneinheitlich geworden, widersprüchlich, und es ist vielfach auch nicht einfach zu lesen. Darüber hinaus gibt es auch noch zahlreiche – wie wir das nennen – zivilrechtliche „Nebengesetze", die zum Teil Verbraucherrecht, zum Teil aber auch allgemeine Belange regeln.

In allen diesen Gesetzen spiegeln sich die von der Kommission in ihrer Mitteilung „Zum Europäischen Vertragsrecht"[8] im Jahr 2001 diagnostizierten Probleme des Gemeinschaftsrechts im innerstaatlichen Recht wider: Von einem einheitlichen Konzept, von einer Ordnung in der Rechtsordnung, von transparenten, leicht auffindbaren Bestimmungen, kann keine Rede sein.

3. Richterrecht

Mindestens ebenso große Bedeutung wie dem Gesetzesrecht kommt in Österreich der Rechtsprechung des Obersten Gerichtshofs zu. Praktisch wichtige Regeln beruhen weitgehend auf Richterrecht. Die Urteile des

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4 ABGB – JGS 1811/946.

5 Durch die so genannte 3. Teilnovelle, RGBl. 1916/69.

6 KSchG – BGBl. 1979/140.

7 Einen beredten Beleg für die Häufigkeit der Novellen bietet § 41a KSchG, in dem das Inkrafttreten der meisten Änderungen in insgesamt – Stand vom 3.1.2008 – 20 Absätzen geregelt wird.

8 Mitteilung der Kommission an den Rat und das Europäische Parlament zum Europäischen Vertragsrecht, ABl. Nr. C 255, 1 vom 11.7.2001.

Obersten Gerichtshofs sind in aller Regel ausführlich und von hoher Qualität. Sie sind auch in der Rechtswissenschaft anerkannt. Das macht es auch dem Gesetzgeber leichter: Er kann sich im Vertrauen auf die Gerichte vielfach mit einfachen und allgemein gehaltenen Regeln begnügen, die im Einzelfall ausgefüllt werden. Das Problem des Richterrechts liegt in seiner Unübersichtlichkeit und Unvorhersehbarkeit. Der Rechtsanwender muss Erfahrung und Fachwissen mitbringen. Er ist nie davor gefeit, dass der Fall nicht so ausgeht, wie er schon entschieden worden ist. Und er muss auch damit rechnen, dass die Gerichte ihre Rechtsprechung ändern.

4. Vertragsfreiheit und Privatautonomie

Dritte Säule des österreichischen Zivilrechts ist die Vertragsfreiheit. Gerade im Schuldrecht gibt es eine Vielzahl von Rechtsinstituten, die allein auf der vertraglichen Gestaltung durch die Marktteilnehmer beruhen. Die gesetzlichen Vorgaben an solche Vertragsmuster sind dünn gesät bis nicht vorhanden. Vielfach gibt es auch nur wenige gerichtliche Grundsatzentscheidungen, die über die Rechtsmäßigkeit oder Rechtswidrigkeit bestimmter vertraglicher Usancen absprechen. Das ist umso bemerkenswerter, als auf solche Art und Weise wirtschaftlich außerordentlich bedeutsame Transaktionen geregelt werden.[9] Sie stehen stets unter dem Vorbehalt, dass die jeweilige Vertragsgestaltung von den Gerichten auch anerkannt wird.

5. Abschließende Bewertung

In einer Gesamtbetrachtung befindet sich das österreichische Zivilrecht trotz dieser Defizite auf der Höhe der Zeit. Es beruht auf einer gefestigten und anerkannten rechtsstaatlichen Tradition. Den aktuellen Bedürfnissen der Marktteilnehmer kann es durch die Wahrung der Privatautonomie und Vertragsfreiheit entsprechen. Den notwendigen sozialen Schutz und Ausgleich bietet es mit dem Verbraucherrecht und auch dem Wohnrecht.

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[9] Etwa Treuhandverhältnisse, die zwar in einzelnen berufsrechtlichen Bestimmungen für Notare und Rechtsanwälte geregelt werden, ansonsten aber durch den jeweiligen Vertrag ausgestaltet werden. Ein weiteres Beispiel sind Leasingverträge, die weitgehend auf den vorgegebenen Vertragsmustern der Leasinggeber beruhen. Überhaupt ist das Kreditrecht nur in Ansätzen gesetzlich geregelt, etwa mit einzelnen Bestimmungen über den Verbraucherkredit im Bankwesengesetz 1993 und im KSchG. Die darlehensrechtlichen Regelungen des ABGB sind dagegen vollkommen veraltet und in der Praxis weitgehend „totes Recht".

Die Gerichte kommen mit den vielfach nur allgemeinen gesetzlichen Vorgaben zu Rande, sie entscheiden schnell und gut und sie genießen das Vertrauen der Bürger.

Wir haben aber auch Probleme: Vor allem ist das österreichische Zivilrecht unübersichtlich und unvorhersehbar geworden. Viele der gesetzlichen Bestimmungen sind in der Praxis „totes Recht", namentlich im ABGB. Strukturelle Ungleichgewichte kann das Zivilrecht nur begrenzt ausgleichen, ein Umstand, der vor allem kleine und mittlere Unternehmen belasten kann. Und wir haben in einigen Bereichen große Unsicherheiten, was die Haltbarkeit vertraglicher Vereinbarungen angeht.

Wir haben damit Reformbedarf. Das ist vor wenigen Tagen auf einem Symposium zur Vorbereitung der 200-Jahr-Feier unseres Gesetzbuchs einhellig bestätigt worden. Dieser Reformbedarf ist einer der Gründe, weshalb das Bundesministerium für Justiz an der europäischen Entwicklung, an den Arbeiten zum Gemeinsamen Referenzrahmen und am Verbraucherrecht, so interessiert ist. Damit befindet es sich nach meinem Eindruck auch in guter Gesellschaft: Denn seit dem deutschen Schuldrechtsmodernisierungsgesetz überlegt man auch in anderen Ländern, ob die eigenen gesetzlichen Regeln modernen Anforderungen noch genügen. Es hängt etwas in der Luft, nicht nur auf der europäischen Ebene, sondern auch in den Mitgliedstaaten.

III. Probleme mit dem Referenzrahmen und der Revision des Verbraucherrechts

1. Allgemeines

Für die Bemühungen der Kommission und der von ihr eingebundenen Wissenschafter hegt das Bundesministerium für Justiz große Sympathien. Die Vorbereitung des Gemeinsamen Referenzrahmens und die Revision des Verbraucherrechts sind – wie auch immer diese Vorhaben ausgehen werden – faszinierende Projekte. Der Versuch, wieder gemeinsame Grundlagen für ein europäisches Zivilrecht zu gestalten, bedeutet für jeden mit der historischen Entwicklung des Privatrechts Vertrauten die Rückkehr zu gemeinsamen Wurzeln. Er ist auch für die weitere Vertiefung des Binnenmarkts essenziell. Die Vorhaben bereiten aber auch Probleme.

2. Politischer Primat

Es ist klar, dass ein derartiges Großprojekt nur unter ausreichender Einbindung der europäischen Wissenschaft erfolgen kann. Die Wissenschaft kann hier aber nicht das letzte Wort haben. Der Primat der zur Rechts-

setzung berufenen Organe Kommission, Rat und Parlament muss auf jeden Fall gewahrt werden. Wie immer der Gemeinsame Referenzrahmen ausgestaltet werden wird und was immer seine rechtliche Grundlage sein wird, es muss sich um ein politisches und nicht um ein wissenschaftliches Instrument handeln. Dieses Grundproblem ist bislang nicht gelöst. Es muss aber gelöst werden. Es geht nicht an, auf der Basis wissenschaftlicher Konzepte, so hervorragend diese auch sind, die rechtspolitische Diskussion im Parlament und im Rat zu überrollen.

3. Einbindung des Parlaments und des Rats

Sowohl das Europäische Parlament als auch die Mitgliedstaaten sind noch nicht ausreichend in die rechtspolitischen Vorarbeiten eingebunden. Das gilt namentlich für die Revision des Verbraucherrechts. Es genügt nicht, einzelne Probleme in eher oberflächlichen Konsultationen mit den Mitgliedstaaten anzureißen. Das möchte ich am Problem der so genannten „Vollharmonisierung" des Verbraucherrechts festmachen: Der von der Kommission im Grünbuch „Die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz"[10] forcierte Übergang vom bisherigen Konzept des Mindeststandards hin zu einer weitgehenden „Vollharmonisierung" ist ein rechts- und verbraucherpolitischer Paradigmenwechsel ersten Ranges. Das muss ausreichend vorbereitet und diskutiert werden, und dazu hat bislang jede Gelegenheit und Bereitschaft gefehlt. Gleiches gilt für den Vorschlag der Kommission, in denjenigen Fällen, in denen eine solche Vollharmonisierung „*eventuell schwierig*" sein könnte, ein Prinzip der gegenseitigen Anerkennung einzuführen.

In diesem Zusammenhang muss auch auf ein weiteres, praktisches Problem der bisherigen Arbeiten hingewiesen werden: Die Fülle des bislang von der Wissenschaft vorgelegten Materials ist überwältigend; so überwältigend, dass sie nicht mehr bewältigt werden kann. Den meisten Mitgliedstaaten fehlt es an den notwendigen Ressourcen für eine Aufarbeitung und Bewertung der Vorschläge der Wissenschafter. Sie müssen sich daher auf das Wesentliche beschränken, auf die wirklich wichtigen Grundfragen. Ihre Bereitschaft, grundlegende Probleme anzugehen, könnte im Hinblick auf den damit und mit dem Vorhaben insgesamt verbundenen Aufwand gering sein. Dabei geht es wohlgemerkt nicht um den Aufwand, der den Ministerien und sonst vertretungsbefugten Stellen in den Mitgliedstaaten erwächst. Vielmehr sollte man sich vor Augen halten, dass die Koordination der jeweiligen Haltung im Rat in den meisten Mitgliedstaaten umfassende innerstaatliche Konsultationen mit den So-

[10] Mitteilungen der Kommission. Grünbuch – Die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz, ABl. Nr. C 61, 1 vom 15.3.2007.

zialpartnern, den Rechtsberufen, den Gerichten und anderen in das Gesetzgebungsverfahren eingebundenen Körperschaften und Stellen bedingt. Der europäische Rechtssetzungsprozess und die Meinungsbildung sind eben nicht nur auf der Ebene der Gemeinschaft, sondern auch in den Mitgliedstaaten selbst komplex und schwierig. Es ist – das kann ich jedenfalls für die österreichischen Verhältnisse sagen – keineswegs so, dass die Vertreter der Mitgliedstaaten in der zuständigen Ratsarbeitsgruppe, im COREPER oder selbst im Rat aus eigenem Gutdünken die wesentlichen Grundfragen mit entscheiden.

Im Zusammenhang damit kann es auch gewisse Probleme bereiten, wenn im Rahmen der Revision des Verbraucherrechts Fragen neuerlich aufgeworfen werden, die in den rechtspolitischen Verhandlungen bereits entschieden worden sind. Das gilt etwa für das erwähnte Grünbuch, das einige grundlegende Weichenstellungen, wie sie in der Richtlinie 1999/44/EG getroffen worden sind, wieder in Frage stellt. Es spricht zwar – das sei zur Vermeidung von Missverständnissen auch gesagt – nichts dagegen, die Auswirkungen dieser Richtlinie zu prüfen und zu evaluieren.[11] Man muss aber nicht jedes Mal das Rad neu erfinden.

4. Inkohärenz der Vorhaben

Große Probleme bereitet auch der bisherige Verlauf der Reformbemühungen. Ein wesentlicher Impuls für die Aktivitäten der Kommission war und ist doch das Bestreben, die Inkohärenz des bisherigen Europäischen Vertragsrechts zu überwinden. Das Projekt hat aber seinerseits wieder einen sehr inkohärenten Verlauf genommen: Standen zunächst allgemeine vertragsrechtliche Fragen im Vordergrund, so haben sich die Gewichte in der Folge hin zum Verbraucherrecht verschoben. Mir ist schon klar, dass hiefür rechtspolitische Entscheidungen der Kommission den Ausschlag gegeben haben. Es fällt unter solchen Bedingungen aber außerordentlich schwer, eine klare und stringente Haltung zu entwickeln und einzunehmen. Als weiteres Beispiel für die beklagenswerte Inkohärenz des Vorhabens möchte ich aus der Revision des Verbraucherrechts-Acquis die völlige Aussparung des Bereichs der Finanzdienstleistungen nennen. Sind denn die Vertragspartner von Finanzdienstleistern nicht auch Verbraucher? Und sind die Richtlinien für diesen Bereich so klar, verständlich und widerspruchsfrei, dass sie keiner Revision bedürfen?

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[11] Eine solche Überprüfung trägt Art. 12 der Richtlinie 1999/44/EG der Kommission namentlich zur Frage der Haftung des Herstellers eines vertragswidrigen Verbrauchsgutes auch ausdrücklich auf.

5. Fehlende Einbindung der Rechtspraxis

Einen ganz wesentlicher Kritikpunkt bildet letztlich die nicht ausreichende Einbindung der gerichtlichen Praxis. Die Kommission hat zwar mit der Schaffung des CFR-Netzes und der Konsultation von Interessenvertretern Großes geleistet. Immer noch ist das gesamte Vorhaben aber stark „wissenschaftsorientiert". Was aus der Sicht des Bundesministeriums für Justiz damit fehlt, ist die Einbindung der Rechtspraxis. Es wird Sie nicht wundern, dass ich hier primär einer Einbeziehung der nationalen und der europäischen Richter das Wort reden möchte. Denn wo wird denn das Zivilrecht letztlich weiterentwickelt? Doch nicht allein auf den Universitäten und auch nicht allein in den Ministerien, sondern bei den Gerichten. Und ich liege gewiss nicht so falsch, wenn ich vermute, dass auch in anderen Ländern der Rechtsfortbildung des Zivilrechts durch die Gerichte eine entscheidende Rolle in der Rechtspraxis zukommt. Dann wäre es aber essenziell, auch die Richter zu fragen und sie intensiver in das Projekt einzubinden.

IV. Wünsche an die Vorhaben

1. Allgemeines

Mit diesen doch kritischen Bemerkungen möchte ich aber keinen falschen Eindruck hinterlassen. Österreich ist an den laufenden Vorhaben interessiert, auch wenn es noch nicht absehbar ist, was dabei herauskommt, auch wenn einzelne Entwicklungen aus österreichischer Sicht Probleme bereiten, etwa die von der Kommission angestrebte „Vollharmonisierung" des gemeinschaftlichen Verbraucherrechts. Es ist jedenfalls hoch an der Zeit, dass sich der Rat positioniert, wie das die Kommission in ihrem zweiten Fortschrittsbericht angemahnt hat.

Aus der Sicht des Bundesministeriums für Justiz wäre es ganz generell wichtig, dass sich das österreichische Zivilrecht in den Ergebnissen dieser Arbeiten wiederfindet. Unsere Rechtstraditionen sollten nicht verloren gehen, sondern im Gemeinschaftsrecht weiterleben. Das erforderte einfache und klare Vorgaben, die dem Primat der Vertragsfreiheit und der privatautonomen Gestaltung der vertraglichen Verhältnisse verschrieben sind. Sie müssen von den Gerichten unter Bedachtnahme auf die Umstände des Einzelfalls ausgefüllt werden. Nicht jede in der Wissenschaft bedeutsame Ordnungsfrage muss geregelt werden. Das europäische Recht sollte im Gegenteil nur das Wichtigste behandeln.

2. Toolbox

Der Gemeinsame Referenzrahmen soll nach den Vorstellungen aller Beteiligten als eine „Toolbox" dienen, aus der sich die Kommission und die anderen europäischen Rechtssetzungsorgane bei ihrer Tätigkeit bedienen können. Das geht auch durchaus in Ordnung, die Erfahrungen mit den Arbeiten an so manchen Richtlinienvorschlägen haben gezeigt, dass es leichter ist, wenn sich die Akteure an gewissen Vorgaben orientieren können. Musterbeispiel dafür ist wieder die Richtlinie 1999/44/EG mit ihrer Anlehnung an gewisse Grundsätze des Wiener UN-Kaufrechtsübereinkommens. In einer solchen Funktion als „Werkzeugkasten" kann sich die Aufgabe des Referenzrahmens aber nicht erschöpfen. Er muss mehr bieten: Er muss namentlich eine Hilfe im Übersetzungsgeschehen bieten, er muss das Verständnis von den einzelnen Rechtsbegriffen und Rechtsinstituten im Gemeinschaftsrecht und in den Rechtsordnungen der Mitgliedstaaten erleichtern, er muss für die Rechtspraxis und die Gerichte Auslegungshilfen bieten. Und er muss auch zur Rechtsentwicklung in den Mitgliedstaaten beitragen. Um das an einem Beispiel zu erklären: Der vor zwei Jahren vorgelegte Diskussionsentwurf für ein neues österreichisches Schadenersatzrecht[12] orientiert sich in weiten Partien an den vom European Centre of Tort and Insurance Law editierten Principles.[13] Wenn das Bundesministerium für Justiz dereinst vor der Aufgabe stehen sollte, in bestimmten Partien des Schuldrechts Reformen in die Wege zu leiten, so sollte das wohl auch unter Bedachtnahme auf europäische Modelle geschehen. Der Gemeinsame Referenzrahmen könnte in diesem Sinn auch für die innerstaatlichen Reformbemühungen von Bedeutung sein.

3. Optionelles Instrument

Die Kommission hat in ihren Mitteilungen immer wieder die Möglichkeit ins Spiel gebracht, mit dem Referenzrahmen eine Vertragsrechtsordnung zur Verfügung zu stellen, die die Parteien wählen können. Die Mitgliedstaaten scheinen dieser Idee nicht gerade aufgeschlossen gegenüber zu stehen. Auch das Bundesministerium für Justiz hat damit gewisse Probleme. Es ist nämlich zweifelhaft, ob es gelingen wird, eine solche allgemein akzeptierte Vertragsrechtsordnung zu schaffen. Auch hier ist an den damit verbundenen Aufwand zu erinnern. Verbauen sollte man sich diese

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[12] Siehe dazu *Griss/Kathrein/Koziol* (Hrsg.), Entwurf eines neuen österreichischen Schadenersatzrechts, Berlin (2005); kritisch dazu *Reischauer/Spielbüchler/Welser* (Hrsg.), Reform des Schadenersatzrechts II, Wirtschaftsrechtliche Blätter (WBl.) 2006, 493.

[13] *European Group on Tort Law*, Principles of European Tort Law, Wien (2005).

Zukunftsvision eines optionellen Instruments freilich auch nicht. Ein „Europäisches Zivilgesetzbuch" strebt Österreich so wie die überwältigende Mehrheit der anderen Mitgliedstaaten aber nicht an.

4. Revision des Verbraucherrechts

Auch hier erwartet sich das Bundesministerium für Justiz wichtige Verbesserungen der momentan nicht sehr befriedigenden Rechtslage. Einheitliche Begriffe, klare und transparente Vorgaben an die Mitgliedstaaten sowie übergreifende Regelungen für bestimmte Konstellationen sind schon seit längerer Zeit notwendig. Die Bestrebungen zur Revision des Acquis sollten allerdings nicht über das Ziel hinausschießen. Vor allem fürchten wir um unsere Autonomie in Bereichen, die bislang zwar „europäisch inspiriert, aber österreichisch ausgeführt" sind. Dabei geht es nicht nur um die zu gewärtigenden Folgen einer „Vollharmonisierung", sondern auch um Einzelfragen, etwa um das Problem, ob der Katalog missbräuchlicher Vertragsklauseln nur im Einzelnen verhandelte (Art. 6:301 Abs. 1 und Art. 6:305 Abs. 1 ACQP) oder auch individuell verhandelte Klauseln umfassen soll,[14] wie weit der Anwendungsbereich der Regelungen über den Rücktritt vom Haustürgeschäft gehen soll[15] und ob dem Verbraucher künftig die Obliegenheit auferlegt wird, eine vertragswidrige Leistung innerhalb angemessener Frist zu rügen.[16] Das Bundesministerium für Justiz hat größte Probleme damit, wenn das Gemeinschaftsrecht zu Einbußen im Niveau des nationalen Verbraucherschutzes oder auch zu empfindlichen Verschärfungen zu Lasten der Unternehmer führen sollte.

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[14] Nach § 6 Abs. 1 KSchG sind die dort aufgezählten – 15 – Vertragsklauseln, die in Teilen dem Anhang der Richtlinie 93/13/EWG entsprechen, allgemein „nicht verbindlich", auch wenn sie individuell ausgehandelt worden sind. Die in Abs. 2 aufgezählten sieben Vertragsklauseln, sind dagegen nicht verbindlich, es sei denn der Unternehmer beweist, dass sie im Einzelnen ausgehandelt worden sind. Der Schutz des österreichischen Verbraucherrechts geht damit weiter als die Richtlinie 93/13/EWG und als die Acquis Principles.

[15] § 3 KSchG über den Rücktritt des Verbrauchers gilt allgemein für alle Vertragsarten (außer – Abs. 3 Nr. 2 – für bestimmte geringwertige Geschäfte) und damit beispielsweise auch für Immobiliengeschäfte, Versicherungsverträge und Wertpapierverträge und andere in Art. 3 Abs. 2 der Richtlinie 85/577/EWG betreffend den Verbraucherschutz im Falle von außerhalb von Geschäftsräumen geschlossenen Verträgen ausgenommene Rechtsgeschäfte. Dieser „horizontale" Ansatz hat sich im Wesentlichen bewährt. Ob er sich in den Regelungen des Art. 5:201 der Acquis Principles wiederfindet, ist nicht klar.

[16] Wie es etwa Art. 5 Abs. 2 der Richtlinie 1999/44/EG – als „Option" für die Mitgliedstaaten – vorsieht.

V. Acquis Principles

Zu den Acquis Principles kann ich Ihnen selbstverständlich noch keine koordinierte Haltung referieren. Die Arbeiten der Study Group on a European Civil Code und der so genannten Acquis Group haben in der österreichischen rechtswissenschaftlichen Diskussion bislang noch keinen großen Widerhall gefunden.[17] Eine rechtspolitische Auseinandersetzung zu den einzelnen Aktivitäten der Kommission hat bislang erst in Ansätzen stattgefunden, etwa bei der Vorbereitung der österreichischen Stellungnahme zum Grünbuch „Die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz" oder zu der (bislang einzigen) Entschließung des Rates „Ein kohärenteres Europäisches Vertragsrecht".[18] Einige Fragen und Zweifel möchte ich aber doch loswerden:

So fragt sich beispielsweise, ob es nicht doch sinnvoll wäre, auch im Verbraucherrecht den Grundsatz der Vertragsfreiheit zu verankern. Das kann doch auch im Interesse des Verbrauchers sein. Auch geht das Modell des informierten Verbrauchers implizit von der Vertragsfreiheit aus, wenn man den Unternehmer verpflichtet, sein Gegenüber rechtzeitig vor Vertragsabschluss mit den für seine Entscheidung notwendigen Informationen zu versorgen. Es greift doch ein wenig zu kurz, wenn die Acquis Principles nur die Formfreiheit (Art. 1:303 ACQP) ansprechen, anderer Inhalte der Vertragsfreiheit und Privatautonomie, namentlich die Abschluss- und die Gestaltungsfreiheit, nicht erwähnen.

Umgekehrt bin ich mir nicht sicher, ob es zweckmäßig ist, den Grundsatz von Treu und Glauben für die vorvertraglichen Beziehungen (Art. 2:101 und 2:103 ACQP) und die Erfüllung (Art. 7:101 Abs. 1 ACQP) in das europäische Recht einzuführen. Das österreichische Zivilrecht kennt dieses Prinzip beispielsweise überhaupt nicht. Das heißt aber nicht, dass die österreichischen Regelungen unausgewogener oder unbilliger wären oder dass die Verbraucher im österreichischen Recht weniger Schutz genössen.

Im Verbraucherrecht sollten die Regeln des Gemeinschaftsrechts den notwendigen sozialen Ausgleich zwischen den Marktteilnehmern herstellen.

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[17] Aus der Literatur vgl. beispielsweise *Eiselsberg* (Hrsg.), Europäisches Vertragsrecht (Wien) 2003; *Posch*, Auf dem Weg zu einem Europäischen Vertragsrecht, WBl. 2003, 197; *Handig*, Europäisches Vertragsrecht, ÖJZ 2004, 130; *McGuire*, Ziel und Methode der Study Group on an European Civil Code, Zeitschrift für Rechtsvergleichung (ZfRV) 2006, 163: *Nestl*, Fortschritte im „Europäischen Zivilrecht", Anwaltsblatt (AnwBl) 2006, 20; *Kathrein*, Europäisches Vertragsrecht – Stand und Entwicklungsperspektiven, Zivilrechtsgesetzgebung heute, in Festschrift Gerhard Hopf zum 65. Geburtstag, Wien (2007), 76.

[18] Entschließung des Rates zum Thema „Ein kohärenteres europäisches Vertragsrecht", ABl. Nr. C 246, 1 vom 14.10.2003.

Auch hier ist aber Vorsicht angebracht. Mit einer „Überregulierung" ist niemandem geholfen, am wenigsten den Verbrauchern. Ich sorge mich auch vor einer gewissen „Überinformation", die genau das Gegenteil von dem erzeugt, was beabsichtigt ist. Die vorvertraglichen Informationspflichten, wie sie in Art. 2:201 ff. der Acquis Principles ausgebreitet werden, werden in diesem Sinn genau überprüft werden müssen. Es spricht doch nichts dagegen, wenn sich auch das Verbraucherrecht auf die wirklich essenziellen Belange beschränkt und die Entscheidung von Detailproblemen den Gerichten überlässt. Und ich möchte davor warnen, künftig selbst alltägliche Geschäfte mit einem immensen bürokratischen Aufwand zu belasten.

Im Verbraucherrecht sollte allgemein auch danach getrachtet werden, einen ausgewogenen Interessenausgleich herzustellen. Denn Regelungen, die nur die Interessen einer Seite im Auge haben, könnten im Einzelfall auf Akzeptanzprobleme stoßen. Dazu sind mir in den vorliegenden Principles einige Bestimmungen aufgefallen, die den Wirtschaftsvertretern Probleme bereiten dürften, etwa die Rechtsfolgen des Widerrufs mit dem Ausschluss einer Nutzungsentschädigung für den Gebrauch der Sache während der Widerrufsfrist (Art. 5:105 ACQP).[19]

VI. Abschließendes

Solche Befürchtungen sollen aber nicht den Blick darauf verstellen, dass wir den Vorhaben der Kommission durchaus aufgeschlossen gegenüberstehen. Wir sind daran interessiert, dass auf der europäischen Ebene das Gemeinsame am Zivilrecht herausgearbeitet wird. Wir sehen die Notwendigkeit, den Acquis daraufhin zu überprüfen, ob er in Wahrheit nicht zu einer Zersplitterung des Verbraucherrechts anstatt zu einer Vereinheitlichung der Marktbedingungen beigetragen hat. Wir sind überzeugt, dass es an der Zeit ist, zivilrechtliche Hemmnisse und Hindernisse im Binnenmarkt in Frage zu stellen. Und vor allem möchten wir dabei sein, wenn sich eine europäische Rechtskultur entwickelt. Dazu möchten wir mit unseren Traditionen, mit unserer Rechtskultur und mit unseren bescheidenen Mitteln beitragen.

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[19] Art. 5:105 Abs. 2 gewährt dem Unternehmer zwar einen Anspruch auf Ersatz der Wertminderung, nicht aber auf Ersatz einer Nutzungsentschädigung für den Gebrauch der Sache während der Widerrufsfrist. Ob eine solche Regelung dem Acquis und namentlich dem Art. 6 Abs. 2 der Richtlinie 97/7/EG über den Verbraucherschutz bei Vertragsabschlüssen im Fernabsatz entspricht, erscheint aber fraglich. Der österreichische Gerichtshof hat die Regelung des § 5g Abs. 1 Nr. 2 KSchG, laut dem der Verbraucher auch ein angemessenes Entgelt für die Benützung der Sache zu leisten hat, als unbedenklich beurteilt (1 Ob 110/05s EvBl. 2006/12). Eine endgültige Klärung dieser Frage wird wohl erst die Entscheidung des EuGH in der Vorabentscheidungssache C-489/07 *Messner* bringen.

Connection between the CFR and a possible horizontal instrument of consumer law

Judit Fazekas (Budapest)

I. Introduction

The Study Group on a European Civil Code – led by Professor Christian von Bar – has published many volumes on the Principles of European Law and is coming close to finalizing its work on the Draft Common Frame of Reference, which is to be "a codified set of Principles of European Law for the law of obligations and core aspects of the law of property".[1] This "academic CFR" will be submitted to the European Commission to be transformed into a final CFR to be adopted by the European institutions by the end of 2009.[2]

The value of this work cannot be overemphasized. Whatever its effect on EC law will be, national re-codifications and revisions of private law cannot, and should not, ignore the fruits of this work. In fact, the volumes published by the Study Group so far are being taken into account and used as a source of inspiration in the ongoing recodification of Hungarian civil law. The draft new Hungarian Civil Code draws upon the draft articles produced by the Study Group. The commentary to the Hungarian draft contains references not only to the Principles of European Contract Law, but for example also to the Principles on Personal Security Contracts.[3]

II. The nature and purposes of the CFR

It is high time to reconsider what form and content the final CFR should take. It seems that for many of those involved in the discussions on CFR, "it is by no means clear what it will lead to in terms of practical out-

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1 See http://www.sgecc.net/pages/en/introduction/index.introduction.htm.

2 See http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/experts_ membstates3105_en.pdf.

3 Some of the provisions on suretyship and guarantee are modelled upon the articles of the Principles of European Law – Personal Security Contracts.

comes" as the European Parliament put it in its 2005 resolution.[4] In the beginning, the Commission's Action Plan[5] suggested that the CFR should cover a broad range of general contract law issues and other measures beyond the CFR, such as the adoption of an optional instrument. At present, the lowest common denominator seems to be that the final CFR could be a toolbox for the European legislature in the field of consumer contract law in order to improve the coherence of the existing and any future *acquis* in this field. In other words, the *form* would be something like an inter-institutional agreement binding only the European institutions in their legislative drafting; the *content* (or scope) would be consumer contract law and possibly some general contract law rules, principles and definitions directly relevant to consumer law. The First Annual Progress Report from the Commission (2005) clearly refocused the project by giving priority to the review of the *consumer acquis*. One speaker of the Vienna CFR-conference summarised this as follows: "The grand EU contract law project has been drawn from the high seas towards narrower waters."[6]

III. The relationship between the CFR and the proposed horizontal consumer law instrument

However, in February 2007, a Green Paper on the Review of the Consumer Acquis was presented by the European Commission.[7] This Green Paper invited views on three possible options. Option II was described in the Green Paper as a "*horizontal approach* consisting of the adoption of one or more framework instruments to regulate common features of the *acquis*, underpinned whenever necessary by sectoral rules" (horizontal instrument combined, where necessary, with vertical action). The more detailed description of Option II envisaged an instrument with a general part which would apply to all consumer contracts (eg. rules on unfair terms, rights of withdrawal) and a second part that would "regulate the contract of sale, which is the most common and broad consumer contract". This horizontal instrument "would repeal, through a recasting exercise, the existing consumer directives fully or in part, and so reduce the volume of the *acquis*". This description reminds me of something like a

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4 See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+TA+P6-TA-2006-0109+0+DOC+PDF+V0//EN.

5 COM(2003) 68 final.

6 See http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference052006/tiina_astola.pdf.

7 See COM(2006) 744 final.

"Code of Consumer Contract Law", a European "*Code de la consommation*".

As the Commission's Report on the outcome of the public consultation states, the vast majority of the stakeholders responding to the Green Paper (Member States, businesses and consumers alike) supported Option II, i.e. the mixed approach combining the adoption of a horizontal instrument with revision of existing sectoral directives whenever necessary; Hungary also supported this proposal.

However, it is unclear to me what the relationship between such a horizontal instrument and a Common Frame of Reference focused on consumer contract law would be. Would the Common Frame of Reference be absorbed by such a horizontal instrument? Would the Common Frame of Reference contain more than this horizontal instrument? These questions were not answered by the Green Paper, quite the contrary: the Green Paper did not even mention the CFR-process. Many of the respondents had the same problem. As the analytical report on the responses to the Green Paper concludes: many contributors "fear that there will be overlap in structure and subject matter between both projects."[8] Therefore many of them found it to be "premature to discuss the options proposed in the Green Paper, as they first would like to see the results of the work being undertaken in the Common Frame of Reference exercise." Some were of the opinion that "a horizontal approach is already under way within the scope of the Common Frame of Reference", therefore – in their view – the reform of the Consumer Acquis should be restricted to a vertical review of the existing directives.

In fact, not only the relationship between a horizontal consumer law instrument and a Common Frame of Reference is unclear, but also the relationship between the horizontal consumer law instrument and the vertical review of the single directives. Let me remind you of the recent discussion in the context of the review of the Timeshare Directive, whether to regulate the way of exercising the right of withdrawal and its legal effects in the Timeshare Directive or to leave it to the horizontal instrument.

I believe that the "academic CFR" with its explanatory notes and comparative background material on the law of the Member States will be undoubtedly very useful both for the European legislature in its future legislative drafting work and for the national legislatures implementing EC law or reviewing their domestic private law. But the question remains of how much of the academic Common Frame of Reference should be included within the final, official CFR, if there is to be one. Should the horizontal consumer law instrument contemplated in the Green Paper become reality, a purely consumer law CFR seems to be superfluous.

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[8] See http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf.

However, in view of possible future EC legislation in the field of consumer contract law, it seems to me that the inclusion of general principles of contract law based on the academic Common Frame of Reference could be beneficial. Such general rules could be included either in the horizontal instrument suggested by the Green Paper, or in the Common Frame of Reference.

IV. The Common Frame of Reference as a starting point for the development of an optional instrument

Finally, I also think that the academic Common Frame of Reference could be taken as a starting point for the development of an optional instrument, although the extension of the scope of such an instrument to property law or tort law seems to me unrealistic, taking into account the profound divergences in the laws of Member States and that the exercise of identifying the "best solutions" from among those available in the jurisdictions of the EU would be much more difficult on the level of EC legislation than it may have been on the academic level.

Acquis Principles

Introductory Remark

Readers may know that the first volume of the Acquis Principles (usually abbreviated ACQP)[1] contains the Chapters 1-7 and that, in the meantime, Chapter 8 on Remedies has also been provisionally finalised and published in a 'rules only' version.[2] The purpose of the following is to publish a preliminary version of the comments to Chapter 8 in order to make them accessible before the next volume of the Acquis Principles comes out. Whereas the rules of Chapter 8, which were prepared by a drafting team,[3] have been approved by the Plenary of the Acquis Group, these preliminary comments have been written by individual members of the drafting team and only slightly been revised by the Acquis Group's Terminology Group. This version of the comments is therefore subject to further amendment and improvement. Authors of the Comments were:

- Art. 8:101, 8:201, 8:202, 8:302, 8:304: P. Machnikowski / M. Szpunar;
- Art. 8:301, 8:303: J. Pisuliński / F. Zoll / M. Szpunar;
- Art. 8:102, 8:401-8:403, 8:407: Ulrich Magnus.

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1 *Acquis Group* (ed.), Principles of Existing EC Contract Law – Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Munich 2007.

2 "Rechtsbehelfe" (Chapter 8 of the Acquis Principles), published in German and without comments in ZEuP 2007, 1152-1155.

3 Members of the Drafting Team were: Piotr Machnikowski, Ulrich Magnus, Jerzy Pisuliński, Judith Rochfeld, Reiner Schulze, Matthias Storme, Maciej Szpunar, Carole Aubert de Vincelles, Fryderyk Zoll.

Chapter 8
Remedies
Section 1
General rules

Article 8:101: Definition of non-performance

Non-performance is any failure to perform an obligation, including delayed performance, defective performance and failure to co-operate in order to give full effect to the obligation.

A. Foundation in the *Acquis*

1. Sources

1 At present, there are many specific rules of Community law concerning various forms of non-performance of specific contracts. The most important provisions in this matter are: Art. 3 of the Consumer Sales Directive; Art. 17 and Art. 18 of the Commercial Agents Directive and Art. 5 of the Package Travel Directive.

Some other instances of non-performance of specific obligations are dealt with, *inter alia*, in the following provisions:

- Artt. 5, 6 and 7 of the Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 (denied boarding, cancellation of a flight, delay);
- Artt. 6 and 7 of the Cross-border Credit Transfer Directive (non-execution of the cross-border credit transfer within the time limit and breach of the duty to execute the cross-border credit transfer order in accordance with the originator's instructions);
- Art. 3 of the Late Payment Directive (modifying the contractual or statutory period of payment of interest).

The UN Convention on Contracts for the International Sale of Goods (CISG) plays an important role as a source of the ACQP rules on non-performance of the obligation. The influence of CISG on ACQP is both indirect and direct. Firstly, the Consumer Sales Directive is at least to some extent modelled after the Convention; this is so especially with respect to the notion of "lack of conformity". Secondly, because of this influence which the CISG has exerted, the Acquis Group decided that the CISG

should be taken into consideration to the extent that it can help to clarify EC law. One has to bear in mind that the Convention contains a comprehensive set of rules in its Artt. 45 et seq. and Artt. 61 et seq., which are applied when a party to a contract of sale fails to perform any of its obligations.

2. Development

The *acquis* does not make use of any general notion of "non-performance of the obligation", nor gives a definition of it. Nevertheless, it is possible to start off from particular rules contained in the directives mentioned above (first of all Art. 3 of the Consumer Sales Directive) to construct a comprehensive and coherent system of liability for the infringement of any contractual duty. As it was stated above, the general notion of "non-performance of the obligation" also finds a firm basis in the CISG. 2

The notion of conformity with the contract has a pivotal role in Art. 2 of the Consumer Sales Directive. Pursuant to it, the seller is obliged to deliver goods which are in conformity with the contract of sale. The requirement of conformity mentioned in this article should not be understood as a reference to the notion of contract in the narrow meaning of this term, but rather to its broader content. This includes, *inter alia*, the description of the goods by the seller, as well as the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect (Art. 2 (2)(a) and (d) Consumer Sales Directive).

It is important to note that the notion of "conformity with the contract" is the basis for the rules on the seller's liability. As Art. 3 Consumer Sales Directive provides, the seller is liable to the consumer for any lack of conformity which exists at the time the goods are delivered. The concept of "lack of conformity" may be considered as the most general and broad-ranging description of the violation of duties owed to a party to the contract when the contract imposes an obligation to deliver goods. This explains why a broad concept of non-performance of the obligation is set forth in the Acquis Principles. The phrase "lack of conformity" is strongly connected with the contract for delivery of tangible goods. Since it may be improper to use it with regard to other types of contracts and other kinds of contractual duties, it is avoided by the present text.

The argument that any kind of failure to perform any contractual obligation may involve the party's responsibility is further supported by Art. 5 of the Package Travel Directive. This article provides that "Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations 3

are to be performed by that organiser and/or retailer or by other suppliers of services without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services."

4 Another argument in favour of a broad concept of non-performance of the obligation is linked to Paragraph (1)(b) of the Annex to the Unfair Terms Directive. This paragraph deals with clauses that inappropriately exclude or limit the legal rights of the consumer in the event of "total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations".

5 The Acquis Principles do not use the expression "breach of contract". This notion belongs to the terminology of the common law, but European legislators usually avoid it (the recital 16 of the Late Payment Directive being an exception). The Acquis Group decided to use "non-performance of the obligation" instead, which also establishes a higher degree of conformity with the DCFR (see, for example, Art. III.–3:101 DCFR).

B. Commentary

1. Meaning and Purpose

6 The definition of non-performance contained in Art. 8:101 ACQP is of crucial importance for the proper understanding of the following articles on remedies as it determines the scope of their application. The rule commented upon here has foundational value for the system of contractual liability which constitutes an important part of the Acquis Principles. Non-performance of an obligation is broadly understood as any failure to perform any contractual obligation. This definition is a cornerstone of the system of contractual liability, in which a party is entitled to pursue an appropriate remedy if the other party to the contract does not fulfil all of its contractual duties.

2. Context

7 Art. 8:101 ACQP links the provisions on specific remedies to the rules on performance (Chapter 7). The provisions contained in Chapter 7 and the contract itself regulate the duties of the parties. The consequences of non-performance of these duties are set out in the present Chapter 8.

8 The field of application of the rules on non-performance is broader than one can gather by reading Art. 8:101 ACQP alone. By virtue of some specific

provisions of the Acquis Principles, the following rules apply also to the non-fulfilment of certain pre-contractual duties, namely the duty to provide information (Art. 2:207 ACQP) and the duty to acknowledge the receipt of an electronic offer (Art. 4:108 (3) ACQP).

3. Explanation

The Acquis Principles understand obligations as giving rise to particular duties, most notably the duty to perform (Art. 7:101 (1) ACQP) The Rules contained in Chapter 8 (Remedies for Non-Performance) apply to all kinds of obligations imposed by a contract on either party. These rules apply to any case which falls short of complete and correct fulfilment of an obligation – complete failure to perform, partial or incomplete performance, delayed performance, defective performance, etc. These rules also apply to the non-fulfilment of a debtor's or a creditor's duty to co-operate with the other party (provided for in Art. 7:104 ACQP). 9

Although the general notion of non-performance denotes lack of performance as well as incomplete or defective performance, the applicable remedies may vary. For example, Art. 8:301 ACQP uses the expressions "minor non-performance" and "partial non-performance" to grant appropriate remedies. 10

The notion of non-performance of an obligation is strictly objective. A debtor's (or a creditor's) conduct amounts to non-performance without any regard to that party's awareness of the circumstance that such conduct amounts to non-performance, or fault. Yet the application of relevant remedies may turn out to be dependent on subjective criteria. 11

4. Examples

Example 1
A sells a computer to B, but the computer is defective when delivered. This constitutes non-performance of A's obligation.

Example 2
C buys a book from an internet bookstore. According to the contract, the bookseller is obliged to deliver the book to the buyer within 14 days from the day of acceptance. Delivery after that period amounts to non-performance of the obligation pursuant to Art. 8:101 ACQP.

Example 3
D and E agree that E should repair the air-conditioning located in D's office; D then refuses to let have access to it. This amounts to non-performance of the obligation owed by D to E under the contract.

Article 8:102: Exclusion or restriction of remedies

The creditor is precluded from exercising remedies against the debtor to the extent that non-performance is attributable to the creditor.

A. Foundation in the *Acquis*

1. Sources

1 The *acquis* does not contain an explicit provision which generally restricts or excludes the creditor's remedies for non-performance to the extent that the creditor itself is responsible for the non-performance. Thus far the *acquis* prescribes only with respect to damages that contributory negligence on the part of the creditor reduces or even excludes a claim for damages (see also Art. 8:403 ACQP). The underlying idea of the present Article can be found to some extent in Art. 11 (1) second indent of the Commercial Agents Directive where the right to commission is not extinguished if the principal is to blame for the non-execution of the contract between himself and the third party. The principle of contributory negligence is, however, a principle of general application (see also the comments to Art. 8:403 ACQP and the references therein). It generally forbids that a creditor shall profit from his own misdoings or causes for non-performance for which he is responsible. The contributory negligence principle must therefore not only be applied to the remedy of damages but also to other remedies such as reduction and, as far as possible, termination. A provision rather similar to Art. 8:102 is contained in Art. 80 CISG.

2. Development

2 Although thus far the *acquis* has explicitly expressed the principle of contributory negligence only for the remedy of damages it is clear that this principle is a general principle which has its foundation in the principle of good faith and fair dealing. It is part of this principle that no one should profit from a self-induced hindrance of performance; and no one should be able to

acquire a claim against another person by his own negligent conduct. The present Article translates this principle to the general area of remedies in case of non-performance.

3. Political Issues

The mentioned general policy consideration underlying the present Article should remain undisputed. It is, however, a policy issue whether mere causation of non-performance may preclude the remedy or whether the creditor must have neglected a duty of care or must have undertaken the risk that caused the non-performance. The *acquis* is not very coherent in this respect. Art. 5 (2) of the first indent Package Travel Directive and the Art. 6 (3) of the Cross-border Credit Transfer Directive use the expression "attributable"; this speaks slightly in favour of more than mere causation. Art. 3 (3) of the Air Carrier Liability Regulation requires rather clearly that the damage is "caused by, or contributed to by, negligence of the injured or deceased passenger." Art. 8 (2) of the Product Liability Directive relieves the producer rather unequivocally partly or wholly from liability where "the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible." From these provisions the principle can be inferred that mere causation should not suffice but that the creditor must be responsible for the own contribution to the non-performance either by acting negligently or by having undertaken the respective risk. 3

The *acquis* may also not be fully coherent insofar as Art. 6 (3) Cross-border Credit Transfer Directive excludes any compensation while the other cited instruments allow a reduction or exclusion of damages depending on the circumstances. Yet, these rules can be generalised in that an apportionment should be allowed. 4

This latter point raises, however, the further policy issue whether and how the present Article applies to the remedy of termination (Art. 8:301) and likewise to the remedy of performance (Art. 8:201 and Art. 8:202). Here, an apportionment is only possible in those – probably rare – cases where performance is clearly severable so that partial termination or performance becomes possible. In all other cases termination and performance can only be granted or denied as a whole. It must then be decided whether and when the creditor's contribution to the non-performance precludes his right to terminate the contract or to request performance thereof. The present Article does not explicitly solve the problem. But the provision should be probably read in the sense that termination or performance is only excluded if the 5

creditor's negligent contribution was the preponderant cause of non-performance.

B. Commentary

1. Meaning and purpose

6 Art. 8:102 ACQP extends the principle of contributory negligence which commonly relates to damages (see also Art. 8:403 ACQP) to all remedies if an obligation has not been performed. If a creditor attributably causes non-performance then this creditor is then precluded from exercising the remedies he otherwise could have exercised. The Article intends to avoid that a party profits from causes for the non-performance of an obligation which are attributable to that party. Such a solution would offend the essential requirements of good faith and fair dealing.

2. Context

7 The present Article concerns all remedies available after a contractual or pre-contractual obligation has been breached. The provision must also be seen in conjunction with Art. 8:403 ACQP which specifies the principle for the remedy of damages.

3. Explanation

8 Art. 8:102 ACQP requires, first, the non-performance of a contractual or pre-contractual obligation. Second, the non-performance must be attributable to the creditor; that means that the creditor must have caused the non-performance in a way for which he is responsible: the creditor must have either neglected the duty not to hinder performance or must have accepted the risk of non-performance. It is not necessary that the creditor alone caused the non-performance. The provision is also applicable where the creditor, but also the debtor, contributed to the non-performance.

9 The exercise of the remedy is, however, precluded only to the extent to which the creditor is responsible. This solution enables a fair apportionment of the consequences of non-performance and does not pose greater difficulties in case of the remedy of price reduction. There the price can be apportioned according to the extent of the parties' contribution to the non-performance. The realisation of the solution is more difficult with respect to the remedy of performance of a non-monetary obligation or in case of ter-

mination. Only if performance is severable partial performance or partial termination can be granted. In case of non-severable performance only an all or nothing solution remains possible; the creditor should then be precluded from the exercise of these remedies only if his negligent contribution was the preponderant cause of non-performance.

4. Example

Business A sells a car to consumer B. The delivery date is 7 January and the place of delivery is A's office. B does not show up at that date and place but appears two weeks later and then takes the car. B's later request for price reduction due to late delivery is unjustified under Art. 8:102. 10

Section 2
Performance and cure of non-performance

Article 8:201: Monetary obligations
(grey letter rule from III.–3:301 DCFR)

(1) The creditor is entitled to recover money payment which is due.
(2) Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless:
  (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or
  (b) performance would be unreasonable in the circumstances.

Comments

There is insufficient basis in the *acquis* for formulating such a rule. The DCFR rule above is reproduced in order to show the context in which the *acquis* rules can operate. Please note that the words and expressions used in the rule above may be inconsistent with Acquis Group terminology. 1

Even though the *acquis* lacks grounds to build a precise and comprehensive set of rules on the specific performance of monetary obligation, it is at least an underlying principle that a creditor is entitled to recover the payment of money that is due. The main argument in support of such rule is Art. 5 of 2

the Late Payment Directive. According to this provision, the Member States are obliged to ensure that an enforceable title can be obtained by a creditor within a specified period of time. Art. 2 (5) of the same directive provides that "enforceable title" means any decision, judgment or order for payment issued by a court, or other competent authority, whether for an immediate payment or payment by instalments, which permits the creditor to have his claim against the debtor collected by means of forced execution. The same principle can be derived from the regulations on the enforcement of foreign judgments, on the European Enforcement Order and the European Payment Order. These provisions remove any doubt that an obligation to pay money must be enforceable.

Article 8:202: Non-monetary obligations (grey letter rule from III.–3:302 DCFR)

(1) The creditor is entitled to enforce specific performance of an obligation other than one to pay money.
(2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation.
(3) Specific performance cannot, however, be enforced where:
  (a) performance would be unlawful or impossible;
  (b) performance would be unreasonably burdensome or expensive; or
  (c) performance would be of such a personal character that it would be unreasonable
  to enforce it.
(4) [not adopted]
(5) The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.

Comments

1 There is insufficient basis in the *acquis* for formulating such a rule. The DCFR rule above is reproduced in order to show the context in which the *acquis* rules can operate. Please note that the words and expressions used in the rule above may be inconsistent with Acquis Group terminology.

Though European law does not regulate the enforcement of a non-monetary obligation, the concept of specific performance of such obligation is common to European private law. Most of the European regulations and directives that aim to protect the weaker party in the contractual relationship require the Member States to take measures that are appropriate to ensure that the rights of that party are respected. To provide the power to enforce these rights is one of the most suitable measures that might be taken. 2

Some of the *acquis* provisions governing the remedies for non-performance of the contract (most of all Art. 3 of the Consumer Sales Directive) could possibly serve as a basis for a rule similar to Art. III.–3:301 (2) and (3) of DCFR. These provisions were not, however, found to be sufficient to justify the adoption of the rule as a part of the existing *acquis*. 3

The DCFR rule was not adopted in its entirety because some aspects of it were found to be incompatible with the *acquis* (essentially with Art. 3 of the Consumer Sales Directive) and the system of non-performance and remedies set forth in the Acquis Principles. However, the general requirement of good faith in exercising the remedies (Art. 7:102 ACQP) applies and, consequently, it may sometimes lead to a result similar to that part of Art. III.–3:301 DCFR, which was not adopted as part of Acquis Principles. 4

Section 3
Termination and reduction of performance

Article 8:301: Grounds for termination and reduction

(1) The creditor may reduce its own performance appropriately, or terminate the contract:
   1. if the creditor has no right to performance or cure under Section 2 above, or
   2. if the debtor has not provided the remedy under Section 2 above within a reasonable time.

   The creditor is not entitled to terminate the contract if the debtor's failure to perform amounts to a minor non-performance.

(2) Regardless of para. (1), the creditor is entitled to terminate the contract for non-performance if the creditor cannot be reasonably expected to be bound by the contract, in particular because of the kind of non-performance or because of the nature of the obligation.

(3) The creditor can terminate the contract under para. (1) with respect to that part which is affected by non-performance, unless partial performance is of no utility to the creditor. Paragraph (2) applies correspondingly.
(4) The creditor is entitled to reduce its own performance if the cure under Section 2 above has not restored the original value of performance.
(5) The remedies provided for in the preceding paragraphs do not prejudice the creditor's right to damages.

A. Foundation in the *Acquis*

1. Sources in the *Acquis*

1 The *acquis* provides a right to terminate a contract in Art. 3 (5) and 3 (6) of the Consumer Sales Directive and, less explicitly, in Art. 4 (7)(subpara. 2) of the Package Travel Directive. The latter Directive establishes a duty of the organiser to bring the consumer to the place of departure (or to another place that the consumer has agreed, if the organiser is not able to provide suitable alternative arrangement or if the consumer does not accept it for good reasons). This could be qualified as a quasi-right of the consumer to terminate a contract. Both Directives treat the right to terminate a contract as an ultimate remedy, to be applied only if the cure of a contract cannot be attained by other means.

2 The Consumers Sales Directive allows a consumer to terminate a contract (to "rescind" as the Directive provides) only
- if the consumer is entitled to neither repair nor replacement; or
- if the seller has not completed the remedy (i.e. repair and replacement) within the reasonable time; or
- if the seller has not completed the remedy without significant inconveniences to the consumer.

Additionally, the contract cannot be terminated if the lack of conformity is minor.

3 The Package Travel Directive provides an instance of what is considered a minor breach. In the case of non-performance of a significant proportion of the services contracted for (or the organiser perceives that it will not be unable to perform these services as according to Art. 4 (7) of the Package Travel Directive), a consumer may require to be taken back to the place of departure or another return-point (which can be treated as a right to terminate a contract) only if the organiser does not offer an alternative service, or if the consumer has a good reason to reject such a service. Both Directives are seeking a possibility to continue a contractual relationship despite the

breach of an obligation, if it is possible and reasonable and not too burdensome for the other party to do so.

The right to terminate a contract is also implicitly recognized by Art. 16 of the Commercial Agents Directive. According to this provision, nothing in this Directive affects the application of the law of the Member States where the latter provides for the immediate termination of the agency contract, *inter alia*, because of the failure of one party to carry out all or part of its obligations. It follows that the *acquis* recognizes the principle that non-performance by the debtor may lead to the creditor's right to terminate the contract. 4

Another remedy besides termination of contract is reduction of the creditor's own performance. In the *acquis* there is a remedy of price reduction. This is expressly provided in Art. 3 (5) of the Consumer Sales Directive. It applies whenever termination of contract is available, and additionally if the lack of conformity of the goods to the contract is minor. 5

Similar remedies, or at least remedies with a similar effect, can be found in the Package Travel Directive (Art. 4 (6)(a), Art. 4 (7) subpara. 1) and the Regulation No 261/2004 – Denied Boarding Regulation – (Art. 8 (1)(a)). In the first case, the aim of the remedy is to compensate the lower value of the alternative arrangement offered by the organiser, in the second case, it provides reimbursement of the costs of the ticket for that part of the journey which was not provided. 6

All remedies discussed under this paragraph can be applied regardless of the reason for non-performance. Termination of contract and reduction of the creditor's own performance are available in the cases mentioned above, even if the non-performance can be attributed to force majeure.

The *acquis* generally accepts that termination of contract and reduction of the creditor's own performance do not prevent the creditor from resorting to other remedies, provided that, according to their content, these remedies can be applied cumulatively. The Consumer Sales Directive refers in Art. 8 (1) to the national rules governing contractual or non-contractual liability, stating that they can be applied alongside one another. 7

A similar reference is contained in Art. 4 (6) of the Package Travel Directive. Equally, according to Art. 12 of the Denied Boarding Regulation, remedies provided by this regulation do not exclude any rights of passengers to receive further compensation.

8 The provisions of Community law mentioned above have not yet been interpreted by the Court of Justice. To date, the *ECJ* has neither delivered any decision on grounds of the termination of a contract, nor on the reduction of performance, as a matter of Community law. It may be worth mentioning, however, that the Court occasionally faces the issue of termination of a contract in cases involving disputes over contracts between the Community and beneficiary institutions from various Member States. These contracts are governed by the law of one of the Member States and, therefore, the decisions of the Court in these cases cannot be considered as a part of Community law. These contracts usually contain clauses allowing the Commission to terminate a contract on the ground of non-performance (see: judgment of 9 June 1999 in the case C-172/97, SIVU [1999] ECR I-3363, para. 17-21; judgment of 16 January 2001 in the case C-40/98, TVR [2001] ECR I-307, para. 26-34).

2. Development

9 The Acquis Principles have generalised the system of remedies of termination of contract and price reduction in several ways. Both of these remedies may be available to any party to a contract; they are not limited to B2C contracts, but form part of general contract law. Some authority for this extension is provided by the Package Travel Directive and the Denied Boarding Regulation. These acts are not confined to consumers in narrow sense (see: Art. 2 (4) of the Package Travel Directive). The notion of passenger is not defined under the Denied Boarding Regulation, and hence there is not a reason to confine it to consumers. The broader personal scope of the application of the system of remedies is however not only justified by the broader nature of the sources quoted above, but also (or even predominantly) by the neutral character of these remedies. Reduction re-establishes the equilibrium of performance in a contract, and termination of contract allows for the reversal of the negative results of non-performance, including partial or defective performance, irrespective whether a B2C or B2B contract is concerned. Termination of contract as a remedy has an established tradition among the European legislations and international treaties such as the CISG. Termination of contract provides an appropriate sanction of non-performance regardless of the nature of either party. The same is also true for price reduction or reduction of performance in general. The termination of a contract and the reduction in price also constitute the part of the general system of remedies in the PECL and DCFR as well as other instruments such as the Proposal of the European Code of Contracts prepared by the Gandolfi-Group.

The Acquis Principles broaden the present sectoral approach of EC private law directives and regulations into more generalized rules. The system of remedies which has been adopted in the Consumer Sales Directive is capable of being applied to other contracts. The Consumer Sales Directive itself applies not only to contracts of sale in a narrow sense, but also to contracts for the supply of consumer goods to be manufactured or produced (Art. 1 (4)). The Package Travel Directive may apply to a variety of services contracts (see: definition of the package in Art. 2 (1)). The Denied Boarding Regulation is concerned with transport contracts. The right to terminate a contract is recognized by many legal systems as the general remedy which is not limited to specific contracts. Termination of contract, irrespective of it classification, is available as a remedy under all academic works on principles of contract law (see: Art. 9:301 PECL; Art. III.–3:301 DCFR; Art. 7.3.1. of the UNIDROIT Principles; Art. 114 of the Proposal of the European Code of Contracts prepared by the Gandolfi-Group). All of these drafts are rooted (albeit to different extents) in the system of CISG, which also served as a source of inspiration for the Consumer Sales Directive. Hence the right to terminate a contract can be generalized into a core remedy within the system of non-performance of contracts. 10

The Acquis Principles also generalize a remedy of price reduction into a wider remedy of reduction of performance. This generalization has two aspects: firstly, the remedy is elevated to a general level which is not confined to particular types of contracts; secondly, reduction is not limited to monetary obligations but is available in reciprocal contracts for all kinds of obligations which are capable of being reduced or diminished. 11

Both generalisations require some explanation. In many national laws, the remedy of price reduction has traditionally been linked to contracts of sale and similar contracts. Common law systems do not even recognize price reduction as a remedy which is separate from damages. We can, however, observe a tendency in academic works on principles of contract law to allow the remedy of price reduction beyond specified cases, as in PECL (Art. 9:401) and the Gandolfi Draft (Art. 113.1). The UNIDROIT Principles, on the other hand, do not follow this pattern. 12

Reduction of performance may serve as a useful remedy in broader sense, because it facilitates the restoration of the contractual equilibrium between the value of performances without having to rely on the more complicated system of damages.

Termination of contract and reduction of performance under the Acquis Principles are predominantly based upon the system which arises from the Consumer Sales Directive. The scope of their application is, however, 13

enlarged. It goes beyond cases of lack of conformity of the delivered goods to extend to all cases of non-performance, as defined in Art. 8:101. The example from the Package Travel Directive (Art. 4 (6) (7)), cf. also Art. 8 (1)(a) Denied Boarding Regulation, Art. 16 (a) Rail Passenger's Rights Regulation, illustrates that reduction of performance can also be applicable in cases of non-performance other than defective performance.

14 Art. 8:301 builds on, but also further develops the system of the Consumer Sales Directive. Art. 8:301 (2) determines more precisely than Art. 3 (3) subpara. 3 of the Consumer Sales Directive the circumstances under which a party may terminate the contract. The Acquis Principles allow the termination without giving the other party the possibility to cure the performance if the non-performance is so serious that the other party can no longer be expected to adhere to the contract; this result is not obvious under the Consumer Sales Directive.

The right to terminate the contract immediately is comparable to Art. 4 (7) of the Package Travel Directive which allows the consumer to reject the alternative suitable arrangement for "good reason".

The Consumer Sales Directive does not deal explicitly with the case that only a part of the goods delivered are affected by a lack of conformity. Art. 8:301 (3) closes this gap with a general rule on the scope of the termination if only a part of a contract is affected by the non-performance.

3. Political Issues

15 An important policy issue is whether there should be a mandatory sequence in which remedies are to be exercised. It has been stated that a party may resort to termination of a contract or reduction of performance only if performance or cure are not effected. The Consumer Sales Directive and the Package Travel Directive follow this model of a mandatory sequence of remedies; this is evident in the case of the Consumer Sales Directive (Art. 3 (5)). Similarly, under the Package Travel Directive the consumer has to accept an alternative suitable arrangement (Art. 4 (7)). The right to cure has the effect that the debtor gets a second chance to perform in full and thereby to prevent the termination or reduction of performance. In the future it might be considered whether the debtor's right to cure (which is much wider and therefore to be distinguished from a possible right of the creditor to enforce cure under Art. 8:202) should be expressed explicitly in an individual Article in order to make this distinction clearer.

The Acquis Principles do not use the notion of the "fundamental breach of contract" known in CISG (Art. 25). However, a similar effect is reached by the application of Art. 8:301 (2).

The development of the remedy of price reduction into the remedy of "reduction of performance" is also a political question. It diminishes the relevance of the right to damages by creating an instrument with a compensatory function and broad scope. The applicability of this instrument to remedy other kinds of non-performance than just the defective performance may cause some friction with other remedies such as (partial) termination and damages, but also facilitates restoration of the balance between parties. 16

B. Commentary

1. Meaning and Purpose

The purpose of Art. 8:301 is to determine the requirements for termination of contract and reduction of performance in cases of non-performance. It also provides that these remedies may apply to all cases of non-performance, without being confined to specific contracts or specific types of non-performance (such as impossibility or delay). 17

2. Context

Art. 8:301 applies to cases of non-performance of contractual obligations. It may also apply to violations of pre-contractual duties, but only if the contract has been concluded (see: Art. 2:207 (3)). It is furthermore feasible to allow reduction of the performance to reciprocal obligations beyond those arising from the contract itself. This can be the case if an invalid contract is unravelled or if the parties seek to recover what they have performed under the contract which has been terminated (see: Art. 8:303). 18

Art. 8:301 (5) regulates the relationship between termination and reduction on the one hand, and damages on the other. Damages may be cumulated with remedies under Art. 8:301. This does, however, not mean that termination or reduction do not have any influence on damages. Reduction of performance diminishes the creditor's loss; termination of contract will likewise lead to a different calculation of damages, as the creditor's loss is not reduced by any performance made or owed under the contract. The creditor may also be entitled to claim damages of costs caused by the termination of the contract.

3. Explanation

19 Art. 8:301 governs two remedies for non-performance of contract, namely termination of contract and reduction of performance. The effects of termination are governed by Art. 8:303. Termination in this sense should not be confused with termination by notice of long-term contracts for reasons other than non-performance of an obligation.

Reduction of performance is available even if a non-monetary obligation is to be reduced, provided that reduction of this performance is possible without depriving the performance of its economic purpose. If the party entitled to the reduction of performance has not yet performed, then its obligation is reduced accordingly. If, on the other hand, this party has already provided complete performance, then it is entitled to recover for that part of the performance which is no longer due as a result of the exercise of the remedy.

20 As the aim of reduction of performance is to restore the contractual equilibrium between the performances owed, then the reduction should be measured proportionally according to the following formula:
V1 : V2 = P1 : P2
V1 – value of debtor's full performance in conformity with the contract
V2 – value of performance actually made by debtor
P1 – price of creditor's full performance in conformity with the contract
P2 – price of performance owed by creditor after reduction

21 Termination of contract may be available for all cases of non-performance, unless the non-performance is minor (see Art. 8:301 (1) last sentence). Non-performance is defined in Art. 8:101 and includes all kinds of failure in performance. It can mean, in particular, that the obligation has not been performed at all (which includes cases of initial or subsequent impossibility), or that it has been performed incorrectly (lack of conformity), or that performance was late. It does not matter whether the non-performance was caused by the fault of the debtor, or whether it has been caused by an impediment beyond the control of this party. Only in the case of a minor non-performance, the creditor is barred from terminating the contract (Art. 8:301 (1)). A party who has terminated the contract may nevertheless be liable for damages caused to the other party provided that the requirements of Art. 8:401 are fulfilled.

22 Reduction of performance has two built-in limitations. Firstly, it only functions for reciprocal obligations. Secondly, it cannot apply in cases of complete failure to perform; there has to be at least partial performance. Otherwise, however, this remedy can be available in all cases of non-performance.

It does not require any fault, and – unlike termination – also applies if the non-performance is only "minor".

Non-performance qualifies as minor if the non-performance does not endanger the purpose of the obligation and still allows for the creditor's interest to be satisfied.
Reduction of performance can be combined with termination of contract if the creditor terminates part of the contract, and reduces its performance in relation to the part which has not been terminated.

Termination of contract and reduction of performance are ultimate remedies. The reason being that, in many cases, the debtor may prevent that the creditor obtains the right to terminate or to reduce performance by cure. Cure means the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation. The right to cure gives the debtor a second chance to effect full performance and thereby to avoid termination or reduction of performance by the other party. Such right to cure ("the second chance") is independent of the question whether the creditor can enforce cure against the debtor. In other words, the debtor may have a right to cure even in those cases where the creditor cannot enforce the cure under Art. 8:202 (2) and (3)(b)(c). According to Art. 8:301 (1) the creditor may reduce his own performance or terminate if either the creditor has not right to performance or cure under Section 2 (e.g. performance unlawful or impossible, Art. 8:301 (3)(a)) or if the debtor has not provided the cure (e.g. in cases where cure is lawful or possible but unreasonably burdensome or of the personal character, Art. 8:301 (3)(b)(c)). 23

Art. 8:301 does not require the creditor to fix an additional period for performance as a condition for termination of contract. The reasonable time requirement arises directly from Art. 8:301 and does need to be expressed by the creditor. The period, qualified as the reasonable time starts with the knowledge of the debtor about the non-performance. This knowledge could result from the notice given by the creditor or from another source. In some cases the nature of non-performance itself would allow to assume the knowledge of the debtor (for example lack of payment). 24

When deciding which length of time should be reasonable for performance or cure, regard should be given to the nature of the obligation and the time which the debtor would normally be allowed for undertaking those steps which are required to complete performance.

Art. 8:301, while laying down a sequence of remedies, also provides exceptions from this rule. Firstly, it allows – under certain conditions – for the remedies of cure and of reduction of performance to be cumulated (see Art. 25

8:301 section 4). This applies, for example, if the debtor has cured a defective performance (for instance by repair) but the repair has not restored the value which would have been provided by proper performance. In such a case, the creditor may reduce his own performance by taking into account the lower value of the cured performance.

Secondly, the creditor may terminate the contract without asking for the cure if the creditor cannot be reasonably expected to be bound by the contract, having regard in particular to the kind of non-performance or the nature of the obligation (Art. 8:301 section 2). This provision applies if cure is possible, but where the non-performance has been particularly grave, as in cases of serious breaches of a duty to loyalty, or where any trust between parties has been destroyed. In these situations, there is no interest of the legal order to force the creditor into maintaining such a contractual relationship. This provision expresses an idea which is similar to the concept of fundamental breach of contract, even though immediate termination under Art. 8:301 (2) requires a graver violation of the obligation, which must be committed in such a way that the creditor has no reason to expect that the cure will really bring the performance into conformity with the contract. It does not matter in this context whether the effects of non-performance for the creditor were predictable for the debtor.

26 Art. 8:301 section 3 limits of the scope of termination of contract if only a part of it is affected by non-performance. According to this provision, termination encompasses only that part of the contract which is affected by non-performance. Typically, this is the case if a seller has delivered only part of the goods which had been ordered. In such a case, termination is limited to those goods which should have been, but in fact have not been delivered. If there is a further delivery outstanding but not yet due, then termination will generally not affect that part. Partial termination may also apply in a case where, although the object of performance is not divisible, a portion of performance which has already been completed has significant economic value (e.g. where a part of a building has been constructed, but the building has not been completed).

The creditor may nevertheless terminate the whole contract if the partial performance is of no utility to the creditor. This is the case if partial performance cannot satisfy the creditor's interest under the contract (even in part) and includes the case in which the creditor cannot use the part of performance which has been delivered in further work, or is too burdensome on the creditor.

In some cases, partial termination of a contract can have effects which are similar to those of reduction of performance. If a part of the obligation has

not been performed and the creditor terminates a contract with respect to this part, the result will be the same as if the creditor reduced his own performance. This does not mean that either one of these remedies is obsolete. On the contrary, the differences between them are significant. If a part of the performance, which has already been provided, is affected by a lack of conformity, partial termination means that the creditor must return the part of the performance which has been affected and may claim damages for non-performance of this part under Art. 8:401. If the creditor instead chooses reduction of performance, he or she would keep e.g. the delivered goods, and their defect would be relevant only for calculating the accordingly lower value of the creditor's performance (e.g. payment of a lower price). In such cases it is relevant as to whether the defect which affects the delivered goods allows qualifying the non-performance as minor. If this is the case, termination is excluded, and the creditor must resort to reduction of performance.

Neither termination of contract nor reduction of performance prevent a 27
creditor from claiming damages according to the Art. 8:401, provided all requirements of this Article are fulfilled – see Art. 8:301 (5). In the case of termination of a contract, the creditor can be entitled to claim damages which are caused by the fact that the creditor has not obtained any performance, and by the fact that the creditor was obliged to return what he or she has received. It has to be stressed that it is equally possible to terminate a contract or to reduce performance without being entitled to damages, in particular if the non-performance is excused under Art. 8:401.

In the case of reduction of performance, the value saved by this remedy needs to be taken into account when assessing the damages.

4. Examples

Example 1
A has sold a car to B. Payment is due ten days after delivery. The car has been delivered by the seller, but the buyer has not paid the price. Two weeks after payment has become due, the seller has declared termination of contract. The declaration of termination has effect, although the seller has not demanded payment from the debtor because the reasonable time in the sense of Art. 8:301 (1) has lapsed.

Example 2
An old clock has been sold in ignorance of the fact that it had just been completely destroyed by an unfortunate event. The buyer may terminate the contract immediately, because there is no right to cure due to impossibility

(Art. 8:301 (1)). The contract is valid and it does not become invalid or ineffective ipso facto.

Example 3
A has ordered a design project of a building by a well known architect. The project is to be delivered within a fixed period of time, but the architect has failed to comply with this time limit. The client wants to terminate the contract immediately, i.e. without demanding performance. The debtor has however a right to cure within the reasonable time in the sense of Art. 8:301 (1). The period starts when the debtor becomes aware of the non-performance. In this case the architect is aware of the non-performance when the obligation has become due. The creditor may not terminate the contract before the "reasonable" time period has lapsed. It is not necessary that the creditor warns the debtor.

Example 4
A bathtub with a hydro-massage function has been installed as according to the order made by A. However, the plumber, disregarding the producer's instructions, has connected the tubes in a way which endangers the life of the users. Customer A may immediately terminate the contract with the plumber according to Art. 8:301 (2) without asking for a cure. The reason is that A's loss of trust in the plumber's competence justifies an abrupt end to the contractual relationship. The customer cannot be forced to ask for performance from a manifestly incompetent contractor.

Example 5
A has bought a house for a sum to be paid in 36 equal instalments. A fails to pay the final instalment. The seller cannot terminate the contract because the non-performance is minor taking into consideration the proportion between the amounts unpaid and the value of the contract as whole. In such a case, the seller is limited to the remedies of performance and damages. Reduction of the seller's performance is not available since that performance cannot be divided.

Example 6
A and B have agreed that A will supply 10 bicycles to B, with B to pay the agreed price in advance. B has paid in due time, but only 80% of the price. When A asks B for full payment, B fails to respond. A may reduce his own performance and deliver only 8 bicycles. Partial termination would have the same effect.

Example 7
A passenger flies with a ticket for business class. Unfortunately, an economy class passenger dies during the flight. As economy class is fully booked, the

crew decide to transfer the corpse to business class and to tie it to the seat next to the one occupied by A. A may ask for a reduction of price which he or she paid for the flight, because having to sit next to a corpse in business class does not conform with the passenger's legitimate expectations, even if the air operator had no alternative option to solve the problem. In such a case it is difficult to determine a value of the reduction, since there is not a market for flights with a corpse placed next to your seat. Possibly the price should at least be reduced to the level of the price for economy class.

Example 8
A has agreed to deliver a vintage car to a film producer who wants to use it for filming a movie. A fails to deliver. The producer terminates the contract after the lapse of a reasonable time. The producer has to pay to actors and other staff, and incurs other expenses for additional days of filming, and also additional costs for finding another vintage car – for which the producer also has to pay a higher rental fee. Regardless of the termination, all of these costs may in principle be recovered under the rules on damages, Art. 8:401 in connection with Art. 8:301.

Article 8:302: Notice of termination (grey letter rule from III.–3:507 paragraph (1) DCFR)

A right to terminate under this Section is exercised by notice to the debtor.

Comments

Article III.–3:507 DCFR on notice of termination has been amended after the Plenary of the Acquis Group had decided to include this Article as a grey letter rule into the Acquis Principles. The text quoted above is taken from the new version of Art. III.–3:507 DCFR (January 2008), as far as it still has the same content. 1

There is insufficient basis in the *acquis* for formulating such a rule. The DCFR rule above is reproduced in order to show the context in which the *acquis* rules can operate. Please note that the terminology used in this rule may be inconsistent with Acquis Group terminology. 2

The Consumer Sales Directive, which serves as a main source of ACQP rules on remedies for non-performance and which provides for termination of contract (although named "rescission" – see Art. 3), does not settle the

way in which this remedy is exercised. Notice of termination ("declaration of avoidance") is generally required under the UN Convention on Contracts for the International Sale of Goods (see Art. 26, Art. 49 and Art. 64 CISG). Some sources of the *acquis* contain the phrase "notice of termination" but they use it in a completely different context (cf. Art. 15 (1) of the Commercial Agents Directive and section 1(g) of the annex to the Unfair Terms Directive).

3 The Acquis Principles do not contain any rule whether the reduction of price needs to be declared. Such as in the case of termination, the question of the means of applying this remedy is not answered by the *acquis communautaire*. Hence the DCFR also does not solve this problem, it is not possible to provide a grey letter rule as in the case of termination.

Article 8:303: Effects of termination

(1) Termination of the entire contract releases both parties from their obligations to perform as from the time when termination becomes effective. In case of partial termination, both parties are released from their obligations which relate to the terminated part.
(2) On termination, each party is obliged to return to the other what has been performed under the contract. In case of partial termination, both parties are obliged to return to the other what has been performed under the terminated part of the contract.

A. Foundation in the *Acquis*

1. Sources

1 The Community law does not govern the effects of termination of contract. Consumer directives are rather silent on this issue. There are, however, some regulations concerning similar institutions which may serve as a basis for the formulation of a black letter rule. Art. 6 (2) in the Distance Sale Directive, regulating the effects of the withdrawal from the distance contract by the consumer imposes an obligation on the business to reimburse any sums paid by the consumer. The same idea is also expressed by the Art. 7 (4) in the Distance Selling of Financial Services Directive. The obligation to return the sums paid or property acquired arises under Art. 7 (5) of the latter Directive.

Art. 7 (2) of the Distance Sale Directive is also related to the problem of the effect of termination. This provision governs the consequences of the supplier's failure to perform due to an unavailability of the ordered goods or services. In this case the supplier must refund any sum paid by the consumer.

A claim for reimbursement of sums paid arises also under Art. 4 (6) p. b. of the Package Travel Directive in the event of the consumer's withdrawal from the contract due to the alteration of the contract before departure.

Additionally, Art. 8 of the Cross-border Credit Transfer Directive gives some indications about the effects of termination. According to this provision, in case of non-execution of the transfer, the originator's institution is obliged to refund to the originator the transferred sum with interest and charges carried by the originator. The similar idea is expressed by the Art. 75 of the Payment Services Directive 2007/64.

2. Development

The sources quoted above prove that the idea of the return of performance which has been made is not unknown in the Community law. Some of these sources deal with the situation where the contract has been brought to an end by a failure in performance, or by the fact that the aim of the contract was not achieved. The European legislator has not determined the results of the "rescission" (termination) of contract in the Consumer Sales Directive, perhaps in awareness of the fact that recovery of performances would usually be allowed under the laws of Member States. 2

The fact that the Consumer Sales Directive was drafted with the model of the CISG in mind justifies the assumption that the effects of termination are envisaged at least in accordance with the basic concept of CISG (see: Art. 81 of CISG). However, there is insufficient basis in the *acquis* for a wholesale adoption of those CISG provision on effects of termination ("avoidance") which have not been repeated in the Directive. In particular, there is no basis in the *acquis* for taking over the provision on abandoned goods which were to be returned. Neither does the *acquis* touch the problem of compensation for the use of the goods in case of termination. One could perhaps consider filling these gaps by using grey letter rules derived from the DCFR (Artt. III.–3:509 to III.–3: 515).

The effects of a partial termination are not directly governed by the sources of Community law. The possibility that partial non-performance may cause limited consequences as far as the effects of termination are concerned must be assumed. In case of partial non-performance one should provide for a so-

lution midway between the total termination of the contract and the denial of the right to terminate the contract. It has been argued that the principle of proportionality should call for partial termination in suitable cases under the existing Consumer Sales Directive.

3. Political Issues

3 As the *acquis* does not contain more specific regulations on termination, Art. 8:303 addresses only the main problems of termination leaving the vast majority of detailed questions open. One could argue that existing provisions should be completed by grey letter rules taken from DCFR; however this solution risks a reduction in the level of consumer protection afforded by the Consumer Sales Directive. The Directive's silence may be interpreted in the following ways: firstly, the Directive protects consumers from bearing additional costs, and secondly, consumers are not excluded the right to terminate the contract in the event that the goods sold have been abandoned or damaged after delivery.

B. Commentary

1. Meaning and Purpose

4 The function of this provision is to define the effects of termination of a contract, including cases of partial non-performance.

2. Context

5 After termination of a contract, the parties are obliged to return everything which has been performed; therefore, the termination generates new obligations. The rules on performance and non-performance apply to the obligations resulting from the termination. Almost all the rules on performance may apply, with the exception of Art. 7:103. Rules on non-performance, and on damages in particular, are also applicable. The remedy of reduction of performance is not excluded (Art. 8:301 (1)). On the other hand, rules on termination do not apply to a failure to comply with obligations arising from termination. Please note that Art. 8:301 limits the right of termination to contractual obligations.

3. Explanation

After termination of a contract, the parties may no longer claim performance of the original obligation. On the other hand, one should not refer to the fiction that a terminated contract has never been concluded. Generally, termination acts *pro futuro*. The original obligation arising from the contract is replaced by the obligation to return e.g. the goods supplied. It is not possible to return services that have been already supplied; therefore the party who has profited from services should reimburse a value corresponding to the services performed. The provision does not deal with the case when it is not possible to return the goods. The Acquis Principles provide a solution by the possibility of withholding the reciprocal performance, which, in case of permanent impossibility, has the same effect as extinguishing the corresponding reciprocal obligation. In case of partial impossibility or of reduction of the value of the performance to be returned after the passing of risk, the party authorized to receive the reduced performance may reduce the value of his own performance correspondingly. 6

There is insufficient basis in the *acquis* for this provision to regulate a possible obligation to remunerate the intermediate use of the goods which are to be returned. A decision of the *ECJ* is expected in this case. Neither does the *acquis* settle the question whether natural or legal fruits are to be returned. In some situations, the rules on damages may provide a partial answer. 7

The effect which termination may have on the property of goods affected is also not decided by Art. 8:303. This provision gives only an indication that the effects of the obligation are not retroactive: a solution which can be read as a slight indication in favour of those legal systems under which property transfer is not directly affected by termination of contract.

If termination affects only a part of an obligation, the parties are obliged to return only that part of the performance which is affected by termination. For example, in the case of an otherwise fully performed contract for the sale of goods of which one part is defective, the buyer has to return the defective goods, and the seller has to return that part of the purchase price which corresponds to the defective goods. If the other party has not yet performed, it may deduct the value of its own performance which corresponds to the non-performed counterpart. In some cases this deduction might lead to the same effects as a reduction of performance would. 8

4. Examples (all presuming that requirements under Art. 8:301 are met)

Example 1
A has sold a scooter to B. B has failed to pay the price and A terminates the contract. B is no longer obliged to pay the price, but must return the scooter.

Example 2
A has sold five cars to B, but one has turned out to be defective and B terminates the contract in respect of the defective vehicle. A may demand the return of the defective car and B is not obliged to pay that part of the price which corresponds to the returned car. If B has already paid, she can recover the same part.

Example 3
A has rented an apartment from B. The building's heating system fails to function in February and A cannot live in the apartment during this month. A terminates the contract at the end of February. The tenant has to return the apartment to the landlord and may ask for return of the rent for the time during which the use of apartment was impossible.

Example 4
A has rented a car but has failed to pay the hire charge for the last month. The owner of the car terminates the contract. The owner may demand the return of the car and may also ask for payment of the value of the use of the car in this month (this value may differ from the agreed charge).

Example 5
A has sold a picture to B and has delivered it to the buyer. B has failed to pay. The picture is then stolen without fault of the buyer. Being unaware of the theft, A terminates the contract. This case cannot be resolved in a convenient way under Art. 8:303 ACQP. A rule saying that in such case the value of what has been performed under the contract is to be returned (cf. Art. III.–3:511 (4) DCFR), is lacking. The *acquis* does not provide a sufficient basis for such rule.

Article 8:304: Withholding performance (grey letter rule from III.–3:401 DCFR)

(1) A creditor who is to perform a reciprocal obligation at the same time as, or after, the debtor performs has a right to withhold performance of the reciprocal obligation until the debtor has tendered performance or has performed.
(2) [not adopted]
(3) [not adopted]
(4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances.

Comments

Art. III.–3:401 DCFR on withholding performance has been amended after the Plenary of the Acquis Group had decided to include this Article into the Acquis Principles as a grey letter rule. The text quoted above is taken from the new version of Art. III.–3:401 DCFR (January 2008), as far as it still has the same content. 1

There is insufficient basis in the *acquis* for formulating such a rule. The DCFR rule above is reproduced in order to show the context in which the *acquis* rules can operate. Please note that the terminology used in this rule may be inconsistent with Acquis Group terminology. 2

The *acquis* does not contain any clear provision allowing one party to withhold its performance when the other party's reciprocal performance is delayed. Only one provision concerning contractual obligations, i.e. Art. 3 (1)(c) of the Late Payment Directive, suggests that such a rule may be part of Community law. Nevertheless, it was found to be too specific to serve as a basis for an ACQP rule. The provision in question states, *inter alia*, that the creditor is entitled to interest for late payment to the extent that he has fulfilled its obligations. This may be understood as meaning that a debtor has a right to withhold its performance until the creditor performs (or, more precisely, until the creditor fulfils all obligations, both main and secondary). This is, however, only one possible interpretation. One may argue that the Late Payment Directive provides only for the right to interest and not the right to the payment itself (conditional on the creditor's own performance). One should also bear in mind that the directive's scope of application is rather narrow, being limited to monetary obligations resulting from commercial transactions. These arguments weighed against establishing a black letter rule in the Acquis Principles. 3

Section 4
Damages

Article 8:401: Right to damages

(1) The creditor is entitled to damages for loss caused by non-performance of an obligation, unless such non-performance is excused.
(2) Non-performance is excused if it is due to circumstances beyond the control of the debtor and of any persons engaged by the debtor for performing this obligation, provided that the consequences of those circumstances could not have been avoided even if all due care had been exercised.

A. Foundation in the *Acquis*

1. Sources

1 On the one hand, there are several legislative instruments of the EU explicitly dealing with the remedy of damages for breach of contract. On the other hand these are less than could be expected. Not rarely, private law Regulations and Directives merely require that the Member States must introduce sanctions which are "effective, proportionate and dissuasive" (see Art. 7 Regulation 2560/2001; Art. 16 (3) Regulation 261/2004; Art. 8 sent. 2 Price Indication Directive; Art. 20 sent. 2 E-Commerce-Directive; Art. 17 (2) Directive on General Framework for Equal Treatment in Employment and Occupation; Art. 11 Distance Selling of Financial Services Directive) The Directives explicitly dealing with the remedy of damages comprise the following:

- The Package Travel Directive provides that the tour organiser and/or retailer is liable for damage resulting from the failure to perform, or the improper performance of the contract unless such failure is attributable to the other party, a third party or to force majeure (Art. 5 (2) of the Package Travel Directive).
- The Late Payment Directive gives a right to damages when agreed terms on the date of payment, or on the consequences of late payment, are grossly unfair to the creditor (Art. 3 (3)).
- The Denied Boarding Regulation provides for compensation if the passenger is not transported to the final destination for which he or she has a valid ticket or if the transport is delayed. The sanction – fixed sums for defined cases – resembles, however, rather a contractual penalty than the remedy of damages.
- The Air Carrier Liability Regulation also deals with damages though only with the case that an air passenger has been injured or killed due to the

operation of an aircraft. The Regulation grants a certain level of damages but requires that the air carrier is liable under the applicable law.
- The Commercial Agents Directive provides for an indemnification or compensation where either the principal has terminated the contract of agency without just reason or where the agent has terminated the contract with just reason (Artt. 17, 18).
- The Cross-border Credit Transfers Directive provides for a right to compensation in case of delayed cross-border payments unless the delay is attributable to either the originator or the beneficiary of the payment (Art. 6 (1), (2) and (3).
- However, the Consumer Sales Directive where a provision on damages could be expected does not mention damages at all but rather leaves this issue to national law.

The European Court of Justice had to decide on the remedy of damages in connection with contractual liability only on few occasions. 2
- In Case C-168/00 *Leitner ./. TUI Deutschland* [2002] (ECR I-2631) the *ECJ* decided that under the Package Travel Directive the consumer's right to damages does not only cover compensation for material losses but also for immaterial harm.
- In the *Rechberger*-Case (C-140/97 [1999] ECR 1999, I-3499) the Court had to deal with Austria's failure to implement the Package Travel Directive correctly. In this case the Court also decided on the issue whether the incorrect implementation had caused damage to the plaintiffs. Though not directly in point on causation with respect to the contractual remedy of damages, the decision nonetheless deals with causation in connection with damages – under the *Francovich* doctrine (cf. Case C-6/90 and C-9/90, *Francovich ./. Italy* [1991] ECR I-5357) – and can therefore give guidance with respect to causation in general. The Court stated here that intervening acts of third parties or unforeseeable events do normally not sever the chain of causation where direct causation is established and where the intervening event would not have caused the damage in any event.
- Though again the decisions are not strictly in point, general rules on damage, causation, fault and contributory negligence can be inferred from many *ECJ* judgments on the liability of the Community under Art. 288 (2) EC Treaty (See, e.g., *ECJ*, T-47/93 C *./. Commission* [1994] ECR II-743; *ECJ*, T-168/94 *Blackspur DIY ./. Council and Commission* [1995] ECR II-2627; *ECJ*, T-230/94 *Farrugia ./. Commission* [1996] ECR II-195).

However, full sets of rules concerning damages for breach of contract are contained in the CISG, the Lando Principles and the UNIDROIT Principles. 3

- The CISG provides for a right to damages in any case of breach of contract, unless the breach can be excused because it was due to an unforeseeable and unavoidable impediment outside the control of the party in breach (Artt. 45, 61, 79 CISG). Damages may be cumulated with any other remedy.
- The Lando Principles contain the following rule (Art. 9:501 (1)): "The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Art. 8:108." (Art. 8:108 exempts the debtor from liability if the non-performance of the duty is due to an unforeseeable and unavoidable impediment beyond the debtor's control).
- The UNIDROIT Principles prescribe: "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles." (Art. 7.4.1). Art. 7.1.7 UNIDROIT Principles excuses non-performance if it was due to an unforeseeable and unavoidable impediment beyond the debtor's control.

4 The *acquis communautaire* is clear insofar that the entitlement to damages for a breach of a contractual duty requires at least: non-performance of an obligation, damage and its causation through the non-performance. Under the present *acquis* it is less clear whether these requirements suffice or whether fault is additionally required. However, taken all mentioned rules together, the *acquis* appears to militate against rather than favour an additional requirement of fault.

2. Development

5 It has been observed that the *acquis communautaire* is often silent with respect to remedies for breach of contractual duties. Though it is already rather frequent that Directives and Regulations prescribe certain contractual or even pre-contractual duties, the EU instruments often omit to provide for corresponding remedies where these duties have been infringed. Partly, they only provide that the sanctions must be "effective, proportionate and dissuasive" (See for instance: Art. 7 Regulation 2560/2001; Art. 16 (3) Regulation 261/2004; Art. 8 sent. 2 Price Indication Directive; Art. 20 sent. 2 E-Commerce-Directive; Art. 17 (2) Directive on General Framework for Equal Treatment in Employment and Occupation; Art. 11 Financial Services Directive) or the contractual sanctions are left to national law. Nonetheless, as shown *supra*, there is already a considerable and growing number of legislative acts and judicative dicta which address the issue of damages or provide at least for this remedy and allow a generalisation of certain rules on damages.

3. Political Issues

The main policy issue of Art. 8:401 is the question whether the remedy of damages should be based on the principle of fault or on a principle of strict liability which does not require fault on the part of the debtor. Under the present *acquis* it is (as mentioned) not clear whether or not fault is additionally required though the rules of the present *acquis* can be taken to favour rather the principle of strict contractual liability. 6

To some extent the decision depends on what losses are covered by the two principles. If all consequences of a breach of contract must be compensated, even those which could not be foreseen or avoided, then strict liability might appear as being too drastic. If there is, however, a reasonable limit of the strict liability principle it can be accepted as a general principle. In order to meet this standard Art. 8:401 (2) excuses only such non-performance which is caused by circumstances beyond the debtor's control and which could not have been avoided even despite the exercise of all due care.

B. Commentary

1. Meaning and purpose

The provision is the introductory as well as the basic norm concerning damages. It deals with the right to damages and defines the general conditions under which a creditor is entitled to damages. Damages is the principal, though in many cases not the only sanction for the violation of a contractual or pre-contractual duty. 7

As of principle, an entitlement to damages requires a loss on the part of the creditor and its causation by the debtor. The loss must stem from the non-performance of an obligation. The provision establishes further that the debtor is also responsible for losses caused by persons whom he has engaged for the performance of a duty. Liability does not depend on the fault of the debtor who is generally strictly ('objectively') obliged to fulfil his promise. However, no liability is incurred if the debtor is excused because unavoidable circumstances beyond his control caused the damage. The formulation of the provision indicates that the debtor must prove such excusing circumstances.

2. Context

The Article introduces the damages part of Chapter 8 which deals generally with remedies if an obligation has not been performed as promised. Damages 8

are then the most common remedy and are available in case of non-performance of any kind of obligation. The present Article defines this reaction to a breach of obligations. The condition that an obligation must have been breached is, however, dealt with in Art. 8:101 et seq. and the obligations which arise from a contract are formulated in preceding Chapters where Art. 8:401 et seq. are specifically referred to by Art. 2:207 (2) and (3), Art. 4:103a (4) sent. 3, Art. 4:103b (4) sent. 3, Art. 5:105 (2), indirectly also by Art. 3:202. Qualifications of the measure and extent of damages are addressed in Art. 8:402 and 8:403.

3. Explanation

a) Breach of obligation

9 Art. 8:401 (1) requires as a first necessary–though not sufficient – condition for any liability in damages that a – contractual or pre-contractual – duty has been violated. This principle is in particular confirmed by the Package Travel Directive (Art. 5 (2): "failure to perform or the improper performance of the contract") but also, for instance, by Art. 45 (1)(b), Art. 61 (1)(b) CISG. The present Article presupposes that such obligation exists. Many contractual obligations are provided for by law – see Chapters 2 and 7 – but they may be also inferred from the nature of the respective contract. The present Article further presupposes that the respective obligation has not been fulfilled.

In general it is neither necessary that the breach is of a specific nature or weight, nor that the aggrieved party has given prior notice of the breach or suchlike The mere non-performance suffices. This general rule does, however, not exclude the possibility to provide for specific requirements for specific situations, for instance for a notice requirement in case of delivery of non-conforming goods or the like.

b) Damage

10 It is the clear general principle that the creditor must have suffered a loss in order to be entitled to damages. The *acquis* requires generally damage as precondition for damages as for instance the Art. 5 (2) Package Travel Directive evidences ("damage resulting …"). Here shall also be referred to the decisions of the *ECJ* on the liability of the Community under Art. 288 (ex Art. 215) EC Treaty cited *supra* in Art. 8:401 margin-no. 2. Without a loss in principle no damages are due. But the *ECJ* has also acknowledged the possibility of nominal damages – a symbolic sum – where the claimant had

suffered a wrong without a loss or can not prove the precise amount of a loss, which was also shown in the Case C-34/87 *Culin ./. Commission* [1990] ECR I-225 (symbolique Franc).

Thus far the *acquis* does, however, not provide for punitive sanctions which aim at a civil punishment by means of money, which the defendant is ordered to pay irrespective of any proportion to the extent of the damage.
On the other hand, damages often have a certain general and special deterrent effect. This preventive function should be activated in appropriate cases, for instance in discrimination cases (cf. Art. 3:202 (2) ACQP).

c) Loss caused by non-performance

Damages are only owed for such losses which have been caused by the debtor's non-performance. This is a more or less self-understanding principle also of the *acquis* (for instance in Art. 5 (2) Package Travel Directive it says "damage resulting … from the failure to perform") and it has been repeatedly stated by the *ECJ* (cf. C-140/97 *Rechberger* [1999] ECR I-3499. If causation with respect to the claimed damage cannot be established then no damages are due. The same rule (Art. 5 (2) Package Travel Directive) has been, and has to be, adopted in case of breach of contract. 11

Thus far, the requirement of causation has not yet been further specified by EU-legislation. The *ECJ* requires that at least the *conditio sine qua non* test is met (Compare for instance Case C-358/90 *Compagnia italiana alcool ./. Commission* [1992] ECR I-2457, 2505; EC, T-572/93 *Odigitria ./. Council and Commission* [1995] ECR II-2025, 2050).

d) No excuse

According to the present Article the entitlement to damages does not require fault on the part of the non-performing party. The provision follows the principle of strict liability with certain grounds of exoneration. Such grounds are unforeseeable and unavoidable circumstances which are outside the control of the debtor and whose risk the debtor has not accepted. A ground for exoneration is in particular force majeure, but also an unforeseeable and unavoidable act of a third person. If those circumstances have caused the debtor's inability to perform the obligation owed then the debtor is not liable for losses which resulted from the non-performance. This rule can be, though not undisputedly, inferred from two *acquis* rules. Firstly the Package Travel Directive is to be mentioned (here shall the contrary decision of the German Federal Court in NJW 2005, 418, 419 et seq. be shortly 12

referred to. The Court held in this case that the Package Travel Directive was based on the principle of presumed fault. To clarify the question the Court should have referred the question to the ECJ). The other *acquis* rule to be mentioned is Art. 9 of the Cross-border Credit Transfers Directive. Apart from these directives, the principle is also in line with Art. 79 CISG. However, this principle may be subject to certain exceptions where the nature of the contract may nonetheless require fault to be propen or where fault is only presumed. But as a general rule it appears to be the underlying principle of the *acquis*. An exception to the rule may for example arise where the contract obliges the debtor not to achieve a certain result but only to use his best efforts (for instance in most contracts for medical treatment). The same solution can be found within the Lando Principles (*Lando/Beale* (ed.), Principles of European Contract Law I and II (2000) p. 434).

Though the Article does not expressly address the burden of prove, its formulation indicates that the debtor bears the burden to prove that circumstances beyond its control hindered the performance.

e) Cumulation of damages with other remedies

13 Though the *acquis* is not really explicit on this matter it yet appears to favour the principle that damages can be claimed in conjunction with any other remedy. Both the Consumer Sales Directive and the Package Travel Directive evidently do not exclude the aggrieved party's right to damages if for instance this party justifiably terminates the contract at the same time; the CISG (Artt. 45 (2), 61 (2)) has also adopted the very same rule. The Acquis Principles follow this approach (Art. 8:302 (5)). Yet, it is clear that damages in combination with other remedies are only available insofar as there is still a loss not compensated by the other remedy.

4. Examples

Example 1
A enters into a package tour contract with tour organiser B. During the tour A is injured as a result of falling down the staircase in the hotel selected by B due to the fact that they were slippery and unsafe. A is liable for the damage and must compensate it.

Example 2
A enters into a package tour contract with tour organiser B. Shortly before the start of the tour a hurricane destroys the booked hotel and B cannot of-

fer any equivalent alternative. B's non-performance is excused because circumstances beyond its control are responsible for the non-performance which could not have been avoided even if B exercised all due care.

Article 8:402: Measure of damages

(1) Damages are a money payment of the amount necessary to put the creditor into the position in which it would have been if the obligation had been duly performed.
(2) Damages cover the loss suffered by the creditor, including the loss of profits.
(3) Without prejudice to the rules on recovery of costs in judicial proceedings, damages include reasonable costs for the enforcement of an obligation.
(4) Damages cover non-pecuniary losses only to the extent that the purpose of the obligation includes the protection or satisfaction of non-pecuniary interests.

A. Foundation in the *Acquis*

1. Sources

Thus far, the *legislative acquis* is not very explicit with respect to which losses are to be compensated and how damages are to be assessed. On the specific aspect of recovery of enforcement costs the Late Payment Directive grants a recovery claim (see Art. 3 (1)(e) of the Late Payment Directive "all relevant recovery costs incurred through the … late payment"). On a general level the Package Travel Directive and the Air Carrier Liability regulation mention the different categories of property damage and personal injury damage. Art. 4 (6) Package Travel Directive leaves the specific assessment of damages partly to national law. However, where the tour operator does not fully perform its obligations the Directive entitles the traveller to compensation for "the difference between the services offered and those supplied" (Art. 4 (7) Package Travel Directive). It is evident from this provision that the traveller is to be placed in a position by way of compensation as if he had been rendered the services offered. Where these Directives and other Regulations and Directives already cited *supra* at Art. 8:401 provide for liability for damage it can therefore be inferred from their formulation and purpose that the whole of the damage has to be compensated even though this is not expressly stated. It can further be inferred that compensation shall make good the loss in a way as if the damage had not happened but that in- 1

stead the obligation owed had been duly performed. The same ideas can be inferred from the Product Liability Directive which defines the notion of "damage" in its Art. 9. Though this Directive deals primarily with tort situations, the general principles for compensation and damages are – and should be – more or less identical in tort and contract.

The *ECJ* has also made clear on various occasions that damages should cover the entire loss including future profits (e.g. C-308/87 Grifoni II [1994], ECR I-341) and including compensation for immaterial harm (Cases C-308/87 *Grifoni II* [1994] ECR I-341 and C-168/00 *Leitner ./. TUI Deutschland* [2002] ECR I-2631).

2 However, the CISG, the Lando Principles, (expressly) Art. 7.4.2 para. 1 of the UNIDROIT Principles and the Principles of European Tort Law each contain a number of provisions concerning damages. Art. 10:101 of the latter e.g. says: "Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages serve also the aim of preventing harm." They are all based on the fundamental principle of full compensation (*restitutio in integrum*).

2. Development

3 The *acquis* is underdeveloped as far as the assessment of damages is concerned. Yet, the few sources allow a generalisation in the sense expressed by the present Article.

3. Political Issues

4 The general principle that damages should compensate for the whole loss is widely accepted. Nonetheless, it could be argued that a reduction clause should limit damages to a measure that is proportionate to the degree of fault of the debtor. However, neither the present *acquis* nor the traditions of the EU Member States provide such a solution.
It could be more doubtful whether non-pecuniary losses should be compensable in the field of contract law. But where the purpose of the obligation also includes the protection of non-pecuniary interests, infringement thereof should also be compensated.

B. Commentary

1. Meaning and purpose

The Article articulates the compensatory aim of damages, namely to reinstate the aggrieved person, as far as money can do, to the state it would have been in had the obligation been correctly fulfilled (principle of *restitutio in integrum*). The provision details further which kinds of losses are to be compensated. It clarifies that damages must not only compensate an ensued damage (*damnum emergens*) but also lost profits (*lucrum cessans*) as well as costs reasonably incurred to enforce the infringed obligation and, where appropriate, non-pecuniary losses. The compensation principle of the Article also gives some guidance on the assessment of damages which is generally a money payment and has to make good the entire loss. 5

2. Context

The provision is part of the damages section of Chapter 8 and supplements the basic damages norm of Art. 8:401 by specifying how the amount of damages is to be assessed. 6

3. Explanation

a) Aim of compensation

According to this Article the general aim and function of damages is compensation. Damages shall reinstate the creditor as far as possible to the state which would have existed had the contractual or pre-contractual obligation been performed correctly. Here shall be referred to Art. 4 (7) Package Travel Directive and also to Art. 17 (3) Commercial Agents Directive ("The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal."). As far as the mentioned EU instruments concern damages such as the Regulation on Air Carrier Liability and the Package Travel Directive – but also the Product Liability Directive – they follow the maxim that damages are only due if the creditor suffered a loss which had been caused by the other party's violation of an obligation. As already indicated this is also the basic principle of the CISG and in other sets of international Principles. 7

Damages therefore require a loss and have to compensate the entire loss caused by the breach of the obligation. At the same time nothing more than the loss has to be made good. By *argumentum e contrario* it has to be inferred 8

that damages shall not enrich the aggrieved party. The formulated principle does not exclude nominal damages (cf. *ECJ* C-34/87 *Culin ./. Commission* [1990] ECR I-225); however, it does not allow for punitive damages which place a money sanction on the debtor which is not related to the extent of the loss of the aggrieved person but to the character of the conduct of the debtor. None of the Regulations and Directives mentioned above, which provide for damages, grant punitive or other non-compensatory damages. Even the penalty available under the Denied Boarding Regulation aims mainly at the compensation of the discomfort and possible costs of passengers whose flights were cancelled or overbooked.

As a rule, compensation is achieved by a money payment.

b) General measure of damages

9 The general measure of damages is the amount necessary to reinstate the aggrieved person to the position without breach (Art. 8:402 (1)). The aggrieved person is entitled to what he could expect under the contract and this expectation interest has to be compensated. Though not explicitly stated by the Package Travel Directive and the Commercial Agents Directive this principle is nonetheless to be inferred from these Directives by necessary implication (See Art. 4 (7) Package Travel Directive and Art. 17 (3) Commercial Agents Directive).

The amount of damages need not only compensate any emerging loss but also a sufficiently likely gain of which the aggrieved person was deprived (Art. 8:402 (2)). Where, however, the breach of the obligation resulted in damage to the integrity of the aggrieved party's person or property then this integrity interest also has to be compensated (As an example cf. the decision of the *ECJ* in *Leitner ./. TUI*). In case of personal injury this is particularly the costs required for recovery, but also includes lost earnings. In case of damage to property it is regularly the costs for repair or for a substitute. In appropriate cases the compensation principle may also require that the loss of use has to be compensated.

10 Art. 8:402 (3) states further that damages also include costs for the enforcement of an obligation. This covers in particular costs for legal advice etc; however subject to the condition that these costs were reasonable i.e. that the enforcement costs were necessary and that their amount complied with the generally usual amount. But as far as costs for legal proceedings are regulated by specific legislation these rules prevail.

The Article does not explicitly define the yardstick according to which in- 11
fringed interests, in particular mere economic interests, are to be assessed in money terms. The compensation principle has, however, the consequence that generally that a sum of money is owed which is necessary to provide an identical good on the market in order to reinstate the aggrieved person. The regular measure of damages is therefore the market value of the infringed position.

c) Pecuniary and non-pecuniary damage

Art. 8.402 (4) specifically addresses non-pecuniary losses: "where the pur- 12
pose of the obligation includes the protection or satisfaction of non-pecuniary interests" non-pecuniary losses must also be compensated. Thus, the nature of the obligation must allow and require that damages for immaterial harm are granted, for instance, if the non-performance of a debtor's duty caused bodily harm combined with pain and suffering to the aggrieved person. In most cases the loss caused by a breach of contract or of a pre-contractual duty will, however, be of a pecuniary nature, namely a diminution of the aggrieved person's patrimony either because this person lost profits or because its tangible and intangible property rights were damaged or destroyed or because this person had to spend money for the recovery of the damage.

But as the *ECJ* held in the *Leitner ./. TUI* decision (C-168/00, ECR 2002, 13
I-2631) in appropriate cases non-pecuniary damage like pain and suffering has to also be compensated. In order to be compensable this kind of damage must be covered by the protective scope of the contract; the contract must intend to prevent such loss. A package tour contract during whose performance a protected person is injured, such as in *Leitner ./. TUI*, is a good example of a contract which intends to prevent discomfort or injury to the traveller.

4. Example

A enters into a package tour contract for himself and his family with tour 14
organiser B. A's daughter is infected with salmonella by food served there in the hotel booked by B. B cannot prove that the salmonella infection was beyond B's control and is therefore liable for the damage. The amount of damages includes cost of medical treatment but also reasonable compensation for pain and suffering and loss of enjoyment of the holiday.

Article 8:403: Contributory negligence and mitigation

Damages are reduced or excluded to the extent that the creditor wilfully or negligently contributed to the effects of the non-performance or could have reduced the loss by taking reasonable steps.

A. Foundation in the *Acquis*

1. Sources

1 Several EU Regulations and Directives recognise that the creditor's contribution to the damage reduces or even excludes this person's claim for damages. This is the case with the Regulation on Air Carrier Liability (Art. 3 (3)), the Package Travel Directive (Art. 5 (2) first indent.), the Cross-border Credit Transfer Directive (Art. 6 (3)) and the Product Liability Directive (Art. 8 (2)). Moreover, the *ECJ* has applied the principle of contributory negligence in order to reduce the claim of an injured party (see Case C-308/87 *Grifoni II* [1990] ECR I-1203; though in this case Italian law was agreed as applicable).

Equally, Artt. 77, 80 CISG, Artt. 9:504 and 9:505 of the Lando Principles and the Artt. 7.4.7 and 7.4.8 UNIDROIT Principles provide that contributory negligence of the claimant or its failure to mitigate the damage afterwards may reduce or exclude the right to damages. The same rule is recognised by the Principles of European Tort Law (Art. 8:101).

2. Development

2 The principle that contributory negligence may reduce or even exclude a claim is widely accepted and belongs to those principles which are long since part of the *acquis*.

3. Political Issues

3 The recognition of contributory negligence is mainly based on the policy argument that a creditor cannot claim full damages for a loss which the creditor him- or herself contributed to and which he or she could have avoided or reduced.

The formulations by which the present *acquis* expresses the principle of contributory negligence are not very coherent (see also the comment to

Art. 8:102 ACQP). The Package Travel Directive and the Cross-border Credit Transfer Directive use the expression that failed performance must be "attributable" to the creditor (cf. Art. 5 (2) first indent Package Travel Directive and Art. 6 (3) Cross-border Credit Transfer Directive). The Air Carrier Liability Regulation requires in Art. 3 (3) that the damage is "caused by, or contributed to by, negligence of the injured or deceased passenger." Art. 8 (2) of the Product Liability Directive partly or wholly relieves the producer from liability where "the damage is caused both by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible." But despite the differing formulations the underlying general principle is clear and can be expressed as formulated by Art. 8:403 ACQP.

The coherency of the *acquis* may be also doubted insofar as Art. 6 (3) Cross-border Credit Transfer Directive excludes any compensation in case a delay is attributable to the creditor while the other instruments cited allow a reduction or exclusion of damages depending on the circumstances. The inconsistency can be removed if Art. 6 (3) Cross-border Credit Transfer Directive is understood to refer only to a delay exclusively attributable to the creditor. These rules can then be generalised in that an apportionment should be allowed according to the circumstances.

B. Commentary

1. Meaning and purpose

The Article states a widely accepted principle, namely that a creditor cannot claim damages insofar and to the extent that he neglected to avoid the creation of damage or to reduce the consequences after a damage occurred. The reduction or even exclusion of a damages claim because of contributory negligence or omitted mitigation requires, however, that the creditor neglected a duty in his own interest to beware his own goods and interests from damage. 4

2. Context

The provision is part of the damages section of Chapter 8 and specifies a qualification for damages claims. It is based on the more general principle that a creditor should not profit from own misdoings. Art. 8:403 must also be seen in conjunction with Art. 8:102. While Art. 8:403 addresses the phase and the creditor's duties when damage occurred Art. 8:102 expresses 5

the same idea for the phase of non-performance of an obligation which need not necessarily result in a loss.

3. Explanation

a) Contribution or mitigation

6 It does not matter whether the creditor's contributory negligence refers to the creation of the damage or to the later mitigation of its effects after the initial damage had already occurred. In both phases the creditor is obliged to avoid damage as far as this was reasonable. If the creditor neglected this duty this results in a reduction of the amount of damages to the extent to which the creditor could have avoided the damage.

In case of contributory negligence the amount of damages is to be reduced, even to nil in extreme cases. Generally, the liable party must adduce the facts which found the defence of contributory negligence or omitted mitigation.

b) Relevant factors

7 Thus far, the Regulations and Directives do not state which factors have to be taken into account for the eventual reduction or exclusion of the creditor's claim for damages. It is however necessary that the creditor has negligently violated the duty to protect his own goods and interests.

4. Example

8 A enters into a package tour contract for himself and his family with tour organiser B. In the hotel booked by B, A's daughter is infected with salmonella by food served there. Immediate treatment would have avoided a longer stay in hospital. However, A waited some days before having the daughter medically treated. B is liable for the damage (cost of medical treatment) to the extent immediate treatment would have caused.

Article 8:404: Delay in payment of money (grey letter rule from III.–3:708 DCFR)

(1) If payment of a sum of money is delayed, whether or not the non-performance is excused, the creditor is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.
(2) The creditor may in addition recover damages for any further loss.

Comment

There is insufficient basis in the *acquis* for formulating such a rule. The DCFR rule above is reproduced in order to show the context in which the *acquis* rules can operate. Please note that the words and expressions used in the rule above may be inconsistent with Acquis Group terminology.

Article 8:405: Interest in case of creditor's non-performance

The creditor is not entitled to interest to the extent that there has been non-performance of the creditor's reciprocal obligation.

A. Foundation in the *Acquis*

1. Sources

The *acquis* contains a similar rule in Art. 3 (1)(c)(i) of the Late Payment Directive according to which "the creditor shall be entitled to interest for late payment to the extent (...) that he has fulfilled his contractual and legal obligations (...)". 1

2. Development

The *acquis* deals with questions of interest rather extensively. The mentioned provision of the Late Payment Directive can be generalised. 2

3. Political Issues

3 It can be questioned whether a creditor shall be entitled to interest only if he fulfilled his own obligations. But the synallagma of contracts strongly favours this solution.

B. Commentary

1. Meaning and purpose

4 The Article restricts the creditor's right to interest. Under Art. 8:404 the debtor is obliged to pay interest irrespective whether or not the non-performance of his payment obligation is excused because in any case the debtor could use the money which he owed the creditor. The present Article excludes the creditor's right to interest if, and to the extent that, the creditor has not fulfilled the own reciprocal obligation.

2. Context

5 The Article prevails over Art. 8:406 which determines the time from which interest starts running. This latter provision must be read subject to Art. 8:405. Otherwise the present Article had almost no practical application.

3. Explanation

6 It is a consequence of the general maxim of good faith and fair dealing that the creditor can claim interest only if he himself has fulfilled his own corresponding obligation. If, for instance, the buyer withholds payment because delivery is still lacking (and if the buyer is neither obliged to pay in advance nor irrespective of delivery at a certain date) then it would offend the principle of good faith if the seller would nonetheless be entitled to interest from the date of the agreed delivery. But it has to be noted that the provision only refers to the creditor's reciprocal obligation. If the creditor does not fulfil an obligation which is entirely unrelated to the debtor's payment obligation then interest is due.

4. Example

7 Business A has sold a printing machine to business B. The date of delivery is 30 June, the date of payment 30 July. A delivers on October 31 and B pays

on November 15. A is not entitled to interest for the time between the contractual date of payment and the actual payment since A had not performed the own reciprocal obligation i.e. delivery. Due to Art. 8:405 the contract must be interpreted in such a way that B had a payment period of one month after delivery.

Article 8:406: Interest in commercial transactions

(1) If a business delays the payment of a price for goods and services without being excused under Art. 8:401, interest is due at the rate in para. (4), unless a higher interest is applicable.
(2) Interest at the rate specified in para. (4) starts to run
  (a) on the day which follows the date or the end of the period for payment provided in the contract, and otherwise
  (b) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or
  (c) 30 days after the receipt of the goods or services, it the date under (b) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.
(3) If conformity of goods or services to the contract is to be ascertained by way of acceptance or verification, the 30 day period under para. (2) (c) starts to run on the day of acceptance or verification.
(4) The interest rate for delayed payment ("the statutory rate") is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question ("the reference rate"), plus seven percentage points ("the margin"), unless otherwise specified in the contract. For the currency of a Member State which is not participating in the third stage of economic and monetary union, the reference rate is the equivalent rate set by its national central bank.
(5) The creditor may in addition recover damages for any further loss.

A. Foundation in the *Acquis*

1. Sources

EU rules on interest are to be found in Art. 3 Late Payment Directive (on the date from which interest is running and on the rate of interest) and in Art. 6 (1) and (2) Directive on Cross-border Credit Transfers (on the right to interest). The *ECJ* has recognised in several decisions, e.g. *Mulder a.o. ./. Council and Commission* (C-104/89 and C-37/90, ECR 1992, I-3061) and 1

New Europe Consulting Ltd. a.o. ./. Commission (T-231/97, ECR 1999, II-2403) that interest has to be paid on sums which are due. At least from the day of the judgment onwards, interest is due.

Also Artt. 78 and 84 (1) CISG, Art. 9:508 of the Lando Principles and Art. 7 (4) (9) of the UNIDROIT Principles contain provisions which permit interest if the payment of a sum of money is delayed.

2. Development

2 The provision follows the Late Payment Directive which details the obligation to pay interest between businesses if a payment has been delayed.

3. Political Issues

3 A policy issue is the question of whether or not interest should be owed if the debtor's delayed payment is excused by grounds beyond his or her control. Irrespective of any exoneration during delay the debtor is in possession of the money that should actually be in the hands of the creditor. For this reason, for instance, the CISG does not apply the exoneration provision to interest claims. On the contrary, it can likewise be argued that an exoneration to pay must also extend to the duty to pay interest. The *acquis* follows this latter rule.

B. Commentary

1. Meaning and purpose

4 The Article addresses the obligation to pay interest between businesses and specifies (for them) the general provision contained in Art. 8:404; which follows exactly the provisions of the Late Payment Directive. The interest duty under Art. 8:406 accrues only if the business is not excused from delayed payment by circumstances beyond its control. The present Article further details the date from which on the interest obligation starts to run, and it fixes the rate of interest.

2. Context

The Article is to be read in conjunction with Art. 8:405 and Art. 8:401. If the creditor itself does not perform his own reciprocal obligation then he cannot claim interest. Furthermore, the debtor is exonerated from the duty to pay interest if the delay is excused by circumstances beyond the debtor's control. Art. 8:406 (5) reserves the creditor's right to recover damages for any further loss under Art. 8:401. 5

3. Explanation

a) Right to interest

The right to interest amongst businesses accrues when the payment of a sum of money is delayed. The right accrues automatically without specified notice being necessary (see Art. 3 (1)(a) and (b) Late Payment Directive). The ground for the delay is generally irrelevant. The right to interest does, however, not accrue if the debtor can prove that he is not responsible for the delay. 6

b) Relevant date

Para. (2) – the wording of which is taken from Art. 3 Late Payment Directive – fixes the regular date from which interest starts running for transactions between commercial parties: first, on the agreed date; otherwise 30 days after the receipt of the goods or services or, if later, 30 days after receipt of the invoice. Para. (3) prolongs this date where goods or services have to first be ascertained in a certain way. 7

c) Relevant rate

Para. (4) fixes the relevant rate of interest in accordance with Art. 3 (1)(d) Late Payment Directive if the parties to the contract have not agreed on another rate of interest. 8

d) Further damage

Interest is a means to fix in a rather abstract way the damage caused by delayed payment. Since the concrete damage of the creditor may be higher then (5) provides that this party may also recover further damage. 9

4. Example

10 Business A has sold a truck to business B for € 100.000. Neither a delivery date nor a payment date was agreed upon. The truck was delivered on 5 May. A sent an invoice which B received on 17 July. B pays on 30 October. On the same day the money is in A's bank account. B is obliged according to Art. 8:406 (2)(b) to pay interest from 30 days after the date when he received the invoice (the earlier receipt of the truck does not matter). Interest therefore runs from 17 August until 29 October. The rate of interest is to be determined according to Art. 8:406 (4). If A had to take credit at a higher interest rate or had other losses through the delay A is still entitled to recover that damages for that loss (Art. 8:406 (5)).

Article 8:407: Unfair clauses relating to interest

(1) A clause whereby a business pays interest from a date later than that specified in Art. 8:406 para. (2)(c) and para. (3), or at a rate lower than that specified in Art. 8:406 para. (4), is not binding insofar as this would be grossly unfair to the creditor, taking into account all circumstances, including good commercial practice and the nature of the goods or services.
(2) A clause whereby a debtor is allowed to pay the price for goods or services later than the time when interest starts to run under Art. 8:406 para. (2)(b) and (c) and para. (3) does not deprive the creditor of interest to the extent that this would be grossly unfair, taking into account all circumstances, including good commercial practice and the nature of the goods or services.

A. Foundation in the *Acquis*

1. Sources

1 The Article is based on Art. 3 (3) Late Payment Directive. That provision allows the option either to invalidate unfair clauses on interest or deferred payment or, to grant a claim for damages instead. The present provision opts for the first alternative. Neither the CISG nor the Lando Principles or the UNIDROIT Principles contain a comparable rule.

2. Development

The provision is part of the EU strategy to improve the situation of small and medium-sized enterprises for which late payment is a particular problem and burden often threatening their existence (see also Recital no. 1 and 7 Late Payment Directive). The cross-border trade and the proper functioning of the single market is also regarded as being impaired by different payment rules and practices (recital no. 9 Late Payment Directive). 2

3. Political Issues

The Late Payment Directive necessitates to choose between the option to either invalidate clauses inconsistent with the Directive, or to award damages where inconsistent clauses are used. A policy choice could also combine both approaches by first invalidating such clause and entitle the creditor in addition to damages with respect to any further loss caused through late payment. This solution has been adopted by the Acquis Principles. 3

B. Commentary

1. Meaning and purpose

The Article invalidates certain clauses concerning interest and late payment between businesses when these clauses are grossly unfair to the creditor. The provision intends to "prohibit abuse of freedom of contract to the disadvantage of the creditor" (see verbally Recital no. 19 Late Payment Directive which justifies the respective provision of that Directive). 4

2. Context

The provision belongs to the Articles on interest (Art. 8:405-8:407) which in essence intend to discourage late payment. The Article does not preclude a claim for damages if the use of unfair interest terms should have caused any damage to the creditor. 5

3. Explanation

a) Deviation from prescribed interest parameters

6 Art. 8:407 (1) invalidates a clause under which the date or rate of interest deviates from the legally fixed standard if in the light of all the circumstances the clause is grossly unfair to the creditor. The term 'clause' does not require a standard contract term; individually negotiated clauses are also covered Art. 3 (3) Late Payment Directive uses the notion "agreement" and thus comprises also individually negotiated terms. However, the purpose of the provision requires that the clause must be proposed by, and agreed upon on the initiative of, the debtor. If the creditor voluntarily proposed the clause it cannot be regarded as grossly unfair to him.

7 Whether a clause is grossly unfair depends on all the circumstances and must be objectively assessed with respect also to good commercial practice (e.g. the usual date and rate of interest in the specific branch) and the nature of the goods or services. It has also to be taken into account whether the debtor has any objective reason to deviate from the prescribed interest parameters (see explicitly Art. 3 (3) Late Payment Directive).

b) Extension of payment date

8 Art. 8:407 (2) orders that the creditor does not lose his entitlement to interest if a clause extends the time for payment over the period from which interest would normally start running and if such extension is grossly unfair to the creditor. The question of gross unfairness has to be answered in the same way as under (1).

c) Consequences

9 If a clause is grossly unfair it is unenforceable (Art. 3 (3) Late Payment Directive). The debtor cannot rely on it. Instead, the legally prescribed terms apply, which can also be found explicitly in Art. 3 (3) Late Payment Directive. This rule however, allows that the national courts may determine differing fair conditions.

4. Example

Business A (seller) and business B (buyer) have entered into a contract on 10
the sale of computer hardware. B's standard terms have been validly incorporated into the contract. The standard terms contain the following clause: "In case of delayed payment interest starts running only if the delivered hardware had worked correctly for a period of twelve months." The clause must be interpreted *contra proferentem* (Art. 6:203 (1)). It must therefore be read as meaning that the contractual date at which interest starts running is one year after delivery. A further requirement is that the delivered good fully functions.. This clause drastically deviates from the normal date when interest begins to run. It must be regarded as grossly unfair and irreconcilable with good commercial practices since it excludes an effective sanction for delayed payment. In fact, if valid, the clause would encourage the buyer to delay payment for a whole year. The buyer's/debtor's interest to ensure that the purchased good conforms to the contract would be one-sidedly preferred at the expense of the seller/creditor.

Table of Cases

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