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The Development of European Private Law and the European Commission's Action Plan on Contract Law^{*2}

1. Introduction

My purpose in this paper is to provide a brief overview of developments in European contract law and to introduce the work of some of the groups involved. By 'European contract law' I do not mean the 'hard law' of the EC directives or regulations but the work that is being done by groups in comparative study of the various systems and the development of 'soft law' in the form of statements of common principles underlying the various laws of contract of the member states. In particular, I will speak about the Commission on European Contract Law, which was led by Professor O. Lando of Copenhagen, and its successor, the Study Group on a European Civil Code (SGECC)^{*3}, which is led by Professor C. von Bar of Osnabrück. First, I will give an overview of what has been or is being done, then I will explain the uses that we think may be made of the work of the Lando and von Bar groups under the European Commission's Action Plan on European Contract law.

¹ The views expressed are purely personal.

² This paper is based on a lecture given at a seminar on the future of European contract law, held in Helsinki in June 2003 (see Lakimies 7–8 (2003), pp. 1119–1133) and at the Society of Legal Scholars Conference on European Contract Law in Sheffield (November 2004, unpublished).

³ I am a member of the steering and co-ordinating committees, and also of the Drafting Group.

2. The Principles of European Contract Law

Many of you may have seen the Principles of European Contract Law produced by the Commission on European Contract Law led by Professor Lando.⁴ These are often called the PECL or, by everyone except Lando himself, the Lando Principles. The Lando Principles are in the form of a series of articles, accompanied by a commentary explaining how they relate to each other and the principles as a whole, to give the reader help in understanding them. There are also notes that explain how each article relates to the various national laws, with references to primary or secondary sources in each national system.⁵

Essentially, the project was to produce a statement of the principles that the group thinks underlie the private law of all the individual member states of the EU. I will return to the purpose of the principles after I have described the SGECC.

3. The Study Group on a European Civil Code

Professor von Bar was a member of the Lando group, and his project grew out of it. Its aim is to do what the PECL have done for general contract law for, more or less, the rest of private law.

The SGECC comprises several teams. Each team is led by a distinguished professor. Most consist of a team leader and a number of young researchers — usually students who are at the same time working on their PhDs — who do much of the comparative research. The teams are based in universities in different countries. In Germany (under Professor C. von Bar in Osnabrück) there are teams working on torts, unjust enrichment, and *negotiorum gestio* ('benevolent intervention') and (under Professor U. Drobnig at the Max-Planck-Institut in Hamburg) on personal security and security of movable property. In the Netherlands, there are teams working on sales (under Professor E. Hondius in Utrecht); service contracts (under Professor J. Barendrecht in Tilburg); and long-term contracts such as those of agency, distribution, and franchising (under Professor M. Hesselink in Amsterdam). More recently, other teams have begun work: one on the transfer of property in movables (under professors B. Lurger in Graz and J. Rainer in Salzburg); one on rental of moveable property (led by Professor K. Lilleholt in Bergen)⁶; and one on trusts (headed by Dr. Swan at Osnabrück).⁷

The Lando group has been subsumed into this larger study group, and an additional team has commenced revision of the PECL to take care of issues that have arisen both in the work on specific contracts and more generally.

4. Other groups

What other groups are there, and what are they doing? I am not able to give an account of all of them, but it may be of interest to outline the work of those with which I am most familiar.

A number of groups apart from the SGECC are working on restatements of the common principles of European law. The works will have a roughly similar format — statements of principles in the form of articles. These groups include:

- the Academy of European Private Lawyers (Gandolfi group), which has produced a code of general contract law⁸;
- the EC group on tort and insurance law (sometimes called the Spier group, as Professor Jaap Spier was a founding member)⁹; and
- a team, established by the late Professor F. Reichert-Facilides and now chaired by Professor Heiss, working on insurance contracts.¹⁰

⁴ See Principles of European Contract Law, Parts I and II. O. Lando, H. Beale (eds.). Kluwer 2000; Principles of European Contract Law, Part III. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Kluwer 2003.

⁵ For further information, see the Lando group's Web site: http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html.

⁶ See <http://www.sgecc.net/>.

⁷ See <http://www.elsi.uos.de/privatelaw>.

⁸ The draft proposal for a body of general European contract law was published in G. Gandolfi (ed.). Code Européen des Contrats – Avant-projet. Giuffrè, Milan 2001. See also R. Schulze, R. Zimmermann (eds.). Basistexte zum Europäischen Privatrecht. 2nd ed. Baden-Baden 2002.

⁹ See <http://civil.udg.es/tort/>.

¹⁰ See <http://www2.uibk.ac.at/zivilrecht/restatement/>.

Also working in part on statements of principles, but taking a slightly different line, is the European Research Group on Existing EC Private Law (*Acquis* Group).^{*11} This group is working specifically on the principles and policies that underlie the existing *acquis communautaire*. There is a second group based in Turin, looking at terminology in EC contract law.^{*12}

Then there are a number of groups that take other approaches. Three will be well known to this audience. The Common Core of European Private Law (or Trento) Project looks at how typical cases would be resolved in the various national systems.^{*13} The Leuven Centre for a Common Law of Europe is producing the Casebooks on the Common Law of Europe series, which aims to present what is common to the various national laws and is found in the *acquis* to a student audience.^{*14} The Society of European Contract Law organises conferences on the general theme of European contract law and publishes the conference papers.^{*15} Many of the papers take an interdisciplinary approach — e.g., employing economic analysis of law.

There are, of course, a number of well-established comparative law institutions that have shown some interest in European contract law. I would mention in particular the Association Henri Capitant^{*16} and the Société de Législation Comparée.

In addition, a number of new groups have been established in the last few months, of particular note being the Research Group on the Economic Assessment of Contract Law Rules, organised from Tilburg, and the Study Group on Social Justice in European Law.^{*17}

5. A European Civil Code?

The name of the study group led by Professor von Bar suggests that its aim is no less than to produce a European civil code, starting with the law of obligations. Is this really what it is about? Was the aim of the Commission on European Contract Law to produce a single European law of contract?

To be honest, views differ. To some people, the case for a European code is obvious. First, having different legal systems within the EU hinders trade within the internal market and is inconvenient. We have managed to achieve technical harmonisation in, for example, the voltages for electrical appliances; we should do the same for our laws. Secondly, the continued existence of different national legal orders perpetuates the national barriers that the EU is seeking to overcome. For some, a European civil code would serve the same purpose of aiding political integration that civil codes have so often served in the past.

Thus, for years there have been strong voices in favour of a European code, or at least a European code of contract law. Professor Lando himself envisaged as long ago as the late '70s that his Principles of European Contract Law might form the basis of a harmonising code.^{*18} In 1989, the European Parliament passed a resolution requesting that a start be made on the preparatory work for drawing up a European code of private law.^{*19} It is clear that the body contemplated unification of the different private laws that are important for the development of a single market.

There are many arguments both for and against a European civil code. Even within the Lando group, there were many who were at best ambivalent about the notion of a European code of contract law that would replace the various individual national laws, or even harmonise them by acting as a form of directive that member states would have to implement by changing the substance of their laws. Quite apart from the difficulty of seeing any legal base for a code in the existing treaties, especially in light of the decision of the

¹¹ See <http://www.acquis-group.org/>.

¹² See <http://www.dsg.unito.it/ut/>.

¹³ See, e.g., R. Zimmermann, S. Whittaker (eds.). *Good Faith in European Contract Law*. Cambridge: CUP 2000. See <http://www.jus.unitn.it/dsg/common-core/home.html>.

¹⁴ See, e.g., *Tort Law* (the contributions by, e.g., W. van Gerven, J. Lever, and P. Larouche). Hart Publishing, Oxford 2000; *Contract*. H. Beale, A. Hartkamp, H. Kötz, D. Tallon (eds.). Oxford: Hart Publishing 2002. See <http://www.law.kuleuven.ac.be/casebook/>.

¹⁵ For example, S. Grundmann, J. Stuyck (eds.). *An Academic Green Paper on European Contract Law*. Kluwer 2002. See <http://www.secola.org/>.

¹⁶ See <http://membres.lycos.fr/HenriCapitant/sommaire.htm>.

¹⁷ See their manifesto 'Social Justice in European Contract Law: A Manifesto'. — *European Law Journal*, November 2004 (10) 6, pp. 653–674. There is not space here to consider the challenge the group makes to the democratic legitimacy of the CFR project. I do not think the criticism is valid so long as the CFR remains merely a 'toolbox' that (more or less) democratically elected or appointed legislators will use to draft legislation.

¹⁸ See the preface to Parts I and II, at p. xi; and the introduction, at p. xxiv.

¹⁹ Resolution of 26 May 1989, OJ C 158/401 of 26.06.1989, repeated in 1994 (Resolution of 6 May 1994, OJ C 205(519) of 25.07.1994); see PECL Parts I and II, Introduction, p. xxiii.

European Court of Justice in the 'Tobacco Advertising' case²⁰, many members of the Commission thought that the real value of European principles lay in less ambitious aims. Moreover, whatever the views in the European Parliament may be, there is no sign in recent European Commission documents²¹ that unification or even substantive harmonisation is anywhere on their agenda. So — and because I am one of the doubters — I want to concentrate in this paper on the other uses to which the Lando Principles and the work of the SGECC may be put.

6. The value of statements of principles

First, there is the question of contracts between parties in different jurisdictions. Private international law allows the parties, broadly speaking, to choose which law shall govern their contract and lays down rules to determine which law shall apply if the parties have not made a choice. But, as Professor Lando so clearly saw, that is only a partial solution to the problem. One of the parties will have to find out about a foreign legal system, and the same party may suspect that the other party will derive some advantage from working under its 'own' law. An alternative is to use a third national system; for example, English law has been adopted very widely as the law governing international transactions between parties who have no other connection with England. If both parties are in fact familiar with English law as well as with their own law, that may well be a good solution; but one or even both of them may not have that familiarity.

Some parties seek to avoid this problem by agreeing that their contract shall be governed by the *lex mercatoria* or 'internationally accepted principles of commercial law'. The first question is whether such a provision is valid. A number of legal systems give such a choice partial recognition, in that they permit the parties to have their disputes resolved by arbitration in accordance with such principles, even though, technically, the arbitration takes place under a national law (and therefore subject to its mandatory rules). But there was until recently also a second problem: what is the modern *lex mercatoria*? What principles of commercial law are internationally accepted? It was very difficult to say until a modern statement of these principles was provided, for use within Europe, by the PECL and — more or less simultaneously and in very similar terms but obviously intended for worldwide use — the UNIDROIT Principles of International Commercial Contracts.²²

An even more obvious solution is for the parties to specify a particular internationally agreed set of rules, preferably one that represents a balance between the different systems, as the law to govern their contract. The prime example is 1980's Vienna Convention for International Sale of Goods (CISG), but that, of course, applies only to sales of goods and has not been ratified by some countries (including my own, though I have been told by those who should know that a decision in principle to ratify it was reached a few years ago²³ and a fresh consultation on the question is under way). But there were no rules for other kinds of contracts until the PECL and UNIDROIT Principles were produced; and in any event they cannot replace national law completely.

The PECL may have other uses in international contracts, even where the contract in question is governed by one or the other party's national law. They may serve to increase our understanding of each other's legal systems and as a translation tool. Let me explain what I mean.

The work of the Lando group has shown that, if a functional approach is taken, in the sense that we look not at the language or concepts used but at the actual outcomes in concrete cases, in the field of general contract law there are actually very few major differences of substance between the legal systems in the European Union — in other words, under most systems, the results of the majority of concrete cases will be broadly the same. The problem is that the concepts and language used by the various laws of contract across Europe are very different from each other. However, the Commission found it possible to set out basic principles, which, by and large, seem not only to be acceptable to lawyers in all member states but also to be readily understandable by them. The 'Comments' that accompany the articles, and more particularly the comparative 'Notes', mean that these principles can be used as a kind of tool for translation from one system to another, or a search engine to enable one to find out whether a rule in one system has an equivalent in another. As one of my Dutch colleagues put it, we envisage a day when the principles will make it possible for a lawyer sitting at her computer terminal to find out what the relevant answer is to a point on contract law

²⁰ *Germany v. Council, Parliament, and Commission*, Case C-376/98. – ECR 2000, I-8419. For a very full discussion of the implications of this case in terms of the legal basis, see S. Weatherill. The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality. – *Journal of Consumer Policy* 2001 (24), pp. 339–399.

²¹ See further below.

²² Principles of International Commercial Contracts (UNIDROIT, Rome 1994).

²³ A bill was prepared for introduction in the House of Lords, but the unfortunate illness of its sponsor, Lord Clinton Davies, led to its abandonment.

in every legal system in the European Union. She will be able to identify how the principles deal with the particular point in which she is interested and then, through the Notes to the relevant article, to find the equivalent rule in each system listed.

Finally, common principles can also provide shared terminology and concepts for European Community legislation. At present, it is often very difficult to interpret directives. To take a simple and well-known example, if a directive calls for a consumer to be able to recover 'damages', what does that mean? In the *Simone Leitner* case²⁴, the European Court of Justice had to decide whether the damages to which a consumer was entitled under the provisions of the Package Travel Directive must include compensation for non-pecuniary loss suffered when the holiday was not as promised. This type of damages is recognised by many national laws but was not recognised under Austrian law.

I suspect that further sectoral harmonisation measures will be adopted by the European Union in years to come. There remain quite a few areas in which differences between national laws are still thought to create some hindrance to trade within the internal market. By no means all of them relate to consumer contracts. So to provide a shared legal language for the drafting of EU legislation is important.

7. Non-contractual liability

These arguments can be used to justify work on general principles of contract law and even on specific contracts, since the parties are, more or less, free to adopt whatever rules they wish to govern their contract. But the parties cannot choose which law of tort should apply. Surely, it might be argued, there is no point in working on tort unless you are in favour of unification of the law of tort across Europe. I disagree, for a number of reasons.

First, I think that sooner or later the various legal systems are going to have to reclassify many of the obligations recognised under modern law. In some arenas, this is already beginning to happen. For example, some still refer to *culpa in contrahendo* as a kind of non-contractual liability, but it is one that is dealt with as part of the law of contract. Similarly, in this country it is slowly being recognised that liability for what we call negligent misstatement²⁵ has as many analogies with contract as it does with tort — and many cases that, because of our doctrine of privity of contract²⁶, we have had to deal with as cases in tort would in other countries be treated as cases of contract. I think that the parties should be free to choose which legal regime is to govern liability for some forms of *culpa in contrahendo* or negligent misstatement. The same is true for the law governing liability for defects in property when the property has been sold by the original contracting party to the claimant, and of many forms of liability in restitution.

Secondly, it is obvious that parties based in one country who are thinking of carrying out operations in another may become subject to tort liability in the country in which they are operating. The simplest example is a construction project, where causing injuries to third parties and interference with their property are very real risks. While actions in tort are normally brought in the jurisdiction where the tort has occurred, and thus will involve local lawyers, that will not necessarily be the case in all situations, and, in any event, the construction company will need to know what legal risk it is running when it prepares its bid and administers the contract. It will usually find it cheaper and more convenient to use lawyers in its own country to provide advice on the various matters involved, if they are able to do so. So the need for 'translation tools' applies equally to non-contractual liability.

Thirdly, any directive that deals with liability in contractual situations may have to deal also with issues of non-contractual liability. It is my guess that gradually the European Commission's efforts to harmonise specific sectors will move further beyond consumer protection measures and will encompass business-to-business relations, and that this will lead to moves to harmonise some areas of non-contractual liability. Liability to subsequent owners for defects in immovable property is one possible example.

²⁴ Case C-168/00, *Simone Leitner v. TUI Deutschland*. – ECR 2002, I-2631.

²⁵ See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* – AC 1964, 465, House of Lords.

²⁶ Recently modified, but not abolished, by the Contracts (Rights of Third Parties) Act 1999.

8. The European Commission: the Communication on European Contract Law

What is the position of the European Commission on these questions of unification, harmonisation, and the drawing up of 'principles' of European contract law? It has varied over time. The European Commission gave financial support to the early work of the Commission on European Contract Law, but this was later withdrawn, ostensibly on the ground that the principle of subsidiarity prevented it. Now the European Commission appears once more to be taking the matter seriously. On 11 July 2001, it published a 'Communication from the Commission to the Council and the European Parliament', effectively a green paper for discussion, on European contract law.^{*27} In essence, this paper did two things. First, it asked for evidence as to whether differences between legal systems genuinely cause barriers to trade within the single market. Secondly, it set out four options for future EC initiatives. These were^{*28}:

- no EC action;
- promote the development of common contract law principles leading to more convergence of national laws;
- improve the quality of legislation already in place; and
- adopt new comprehensive legislation at EC level.

In fact, the options were not, strictly speaking, alternatives; for example, it is possible to adopt options II and III both. Moreover, Option IV includes several sub-options, as the paper contemplated (without giving any detail) a choice of instrument. The choices ranged from, at one extreme, a regulation, which I assume would simply impose a unified system of contract law upon member states, or a directive, which would give member states a certain degree of flexibility in adapting their law to the directive, to, at the other extreme, a recommendation, which would leave the member state free to follow the code only as far as it wished to do so.

The reactions to this communication were many and varied. First, on the question of whether differences between national laws hindered intra-Community trade, some took the view that this is definitely the case. Others said that differences in particular sectors did so. For example, the difference in mandatory requirements for insurance and other financial services make it difficult to sell these services across borders and, consequently, give an advantage to domestic companies over outsiders. However many denied that differences 'obstructed' trade between the member states. It is perhaps unfortunate that the paper used this term — some respondents seem to have interpreted this question as asking whether trade was actually prevented, which they denied. However, at the same time, some of them agreed that the need to find out about the law of another country might add to cost. That is surely a hindrance to trade.

As to the options, few thought that Option I, leaving things to the market, would suffice. Conversely, almost everyone seems to have been in favour of Option III, improving the quality of the *acquis*. Most were also in favour of Option II, the so-called restatement option. Some however, like our national government, remarked that, while they saw value in it, they did not regard greater convergence of national laws as an end in itself. Rather, they saw diversity as a virtue. Parties may have differing preferences and should retain the freedom to choose the law they wish to govern their contract.

Inevitably, Option IV attracted a great deal of comment, ranging from enthusiastic support to, in the case of the UK government, opposition to the option in any of its forms.

So what happens now? There was by no means consensus within EU organs. The Council of Ministers produced a rather low-key document^{*29} that principally emphasises the need to improve the coherence of the *acquis communautaire*. It also suggested that the Commission should look at whether differences in non-contractual liability and property law constitute barriers to the functioning of the internal market. The Commission subsequently arranged for such a study to be carried out.

In contrast, the European Parliament reacted by requesting a detailed action plan^{*30}, setting very ambitious deadlines:

- by the end of 2004: to compile a database, in all Community languages, of national legislation and case law in the field of contract law and to promote, on the basis of such a database, comparative law research and co-operation between interested parties, academics, and legal practitioners;

²⁷ COM (2001) 398 final. The paper is available on the Internet at http://europa.eu.int/comm/off/green/index_en.htm.

²⁸ See Communication, para. 4.

²⁹ <http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf>.

³⁰ COM (2001) 398 final, C5-0471/2001 – 2001/2187(COS). – OJ C 140 E, 13.06.2002, p. 538.

- in parallel to the above, by the end of 2004: on the basis of detailed expert advice, to put forward legislative proposals aimed at consolidation (for example, streamlining, simplification, and standardisation of legal concepts, as well as codification, extension, and abrogation) of the law;
- by the beginning of 2005: in co-operation with the European Community's Office for Official Publications, to publish the comparative analysis and common legal concepts and solutions in the appropriate form;
- from 2006: to enact European legislation implementing the common legal principles and terminology for cross-border or national contractual relations, with the possibility of abrogating contracts;
- at the beginning of 2008: to review the extent to which the common legal principles and uniform terminology in European law have proved their value in practice, with consideration of whether uniform European provisions should be laid down in respect thereof, so as to lead, in the longer term, to uniformity in contract law within the EU and as regards the laws of its member states; and
- from 2010: establishment and adoption of a body of rules on contract law in the European Union that takes account of the common legal concepts and solutions established under previous initiatives.

The Economic and Social Committee said it would prefer to see European contract law in the form of a regulation.³¹ This would not replace national laws, however. It would be a set of rules that the parties could choose to govern their contract in place of national law. It would contain consumer protection measures, since the Economic and Social Committee sees the new law as being particularly valuable to consumers and SMEs.

9. The Commission's action plan and *The Way Forward*

In the light of these various reactions, in January 2003 the European Commission produced its *Action Plan on a More Coherent European Contract Law*.³² The action plan called for comments on three proposed measures: increasing the coherence of the *acquis*; promoting the elaboration of EU-wide standard contract terms; and further examining whether there is a need for a measure that is not limited to particular sectors, such as an 'optional instrument'. In October 2004, the Commission published a further paper, *European Contract Law and the Revision of the Acquis: The Way Forward*³³, which confirms and develops in more detail its plans under each heading.

10. Improving the *acquis*: the Common Frame of Reference

Improving the coherence of the *acquis* was Option III of the 2001 communication. What is interesting is that the Commission is in effect combining this with Option II. Its principal proposal for improvement is to develop a common frame of reference (CFR), which should then be used by the Commission as a tool in both drafting new legislation and creating a review of the existing *acquis*.³⁴

This seems a very sensible reaction to the problems that were suggested or confirmed in the consultation process. However, the *Action Plan* was not very clear on some intriguing questions about the CFR. What will it look like? What will it cover? And how will it be produced?

On the question of what the CFR will look like, the *Action Plan* gave some broad hints that the CFR would not be just a set of definitions: the *Action Plan* seemed to envisage a statement of rules.³⁵ This seems to be confirmed by the *Way Forward* paper, which states:

³¹ ECOSOC INT/117 European contract law. – OJ C 241, 7.10.2002, p. 1.

³² COM (2003) final, OJ C 63/1.

³³ Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, 11 October 2004. This is available at http://europa.eu.int/eur-lex/de/com/cnc/de_cnc_month_2004_10.html.

³⁴ Action Plan para. 72.

³⁵ See, e.g., Action Plan paras. 62–63.

The structure envisaged for the CFR (an example of a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles may be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR.^{*36}

Annex I to *The Way Forward*, in which the Commission sets out a possible structure for the CFR, envisages three separate chapters — for principles, definitions, and model rules, respectively.

I am not quite sure what is intended by the various headings. 'Model rules' is clear enough, but how are 'Principles' different from 'Model rules', and what is to be included in the 'Definitions' in Chapter II?

On 'Principles' we can get some idea from Annex I, in which the Commission suggests the possible content of each chapter. As examples of the principle to be included in Chapter I of the CFR, the annex lists 'the principle of contractual freedom', 'the principle of the binding force of contract', and 'the principle of good faith'.^{*37} Thus, principles in this context are simply the most general provisions of contract law. The annex refers also to 'exceptions' qualifying such general principles, so that 'freedom of contract' is qualified by 'application of mandatory rules', 'in particular where a contract is concluded with a weaker party'.^{*38}

The scope of the 'Definitions' in Chapter II is rather less clear. The annex gives as examples:

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

Obviously, some brief definitions in the narrow sense would be needed, but in the PECL there is a very limited number of these.^{*39} There is no single definition of either damages or when a contract is concluded. The 'definitions' have to be derived from a series of articles^{*40}, and, to be honest, I think it would be hard to draft short definitions concerning such complex topics. Perhaps what is intended is the kind of broad statement that of itself carries no force but is merely a reference to other, more detailed, provisions. If this is right, then any difference from the PECL is largely one of drafting technique.

Thus, I think that in terms of its form, the core of the CFR is envisaged as being similar to the articles of the PECL — a set of principles that set out basic concepts and how they interrelate in the form of a series of rules.

I hope that the CFR will include not only rules, similar to the articles of the PECL, but also a commentary explaining the interrelationship of the rules and giving examples. Such commentaries can be enormously helpful in understanding the operation of the rules and are widely used in restatements, both national (as with the American Law Institute's 'Restatements') and international, as with the UNIDROIT Principles of International Commercial Contracts.^{*41} Even the UK Parliament is coming close to having a commentary on its legislation, in the form of the 'Explanatory Notes' that accompany bills. It would be a great shame if the CFR did not include comments on the rules.

In terms of content, the model rules that are envisaged by the annex to *The Way Forward* seem to be the equivalent of the rules of the PECL. Sections I and III–VII follow very closely the scheme of the PECL, not only parts I and II but also Part III. Part III deals with a number of topics that either are applicable not only to contract claims but other areas of law^{*42} or were omitted from the earlier work.^{*43} Annex I of *The Way Forward* includes most of the former but not the latter.

This suggests that the core of the CFR will be general principles of contract law, the infrastructure on which rules governing specific contracts are built. Indeed, that is just where a CFR is most needed, because it is in those general principles that we find the greatest divergences in concepts and terminology. However, *The Way Forward* contains additional items that are of considerable significance.

First, the paper envisages that the CFR will deal not only with general principles but with some specific contracts. Annex I lists sales and insurance contracts. The *Action Plan* had stated that service contracts as well should be covered.^{*44} It mentioned rules for areas in which we can expect further legislation — finan-

³⁶ Way Forward para. 3.1.3, p. 11.

³⁷ Way Forward Annex I, p. 14.

³⁸ Annex I, p. 14.

³⁹ See arts. 1:301–1:305.

⁴⁰ Conclusion of a contract, from arts. 2:101–2:211; damages, from arts. 9:501–9:510.

⁴¹ See now the 2004 edition.

⁴² Plurality of parties, assignment of claims, substitution of new debtor / transfer of contract, set-off, and prescription. The annex includes all but set-off.

⁴³ Illegality, conditions, and capitalisation of interest. The annex does not refer to these, save that 'interest' is mentioned in the remedies section without indication as to whether simple or compound interest is meant.

⁴⁴ Action Plan para. 63.

cial services and insurance — and also said that credit securities on movable goods and the law of unjust enrichment should be covered.^{*45} Whether the omission of these from *The Way Forward* represents a change of heart or merely a reluctance to appear overambitious I do not know.

Secondly, *The Way Forward* makes it clear that the primary purpose of the CFR is to help in the revision of the *acquis*, and it goes beyond the *Action Plan* in setting out a plan and a timetable for this revision. Most of the *acquis* deals with consumer contracts, and it is evident that the Commission intends that the CFR deal with specific issues relating to consumer contracts as well as lay down general rules that might apply to business-to-business contracts. The paper states:

A distinction between model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged.^{*46}

Thus, it seems that the rules may have to deal specifically with consumer contracts in general, as well as — I assume — consumer sales and consumer insurance. That will be quite a contrast to the PECL, which do not have specific consumer provisions. The point is made even clearer in Annex I. Section II of the model rules might deal with pre-contractual duties and, in particular, pre-contractual information obligations — phrases that to an English lawyer at least suggest consumer protection rules rather than rules for contracts in general. I will return to this issue later.

I think that the CFR needs to contain even more than rules dealing with consumer contracts, however. We have to remember that the CFR is not to be a set of binding rules. Rather, it is to provide definitions and concepts, and to be a model that legislators may apply or otherwise follow when drafting or revising Community instruments. The legislators will want to know why one approach or concept might be preferable to another. This might be for reasons of tradition — that the approach in question reflects the laws of the majority of member states or of the majority of the existing Community instruments that touch the topic. Here detailed notes on the derivation of the rules and a comparative evaluation would seem to be essential. In addition, I think the CFR should contain, or be accompanied by, a fairly full discussion of underlying policy — for example, concerning why a particular kind of safeguard for consumers is thought to be justified in one type of case but in another case to be an unnecessary restriction of freedom of contract (in other words, what justifies the particular exception to the ‘principle’ of freedom of contract). There may need to be some general discussion of competing policy approaches or philosophies of contract law in general, and of how a suitable balance between the competing approaches may be achieved.

As to how the CFR is to be produced, the *Action Plan* referred to the ongoing research process and stated explicitly that it did not wish to reinvent the wheel; further research projects should be undertaken only where ongoing research leaves a gap. Thus, it seems that the Commission intends to rely largely on the work of the various groups that are already in existence.

The Way Forward makes it clear, however, that it does not wish to rely on a wholly academic product. ‘Stakeholder participation’ is essential. The paper stated that the Commission will establish a network of stakeholder experts to engage with the academic researchers and that there will be regular workshops ‘to enable stakeholders to identify practical issues to be taken into account and give feedback’.^{*47} There will also be working groups composed of experts from member states.^{*48}

The *Action Plan* suggested that research funds will be made available to these groups via the Sixth Framework Programme, which specifically included a call for research in this area, and this is indeed happening. Funding has been given to the Joint Network on European Private Law, whose work Professor von Bar will describe in his paper.

Before I conclude, however, I will say a few words about three matters. First, how will the draft CFR be turned into the final product; secondly, if it is to be used to revise the *acquis*, how will it have to differ from the PECL; and, thirdly, what uses are to be made of the CFR, and what must it therefore contain?

⁴⁵ *Ibid.*

⁴⁶ Way Forward para. 3.1.3, p. 11.

⁴⁷ Way Forward para. 3.1.2, p. 10.

⁴⁸ *Ibid.*

11. From CoPecl to CFR

What is to happen after the network has submitted its 'draft CFR' to the Commission? The Commission plans to turn the researchers' draft into the CFR. How this will be achieved is not wholly clear, even after the *Way Forward* paper. I can envisage the input to the Commission, and I have said what I think the outcome will look like; however, the process of production will take place in what for the moment remains a mysterious black box. *The Way Forward* states that the EP, the Council, and the member states 'will be invited to examine the researchers' final report and the Commission's evaluation [...] Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work.'⁴⁹ This suggests that production of the CFR will involve a political process within the Community organs and member states. Whether that is desirable is a question to which I will return.

In the *Action Plan*, the Commission said that it will consult 'with stakeholders and other interested parties', in which it seemed to include industry, retail business, legal practitioners, and consumers.⁵⁰ *The Way Forward* states that after the 'political' process just mentioned, there will be a six-month consultation with stakeholders. This rather suggests that stakeholders will have input for the research efforts only via the workshops etc., before the CoPECL are delivered to the Commission, and the six-month consultation period at the end.

12. Differences from the PECL: general rules of consumer law

We have seen that the Commission wants and needs a CFR that will help it to revise and possibly extend the *acquis* of consumer legislation. Thus, it must either lay down rules on consumer protection that the legislator may wish to adopt or, as I have suggested, explain in what circumstances departure from the general rules of contract law may be justified and what type of consumer protection device is appropriate to each circumstance. This strikes me as quite a challenge.

Of course, much of the work of the *Acquis* Group, a leading partner in the Joint Network on European Private Law, is aimed at just this. The group is concerned to extract the principles (if any) that underlie the existing *acquis*, much of which is consumer law. However, the *acquis* does not deal with every issue of consumer protection, even as concerns the individual rights of consumers, and does not necessarily contain the correct answers, as the Commission's paper acknowledges.⁵¹ In particular, the Commission is interested in whether the 'minimum harmonisation' clauses of the directives allow the directives to achieve the goals of a high level of consumer protection and the elimination of market barriers.⁵² As will be apparent to those who have considered the impact of the draft Directive on Unfair Commercial Practices as a set of broad standards governing what is to be forbidden and its 'maximum harmonisation' clause, the abandonment of minimum harmonisation in any revised directive might bring a considerable diminution in consumer protection unless the replacement directive has quite tough requirements. Thus, the Commission may envisage moving from what might be called (not wholly accurately) a 'lowest common denominator' directive, one setting fairly low requirements but allowing member states to give consumers additional protection, to a genuinely high level of consumer protection. Obviously, that may go beyond anything in the existing *acquis*. The Commission is quite right to say that the model rules should draw not only on the *acquis* but on 'best solutions found in Member States' legal orders'.

The Commission on European Contract Law did not attempt to deal with consumer protection — indeed, it deliberately avoided issues of consumer law on the ground that these 'raise policy issues more appropriately determined by Community law and national legislation'.⁵³ The PECL are aimed at providing the 'infrastructure' of general rules on which rules for specific contracts and consumer contracts may be built, though in some cases they may be directly applicable to business-to-business or other non-consumer contracts because there is no more specific regulation. Nor to date has detailed analysis of national consumer protection regimes taken place in the discussion of the Co-ordinating Committee of SGECC. This is because the principal chapters that have been finalised are either on topics already regulated by EU directives (sales) or

⁴⁹ *Way Forward* para. 3.2.3, p. 12.

⁵⁰ *Action Plan* para. 65.

⁵¹ See the questions posed in *Way Forward* pp. 3–4.

⁵² *Way Forward* p. 3.

⁵³ PECL Parts I & II, Introduction, p. xxv.

on topics that primarily concern business-to-business contracts (long-term contracts). It therefore seems to me that work on general common principles of consumer protection beyond the *acquis* needs to be done by one of the Principle Drafting Groups.

13. The goals and contents of a Common Frame of Reference

13.1. Use as a toolbox

The CFR may have to differ from the PECL in other ways also, ways that reflect its purpose. What is required of the CFR as a 'toolbox' may differ from what is needed for its possible use as the basis for an optional instrument or even as a modern statement to be followed by legislators looking to update their contract law, in the way that the Lando group suggests.

To me the point of the CFR as a toolbox seems to be twofold. First, it should set out what the common principles of the current laws of the member states are. As I have argued earlier, for the most part the laws do achieve rather similar results; the problem is one of translation between differing terminology and conceptual structures. The issue is not to fix what European legislation should be but to provide an agreed language by which we can try to ensure that it achieves what is wanted in each system. But the CFR should not try to hide differences. True, it has to come up with a rule of some kind — a majority rule, for example. But the Notes should clearly explain when the rule stated does **not** represent the laws of some member states, so that the differences can be taken into account in drafting the relevant EU legislation. Equally, so far as possible, different traditions in applying principles such as good faith should be studied and explained openly, so that we may know of them.

Secondly, the CFR should by all means reflect what the researchers and stakeholders conclude is the 'best' of the national approaches to achieve a particular policy outcome — if there is an agreed policy and if it can be agreed that one technique of achieving it is clearly superior to others. However, I suspect that more usually there will be a range of policy outcomes as well as of techniques. I think that, for the purpose of using the CFR as a toolbox, the researchers should then content themselves with adopting that policy approach that seems to reflect the majority position, or perhaps 'the modern trend'. But whatever happens, the other policy approaches and other techniques should not be suppressed. On the contrary, they should be flagged very clearly in the Notes, and the choice discussed in the evaluative commentary. The aim of the CFR as a toolbox should not be to legislate; it should be to present the legislators with options.

The fact that stakeholders are taking part in the process does not show that the aim is different. It is true that practitioners and other stakeholders often have political aims; lawyers often argue for outcomes that they believe will suit their clients. For this reason, it will be important to ensure that the stakeholders are drawn from each side of any divide. I believe it is important that they be there, however, to ensure that issues of policy and social justice are flushed out into the open. It is even more important that the researchers who will be responsible for the CoPECL, and whoever at the Commission has the task of turning the CoPECL into the CFR, recognise policy issues for what they are and set out the arguments on each side. A failure to do that — for example, through the simple enunciation of a rule that in fact represents a contested policy choice — would not only be an academic failure; it would be an improper arrogation of decision-making powers.

I must confess that I am worried by the plan to make the approval of the CFR subject to some political consultation. At that stage, I think there may well be attempts to make policy choices — or at least, by fixing the terms of the CFR, to rule out some for the future. I also worry that what I believe could be, technically speaking, a very fine product will be ruined by last-minute alterations of a political nature. We cannot afford the sort of nonsensical insertions that were made in the Fundamental Charter of Rights: phrases that sound fine at the moment of proposition but are very uncertain in their legal effect — or devoid of any effect at all. And it should be clear from what I have said that I believe political input to be unnecessary at the stage of creating the CFR as a toolbox. The CFR will be only a kind of 'draughtsman's handbook'; the legislators will have absolute control over whatever goes into any new or revised instrument at the time it is passed.

13.2. The optional instrument

Were the CFR to be used as the basis for an optional instrument, the final result would have to be different again. Let me say a few words about the third proposal of the Commission, that we should continue to reflect on the need for an optional instrument that might be based on the CFR.

It is worth noting what is meant by an optional instrument. At least in informal discussion, some commentators on the Communication document of 2001 seemed to suggest that, as not all countries would agree to a European contract code to replace national laws, there might instead be a new treaty adopting an optional code, to which countries might adhere if they wished. In other words, the situation might be a bit like adoption of the common currency, with another two-speed Europe and, no doubt, with endless arguments as to which group is the tortoise and which the hare. But this is not what the Communication referred to explicitly^{*54}, nor what the *Action Plan* or *Way Forward* envisages. They speak of a set of contract rules that the parties might choose to govern their contract, rather as now parties in the countries that have ratified the CISG can choose to use it instead of one of their national laws. And if the optional instrument were to be adopted via an international or Europe-wide convention, then, like the CISG, it could replace the national system of law.

In fact, that may not be necessary. The European Commission has circulated a separate consultation paper on reform of the Rome Convention^{*55}, and one of its questions is whether said convention should be amended to allow the parties to adopt a non-national system, such as the PECL or the UNIDROIT Principles, in place of a national law.^{*56}

I believe that this should be permitted, though, obviously, careful thought will need to be given to which sets of principles should be permitted. I would not want a situation in which 'principles' drawn up by, for example, a business association representing only the interests of its members could be used in place of national law. Some have raised other objections — that the rules are likely to be incomplete, the issue of what is to happen if one party is in a signatory country but not the other, and so on. But I do not see that these objections have any more force than they do in relation to the CISG, and the CISG seems to be working reasonably well.

There are more questions about the optional instrument, however. One is whether it should be a system that the parties must opt in to; or one that will apply if they do not opt out, as with the CISG where international sales are concerned. The answer must be linked to the second major question: should it apply only to cross-border transactions within the EU or also to domestic transactions?

I think these questions are difficult. My initial reaction is to say that I think it would be acceptable to permit parties to choose the optional instrument even for domestic transactions if they so wish — but that they should have to make a positive choice, rather than be bound by it unless they opt out. The latter would pose too large a threat to national laws.

But this begs the question of whether there should be an optional instrument at all. I suspect that the UK government for one may not favour it. It seems to threaten the national system. However, I am not convinced that this is a legitimate ground for opposing the optional instrument.

I think I should make my position plain. I have argued elsewhere that there is a positive value in diversity.^{*57} It allows us to have different rules for countries that still do not exactly have similar social and economic conditions; as Professor T. Wilhelmsson has eloquently argued^{*58}, it allows us to experiment; and, most importantly, I wish to preserve pluralism in our society for its own sake. We might need to surrender pluralism where diversity creates real problems; but I do not think that legal differences must necessarily do so.

I have argued elsewhere^{*59} that we should have harmonisation of law to the extent that we remove major differences that might constitute serious, hidden traps for those seeking to do business across national borders, particularly differences that might expose parties when they are unlikely to be insured or to be able to take other precautions. Beyond that, unification or even harmonisation of contract law is unnecessary because for most consumer and business transactions all that matters is that the different laws are approximately the same and that any major differences are easy to discover. This is because most consumer and

⁵⁴ See para. 66.

⁵⁵ COM (2002) 654 final of 14 January 2003.

⁵⁶ Question 8.

⁵⁷ Finding the Remaining Traps Instead of Unifying Contract Law. — S. Grundmann, J. Stuyck (eds.). *An Academic Green Paper on European Contract Law*. Kluwer 2002, pp. 67–72; *The Principles of European Contract Law and Harmonisation of the Laws of Contract*. — Andersen, Fejø, Nielsen (eds.). *Festschrift til Ole Lando*. 1997, pp. 21–40.

⁵⁸ T. Wilhelmsson. *Private Law in the EU: Harmonised or Fragmented Europeanisation?* — *European Review of Private Law* 2002, p. 77.

⁵⁹ See Note 57, pp. 67–72.

business transactions do not depend on precise assessment of the legal rules; provided the parties know roughly what their position is, they will not be discouraged from transactions across borders by small differences that are likely to be of importance in only a minute proportion of cases. It is only in the case where a dispute arises and the parties are unable to reach a negotiated commercial settlement that it will become necessary to descend into the finer points of law and to work out which law governs the contract and precisely what that implies in terms of contractual liability. This is going to be, in percentage terms, a very small number of cases.

There are some businesses that require much greater certainty than do the manufacturers who formed the subject of the studies to which I have referred. In particular, where markets fluctuate greatly — for example, commodity markets or the charter market — it is very common for the parties to plan the contract in very considerable detail (using standard forms that are signed by both parties) and to use arbitration or litigation as a way of solving disputes. For these parties, the answer is either a known national law (in many cases, that is English law) or use of a neutral international system — and the optional instrument could provide just such a system.

Perhaps the strongest argument for an optional instrument, at least if it is employed on an opt-in basis, is simply this: if parties wish to use such an instrument, what grounds do we have to stop them? Those who argue against unification of our law often give as a reason the preservation of freedom to choose a particular system of law that suits the needs of the transaction. Exactly the same argument supports the creation of an optional instrument. And if gradually the optional instrument comes to displace national laws, it will be as the result of more or less conscious choice by the users of the law. To me that appears an entirely legitimate outcome.

But when an optional instrument is to be created, it will then not set out options for legislators; it will have to embody legislative decisions on policy. Explanatory Comments, and Notes comparing the optional instrument to national laws would still be very useful; but the instrument would set out choices for legislators. It would, in other words, be much more like the PECL than I think the CFR 'toolbox' will be.^{*60}

14. Conclusions

In conclusion, I would say that the plans proposed in the Commission's *Action Plan* and elaborated upon in *The Way Forward* are generally to be welcomed. With the possible exception of the 'opt-out' optional instrument, they do not represent a threat to national contract laws; rather, the CFR and the improvement of the *acquis* to which it should lead will, I hope, have the effect of making it easier to incorporate EU legislation into national laws. An opt-in optional instrument might lead to national laws being used less because parties choose to apply the instrument. I see no reason to object, at least when the choice is a truly free and informed one. However, the optional instrument would have to be fashioned in a way that will protect those parties — and they might be the majority — who are not wholly free or fully informed, and it is then that difficult decisions about content and process will have to be made.

However, my conclusions do rest on the assumption that the CFR and any optional instrument are executed well. Making sure that they are prepared properly is something to which I think both academic and practising lawyers with an interest in contract law, in its widest sense, can and should contribute, whether or not they have any expertise in European or comparative law. I very much hope that all who can will do so.

⁶⁰ Such an instrument, even only for international transactions, would involve political choices of the kind that concerns the Social Justice Group (see above, Note 17). That would be so even were it an opt-in instrument. Parties would frequently opt in without knowing exactly, or even approximately, what rules would then apply to their transaction and the degree of protection that they would be afforded, and they might not have the bargaining power to avoid the optional instrument or something even less favourable. The rules of the optional instrument would not be a purely technical matter; legislative choices over them would have to be made. Some means of ensuring both a reasonable degree of social justice in the provisions of the instrument and a modicum of democratic input would be essential.