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# European Initiatives (CFR) and Reform of Civil Law in New Member States: Differences between the Draft Common Frame of Reference and the Principles of European Contract Law

## 1. Introduction

The Draft Common Frame of Reference (DCFR) incorporates a revised and updated version of the Principles of European Contract Law (PECL). This was done with the permission of the Commission on European Contract Law (the Lando Commission), who created PECL.<sup>1</sup> The DCFR also includes a lot of new material. The purpose of this contribution is to explain why, and how, PECL has been changed. It will concentrate on changes of a general nature rather than specific changes in the content of particular articles, and it will concentrate on Books I to III of the DCFR because those are the books that overlap with PECL. Later books contain entirely new material. This will be mentioned but not explored in detail.

Nothing said here should be regarded as detracting in any way from the outstanding merits of PECL. It will be obvious to anyone who reads both texts that PECL was the indispensable basis for Books I to III of the DCFR. PECL is carried forward in these books, not only in substance but also in form. But time does not stand still, and inevitably there are some changes. There is a reason for every single change made to the PECL rules. There will not be space here to go through the articles one by one and comment on every slight drafting change. However, the reasons for major changes will be explained and the general factors that have resulted in many small changes will be mentioned.

The first version of the DCFR is in English, and so some of the following remarks will be of particular relevance for provisions drafted in English. Some may be of little relevance with respect to non-English versions. The fact that the DCFR will be translated into many languages has, however, been taken into account in its preparation. Following the example of PECL, it tries to avoid technical legal terms derived from one particular legal system and to prefer ordinary descriptive language that can be translated without the danger of using the wrong technical term or carrying unwanted baggage.

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<sup>1</sup> Several members of the Lando Commission are also members of the Study Group on a European Civil Code (“Study Group” from now on).

## 2. Seven omitted articles

Virtually the whole of PECL is incorporated in Books I to III of the DCFR. Only seven articles from PECL have no equivalent in the DCFR.

Two general articles<sup>2</sup> near the beginning of PECL are omitted. These articles attempted to regulate the way in which PECL might be used as an optional instrument, and the effect on national mandatory rules of an opt-in by contracting parties. These are not matters that can be regulated from within a soft-law instrument. They have to be regulated from outside. The inclusion of articles on these lines would have been particularly inappropriate in the DCFR, given that the question of its use as the basis for an official optional instrument is currently under debate.

Article 1:107 of PECL has also been omitted. This provided that these principles applied with appropriate modifications to agreements to modify or end a contract, to unilateral promises, and to other statements and conduct indicating intention. The reason for omitting the first part (agreements to modify or end a contract) is that such agreements would already be contracts under the definition of the word used in the DCFR.<sup>3</sup> The reason for omitting the second part is that the technique of applying contractual rules to unilateral juridical acts is not entirely satisfactory. The rules on interpretation, for example, are different because in the latter case there can be no reference to the common intention of the parties. It is not easy for the reader to know what appropriate modifications to make. The rules on formation also have to be different. The DCFR therefore deals specifically with unilateral juridical acts in many later articles. Any gaps would be filled by the application of the general rules on interpretation and development of the rules, which already provide in effect for application by analogy.<sup>4</sup>

The remaining four omitted articles<sup>5</sup> are all in the chapter on the authority of agents and all deal with the topic of indirect representation. There will be indirect representation where A mandates B to do something for A in relation to a third party but in such a way as not to involve A in any direct legal relationship with the third party. For example, A mandates B to look for and buy, in B's own name, some rare object and agrees to buy it from B at the price B paid for it plus a commission. The material on this topic fitted rather uneasily in the chapter on the authority of agents. Its inclusion was criticised at a stakeholders' meeting, and, after further discussion and consideration, the co-ordinating committee of the Study Group on a European Civil Code<sup>6</sup>, at a meeting held in Tartu in December 2005, decided to delete it, at least from that chapter.<sup>7</sup> The internal relationship between the principal and the representative under such contracts is governed by the 'Part on Mandate' in Book IV, and some special rules on the transfer of ownership of property acquired or transferred by the representative will be included in a later book on the transfer of ownership in movables.

## 3. New material in Books IV to X

The DCFR includes not only the material from PECL but also model rules for particular contracts and contractual relationships. Already in the Interim Outline Edition there are model rules on sale of goods; lease of goods; services (including construction services, processing services, storage services, design services, information and advice services, and treatment services); mandate; commercial agency, franchise, and distributorship; and personal security. Model rules on loans and donations will be added later in 2008.<sup>8</sup> This new material is potentially important in the European context. Some of these topics ought, in theory at least, to be among the first to be considered for uniform regulation at European level. Comprehensive uniform rules (as opposed to partial and fragmented rules) on the sale or lease of goods, and the provision of services, and on the establishment and regulation of marketing framework relationships, would seem, for example, to be rather appropriate for an internal market and pre-eminently the sort of thing that could be achieved only by action at European level.

The DCFR also already includes in the Interim Outline Edition model rules on benevolent intervention in another's affairs, unjustified enrichment, and non-contractual liability arising out of damage caused to another.

<sup>2</sup> Articles 1:103 and 1:104.

<sup>3</sup> See Annex 1 — A 'contract' is an agreement which gives rise to, or is intended to give rise to, a binding legal relationship or which has, or is intended to have, some other legal effect.

<sup>4</sup> See I.-1:102 (Interpretation and Development) paragraph (4).

<sup>5</sup> Articles 3:102, 3:302, 3:303 and 3:304.

<sup>6</sup> The "Study Group" from now on.

<sup>7</sup> The question of its possible inclusion elsewhere was left open.

<sup>8</sup> Model rules on other special contracts and contractual relationships could be added later if this were thought to be useful. Book IV is designed for expansion.

Rules on trusts and proprietary securities will be added later on in 2008. The ‘internal market’ argument for uniform European rules concerning these topics is perhaps not so immediately apparent. And yet it can hardly be denied that there would be benefits to the European insurance industry in having uniform rules on non-contractual liability for damage, and that there would be a more level playing field in European commerce generally if there were uniform rules on proprietary securities and as to what could be done by the use of trusts. The rules on benevolent intervention and unjustified enrichment differ significantly from country to country at present (more significantly than the rules on contracts and on contractual rights and obligations). These branches of the law play a useful supplementary role in filling gaps and preventing injustice. It is clear that distortions could occur if other rules were uniform but these were not.

Thus, the most immediately obvious difference between the DCFR and PECL is that the DCFR includes a great deal of material on special contracts and other matters that is of great potential relevance for the development of European private law. This material takes account of, and sometimes follows quite closely, existing EU directives, but it has been drafted so as to fit well, at the technical level of drafting and terminology, with Books I to III of the DCFR.

## 4. Acquis Group material in Books II and III

Books II and III of the DCFR contain substantial blocks of rules derived from material provided by the European Research Group on Existing EC Private Law (the Acquis Group). There are rules on non-discrimination in the provision of goods and services available to the public<sup>9</sup>; on marketing and pre-contractual duties<sup>10</sup>; and on the right of withdrawal from certain contracts within a short ‘cooling-off’ period.<sup>11</sup> There are more extensive rules on unfair contract terms.<sup>12</sup>

One of the challenges in producing the DCFR was to merge the ‘classical’ contract law approach of PECL with the newer, more overtly functional and ‘policy-based’, approach of the *acquis*. Adjustments were necessary in both directions. For example, the Acquis Group’s approach to ‘writing’ and ‘signature’ (designed to cater for the electronic age)<sup>13</sup> has been adopted throughout the DCFR. The same applies to the Acquis Group’s use of the term ‘business’ rather than ‘professional’. These decisions in themselves account for a number of changes to the PECL rules. On the other hand, the rules provided by the Acquis Group often had to be adjusted at the drafting level to fit in with the rest of the DCFR, and this process of verbal adjustment sometimes threw up problems of a more substantive nature, which had to be resolved.

It is for the reader to judge whether the task of combining PECL rules and Acquis Group rules has been successfully accomplished. What is quite clear is that it had to be attempted. An interesting aspect of the attempt was confirmation of the perception that it is becoming increasingly difficult to preserve a rigid distinction between private law and public law. The distinction has been preserved in the DCFR for the time being. Whether it is worth preserving forever is another debate, for another time. There is clearly a public law background, to say the least, to rules on such topics as discrimination and unfair contract terms. A similar remark could be made about the distinction between substantive law and procedural law. The inclusion of material from the *acquis* has made it even clearer than it was already that any attempt to reformulate European private law in the early 21<sup>st</sup> century is going to push at some boundaries — and quite rightly so.

## 5. Other new material in Books II and III

There is a new rule on mixed contracts in the DCFR.<sup>14</sup> The need for this became obvious as work proceeded on the special contracts in Book IV. Many contracts are a mixture of sale and services, or a mixture of different kinds of services. Other kinds of mixes are also common. It is useful to have some indication of how various rules are to apply in such cases. Of course, the presence of this rule is not meant to indicate that every new kind of contract is to be regarded as a mixture of the nominate contracts that are specifically mentioned in Book IV. The principle of freedom of contract remains paramount.

<sup>9</sup> Articles II.–2:101 to II.–2:105 and III.–1:105.

<sup>10</sup> Articles II.–3:101 to II.–3:201 (the rules in II.–3:301 to II.–3:401 had their equivalent in PECL).

<sup>11</sup> Articles II.–5:101 to II.–5:202.

<sup>12</sup> Articles II.–9:401 to II.–9:401. Some of these rules, but not all, had equivalents in PECL.

<sup>13</sup> See DCFR articles I.–105 and I.–1:106.

<sup>14</sup> II.–1:108.

There is a new rule on the effect of failure to notify a non-conformity in goods or services supplied to a person who is not a consumer.<sup>\*15</sup> The reason for the inclusion of this rule in Book III was to generalise a rule that was appearing in unnecessarily different forms in different Parts of Book IV.

There are new rules on unilateral juridical acts<sup>\*16</sup>, a matter that, as already noted, was dealt with only by analogy in PECL. There are also new rules on time-limited rights and obligations<sup>\*17</sup>; on the variation and termination of rights, obligations, or contractual relationships by agreement<sup>\*18</sup> or by notice<sup>\*19</sup>; on the extinctive effect of performance<sup>\*20</sup>; and on the extinction of obligations by merger.<sup>\*21</sup> There is a new rule addressing when, in a case of plurality of creditors, different types of right arise.<sup>\*22</sup> These rules are not inconsistent with anything in PECL, and their content will not, it is hoped, be surprising. The reason for their inclusion is simply to fill gaps.

There is a new rule on the basic requirements for an assignment of a right to performance.<sup>\*23</sup> PECL had said that certain things were not required but did not say what **was** required. Related to this is a new rule on entitlement to assign.<sup>\*24</sup> There is also a new rule on the most important effect of the assignment of a right to performance — namely, that the assignor ceases to be, and the assignee becomes, the creditor.<sup>\*25</sup> These additions to the assignment chapter were prompted to some extent by the discussions on the topics of proprietary securities and the transfer of ownership of movables and by a desire for greater consistency of treatment.

## 6. More definitions

The DCFR contains more definitions than PECL. Not only are there more definition articles in the body of the text but there is also an annex of definitions containing 147 entries. The main reason for the increased use of definitions is that it was made clear by the representatives of the European Commission that definitions of key terms would be particularly useful. Of course, there are good drafting reasons for using definitions anyway, provided that they are used wisely and in moderation. The use of definitions was found useful in preparing the DCFR. On several occasions, the presence of a definition served to resolve a doubt that had arisen in discussion, and the fact that a word had been defined for the purpose of earlier articles often made it easier to draft later articles.

## 7. Expansion of some rules

Some of the PECL rules are to be found in a more developed and expanded form in the DCFR. For example, the rules on the effect of a stipulation in favour of a third party<sup>\*26</sup> are considerably more developed than the equivalent rules in PECL.<sup>\*27</sup> This reflects changes in national laws and further thinking since the PECL rules were formulated.<sup>\*28</sup> The rules on cure by the debtor in an obligation are also expanded.<sup>\*29</sup> This took account of work done for the part of Book IV on sales of goods, which itself took account of exiting EU law. It was found useful and appropriate to generalise the sales rules and to put them in Book III. In both of these areas, the results are closer to the approach taken in the UNIDROIT Principles<sup>\*30</sup> than to the former PECL approach. There has also been expansion of the rules on the restitution of benefits after termination of a contractual

<sup>15</sup> III.–3:107.

<sup>16</sup> Articles II.–4:301 to II.–4:303 (Formation) and II.–8:201 to II.–8:202 (Interpretation).

<sup>17</sup> III.–1:107.

<sup>18</sup> III.–1:108.

<sup>19</sup> III.–1:109.

<sup>20</sup> III.–2:114.

<sup>21</sup> III.–6:201.

<sup>22</sup> III.–4:203.

<sup>23</sup> III.–5:104.

<sup>24</sup> III.–5:111.

<sup>25</sup> III.–5:113.

<sup>26</sup> Articles II.–9:301 to II.–9:303.

<sup>27</sup> Article 6:110.

<sup>28</sup> See, e.g., the English Contracts (Rights of Third Parties) Act 1999.

<sup>29</sup> Article 8:104 of PECL. Articles III.–3:202 to III.–3:204 of the DCFR.

<sup>30</sup> See the UNIDROIT Principles of International Commercial Contracts 2004 articles 5.2.1 to 5.2.6 and 7.1.4.

relationship on grounds of fundamental non-performance.<sup>\*31</sup> Here the work on unjustified enrichment had shown that a number of questions had been left unregulated by the PECL provisions.

PECL has only a limited provision on the computation of time. It applies only to the computation of time in relation to “a period of time set by a party in a written document for the addressee to reply or take other action”.<sup>\*32</sup> The lack of more general rules was noted and regret expressed during the preparation of the chapter on prescription. The DCFR now has more comprehensive provisions<sup>\*33</sup>, which draw on existing European law.<sup>\*34</sup>

## 8. Some verbal clarifications

There is an impatience in some quarters with legal concepts. Concepts are old-fashioned — professors’ play-things. New model rules should be functional rather than conceptual. They should concentrate on the real world. That is all very well. Of course, new rules should be functional. Of course, they should relate to the real world — a world that is constantly changing and that contains many surprises and many more sets of circumstances than could readily be imagined. But rules have to be expressed in words and are unlikely to fulfil their function very well if they are expressed in words that are used in a loose, overlapping, and confusing way. Some of the changes to PECL are designed to express in more precise words rules having exactly the same function.

### 8.1. Contract or contractual relationship

PECL uses the word ‘contract’ in different ways. Usually it refers to a type of agreement — a bilateral or multilateral juridical act. Sometimes it refers to a continuing relationship resulting from such an act. This can be confusing even within the one language. For example, a meeting could have a long and heated debate about whether something is a contract only to find that people are using ‘contract’ in different senses and that both sides are right! And to use ‘contract’ in different senses can lead to even more confusion when texts are translated and when rules are applied in different national systems. The Study Group, after considering the prevailing usage in EU directives and in European and international instruments, including soft-law instruments like PECL itself, decided to use ‘contract’ for a type of bilateral or multilateral juridical act and to use the term ‘contractual relationship’ for the continuing legal relationship that often results from a contract. This turned out to be a considerable aid to clarity of thinking in relation to such topics as third-party rights and termination for fundamental non-performance. For example, it is obviously not a contract as a juridical act that is terminated. It is a continuing contractual relationship that is terminated. One can consider the analogy of a wedding and the continuing marital relationship resulting from it. A divorce terminates the continuing marital relationship. It does not affect the fact that the wedding took place as a matter of history. It does not, and cannot, terminate the wedding.

### 8.2. Duty or obligation

PECL does not distinguish clearly between ‘duty’ and ‘obligation’. This causes a lot of difficulty in relation to those few provisions that employ the concept of duty rather than obligation, including the provision on good faith.<sup>\*35</sup> Is a breach of the duty of good faith a non-performance of an obligation with the consequence that all of the remedies for non-performance of an obligation are available? If so, why is it not called an obligation? Or is it not such a non-performance, in which case we have a duty without a sanction? Either the drafting is defective or the result is defective. The DCFR distinguishes between a duty and an obligation.<sup>\*36</sup> A duty is rather more vague and rather more general. It need not involve a specific creditor. One can, for example, have a duty to be a good citizen or not to harm other people in certain ways. A duty need not have a legal sanction. So any provision imposing a duty should state clearly the effects of a breach (as the provision on good faith

<sup>31</sup> Articles III.–3:511 to III.–3:515 of the DCFR. Articles 9:307 and 9:308 of PECL.

<sup>32</sup> Article 1:304.

<sup>33</sup> See Annex 2.

<sup>34</sup> The rules in Annex 2 reflect rules which are commonly found in national systems and which have been found to be commercially convenient. The actual wording is derived, with minor drafting changes, from the EEC/Euratom regulation No. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

<sup>35</sup> PECL article 1:201.

<sup>36</sup> See Annex 1.

in the DCFR now does). Under the DCFR, an obligation is a duty to perform that is owed by one party to a legal relationship (the debtor) to another party in that relationship (the creditor). The creditor will have a corresponding right to performance. Unless otherwise stated, non-performance of the obligation will bring into play the remedies for non-performance set out in the DCFR. It follows that, under the scheme of the DCFR, all obligations are duties but not all duties are obligations.

Another question in relation to the word ‘obligation’ is whether an obligation is a bilateral relationship or a unilateral duty owed by the debtor. The former usage — seeing the obligation as a tie or *vinculum* — has a long and respectable history, but the latter usage is now more prevalent — and it is the latter usage that was expressly adopted by the Study Group at its Warsaw meeting. The debtor has an obligation, and the creditor has a corresponding right. The obligation is not the whole relationship but the debtor’s part of the relationship.

### 8.3. Assignment or act of assignment

PECL uses ‘assignment’ sometimes in referring to the contract or other juridical act that is intended to effect a transfer of a right to performance<sup>\*37</sup> and sometimes of the actual transfer itself.<sup>\*38</sup> The DCFR distinguishes between the two. It uses ‘assignment’ for the actual transfer and ‘act of assignment’ for the contract or other juridical act that is intended to effect the transfer.

### 8.4. Performance or benefit received by performance

PECL sometimes uses ‘performance’ for the act of performing an obligation and sometimes for the benefit received via the performance.<sup>\*39</sup> The two are quite different. An act of performance, once completed, does not, for example, have a market value. Car dealers sell cars, not the acts by which those who sold the cars to them performed their contractual obligations. The DCFR tries to reserve ‘performance’ for the act of performing and to refer to the benefits received through performance where this is what is meant.<sup>\*40</sup>

### 8.5. Void/voidable/invalid/ineffective

The meaning of the words ‘void’, ‘voidable’, ‘invalid’, and ‘ineffective’ is not always clear in PECL. These words are quite important and quite useful. The DCFR attempts to clarify them.<sup>\*41</sup>

### 8.6. End or terminate

Some articles in PECL talk of a contract being ‘ended’.<sup>\*42</sup> For example, “A contract for an indefinite period may be ended by either party by giving notice of reasonable length.”<sup>\*43</sup> Others talk of termination. For example, a party who has demanded an assurance of due performance and who has not been provided with such an assurance within a reasonable time “may terminate the contract” by notice in certain situations.<sup>\*44</sup> There is a danger of confusion here. The two words ‘end’ and ‘terminate’ mean the same thing in ordinary English. It would be possible to define ‘terminate’ in such a way that it refers only to termination on certain grounds and to use ‘end’ for termination on other grounds but that would be highly undesirable. Definitions should not produce traps for readers by giving unnatural meanings to ordinary words. The DCFR uses ‘termination’ in its ordinary sense of bringing to an end with prospective effect, except where otherwise provided.<sup>\*45</sup>

Under the DCFR, as already noted, it would be the contractual relationship (and not the contract) that would be terminated. PECL, however, sometimes used ‘contract’ to refer to the continuing contractual relationship rather than the juridical act giving rise to it.

<sup>37</sup> See, e.g., article 11:104 (Form of Assignment).

<sup>38</sup> See, e.g., article 11:201 (Rights Transferred to Assignee).

<sup>39</sup> See, e.g., article 9:401 (1) (Right to Reduce Price).

<sup>40</sup> See, e.g., article 3:601 (1) (Right to Reduce Price).

<sup>41</sup> See Annex 1.

<sup>42</sup> See, e.g., articles 2:106; 6:109; 6:111.

<sup>43</sup> Article 6:109.

<sup>44</sup> Article 8:105 (2).

<sup>45</sup> See Annex 1. In fact when a contractual relationship is terminated there may be restitutionary effects and some rights and obligations (such as those relating to the resolving of disputes) may survive termination. So the words “except where otherwise provided” are important.

## 9. Other drafting changes

PECL is very well drafted. Nonetheless, the close scrutiny it received in the course of the work of the Study Group revealed various small ways in which the drafting could be improved. A few of these will be mentioned. There is no doubt that the close scrutiny that the DCFR will receive will lead to suggestions for further drafting improvements. That is good. That is how progress is made.

### 9.1. Party

Often, but not always<sup>\*46</sup>, in dealing with the non-performance of an obligation, the English text of PECL uses the term ‘aggrieved party’ to describe the creditor and the term ‘non-performing party’ to describe the debtor. The French text generally uses the concepts of *créancier* and *débiteur*.<sup>\*47</sup> There is nothing wrong with describing parties to a legal relationship as ‘aggrieved’ (if they are actually aggrieved) or ‘non-performing’ (if it is made clear what it is that they are not performing)<sup>\*48</sup>, but it is unnecessary if the terms ‘creditor’ and ‘debtor’ are already available. It infringes against the drafting principle of not multiplying terms unnecessarily. The DCFR uses ‘creditor’ and ‘debtor’ in these situations.

### 9.2. Gender-neutrality

Both PECL and the DCFR try to adopt gender-neutral drafting. This is important, particularly in English, because of the way in which personal pronouns are used. It would be objectionable to give the impression that in the Europe of the 21<sup>st</sup> century only men were legal actors. Women and legal persons are also legal actors. So both PECL and the DCFR avoid using ‘he’ to mean ‘he, she, or it’. The articles in the first nine chapters of PECL avoid this problem by using ‘it’ to refer to a party, or a debtor or a creditor. There are also many references to ‘a party which’ does something. However, this is not quite right either. It rather gives the impression that only companies and legal persons, and not natural persons, can be legal actors. It avoids one trap but falls into another. It also sounds rather strange and ungrammatical to an ordinary user of the English language. The DCFR tries to avoid both traps and to conform to ordinary English usage. Sometimes this leads to a slightly awkward repetition of a noun, but that is a price worth paying.

### 9.3. Supposed knowledge

A problem arises when a provision must refer to a situation where a person did not actually know something but could reasonably be expected to have known it. To deal with this situation PECL sometimes uses ‘ought to have known’<sup>\*49</sup> and occasionally ‘could not have been unaware’.<sup>\*50</sup> The ‘ought’ formula implies that there is a duty to know, which usually will not be the case.<sup>\*51</sup> The ‘knew or could not have been unaware’ formula, although it now has a long pedigree, is not a very satisfactory one either. ‘Could not have been unaware’ means ‘must have been aware’. A person who must have been aware of something was aware of it. So, logically, the formula says ‘knew or was aware’ which just means ‘knew or knew’. The DCFR generally uses ‘knows or could reasonably be expected to know’ or some variant of that formula (depending on the appropriate tense). It should be noted that there is no implication in that formula that a person is expected to make enquiries. Everything depends on what is reasonable in the circumstances. There will be many circumstances in which a person could not reasonably be expected to make enquiries or conduct investigations. Sometimes, when the policy is that there should definitely not, in any circumstances, be an expectation of enquiries or investigations, the DCFR uses a formula that makes this clear.<sup>\*52</sup>

<sup>46</sup> Contrast, for example, article 9:101 (“creditor”) with article 9:102 (“aggrieved party”).

<sup>47</sup> See, e.g., article 9:504.

<sup>48</sup> See above.

<sup>49</sup> See, e.g., article 4:111 (2).

<sup>50</sup> See, e.g., article 3:205 (3) (a).

<sup>51</sup> Sometimes, however, this will be the case and then there is no objection to the “ought” formula.

<sup>52</sup> See, e.g., IV.C.–2:108 (5) “obvious from all the facts and circumstances known to the service provider without investigation”.

## 9.4. Juridical act

PECL does not use the expression ‘juridical act’. Instead it refers to statements and conduct indicating intention.<sup>\*53</sup> That, however, is too broad. “I am going out to buy a newspaper” is a statement indicating intention. Lifting a soup spoon and moving it in the direction of a plate of soup is conduct indicating intention. Neither needs to be regulated by rules on grounds for invalidity, interpretation, and so on. The DCFR defines a ‘juridical act’ — actually one of the key building blocks of a system of private law, along with legal relationships, obligations, and rights — as “any statement or agreement or declaration of intention, whether express or implied from conduct, which has or is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.”<sup>\*\*54</sup>

## 9.5. Performance of what?

PECL sometimes refers to ‘performance of a contract’.<sup>\*55</sup> However, a contract is not performed — and this is true whether the word is used to refer to a juridical act or to a relationship. What is performed is an obligation that arises from the contract and is part of the legal relationship between the parties.

# 10. More transparent structure

PECL covers one major category, ‘contract law’, and 17 subcategories — (1) general provisions, (2) formation of contracts, (3) authority of agents, (4) validity, (5) interpretation, (6) contents and effects, (7) performance, (8) non-performance and remedies in general, (9) particular remedies for non-performance, (10) plurality of parties, (11) assignment of claims, (12) substitution of new debtor: transfer of contract, (13) set-off, (14) prescription, (15) illegality, (16) conditions, and (17) capitalisation of interest. Some of these subcategories are subdivided, but that need not concern us here. The important point for present purposes is that everything is grouped under contract law. This is obviously unsatisfactory. Subcategories 2, 3, 4, and 5 above are not confined to contracts but apply also to other juridical acts. The material in subcategory 6 deals partly with contracts and partly with contractual obligations. That in subcategories 7 to 9 may have been intended to deal only with contractual obligations but is often framed in terms of obligations, whether contractual or not. Subcategories 10 to 14 pertain to obligations in general and corresponding rights to performance. Subcategory 15 involves contracts and other juridical acts. Subcategory 16 (as drafted in PECL) concerns contractual obligations, and, finally, subcategory 17 deals with delay in the payment of money and is not limited to money payable under a contract.

There are two criticisms of the PECL structure. Firstly, it is misleading to put all of this material under the heading ‘Contract Law’; secondly, there is a certain lack of organisation of the subcategories. In relation to both criticisms it must be kept in mind, however, that PECL developed over many years. What was to be included by the end, and how it was to be included, may not have been foreseen at the beginning. This excuse was not available to the drafters of the DCFR. The DCFR had to adopt a more transparent structure.

The Study Group gave a lot of thought to the question of structure, a problem that has caused difficulty for centuries but that is probably of greater theoretical interest than practical importance. A sound structure can make material easier to use, understand, and change. A poorly formed or non-existent structure can lead to inaccessibility and avoidable confusion. Would readers look for rules on obligations in general in a book on contract? At the same time, it has to be said that structure is not all that important. Systems with very different structures, some of which must seem rather poor to any thoughtful observer, survive and serve their users well.

In the present context there are two faults to be avoided. One, illustrated by PECL, is to put too much under the ‘contract’ heading. Even if this term is used loosely to include not only contracts as juridical acts but also the legal relationships arising from them, it is still too narrow to cover non-contractual obligations and corresponding rights. And, of course, if ‘contract’ is narrowly defined as a type of juridical act, then even contractual obligations should be under another heading. The other fault is to place too much under ‘obligations’. A contract seen as a juridical act may be a source of obligations and corresponding rights. A contract seen as a legal relationship will generally involve obligations and corresponding rights. But, on either view, a contract is not an obligation any more than an obligation is a contract.

<sup>53</sup> Article 1:107. Principles apply with appropriate modifications to “unilateral promises and to other statements and conduct indicating intention”. See also article 1:303 (6) “In this Article, ‘notice’ includes the communication of a promise, statement, offer, acceptance, demand, request or other declaration”.

<sup>54</sup> See article II.–1:101 (2) and Annex 1.

<sup>55</sup> See articles 6:111 (2); 8:107; 9:302; 9:502.

The DCFR tries to avoid both of these pitfalls. It distinguishes between contracts and other juridical acts (Book I) and obligations and corresponding rights (Book II). This distinction became all the more necessary after it had been decided to use the word ‘contract’ only of the juridical act and to use the word ‘obligation’ only of the debtor’s side of a legal relationship between debtor and creditor. The topic of marketing and pre-contractual duties is included in Book II because of its close connection to contracts. The other material in Book II deals with formation; cooling-off periods (rights of withdrawal); representation (referring to the effect of concluding a contract or other juridical act as a representative of someone else); grounds of invalidity; interpretation; and the contents and effects of contracts. The remaining PECL material is in Book III. However, more of the articles in Book III are generalised to cover all obligations within the scope of the DCFR and not just contractual obligations. This just carries a step further what was already done in PECL, but in a more transparent way. If it were decided to use the DCFR for an instrument relating only to contracts and contractual rights and obligations — which would give it a narrower scope than PECL and would considerably reduce its potential value — it would be an easy matter to provide that for the purpose of such an instrument ‘obligation’ means ‘contractual obligation’. Very few provisions<sup>56</sup> would require anything more than that.

## 11. Expanded and updated national notes

The Interim Outline Edition consists only of articles, with an ‘Introduction’ section and other appendages. It does not include explanatory comments or notes on the solutions adopted by the laws of the Member States. However, the full version of the DCFR will include national notes. They will include material from the Member States that have joined the EU since PECL was written. The notes on the laws of the older Member States will be updated.

## 12. Conclusions

The cover page of the Interim Outline Edition of the DCFR says that it is “based in part on a revised version of the Principles of European Contract Law”. I have tried to explain some of the ways in which PECL has been revised for the purposes of the DCFR. However, it is worth repeating the point that Books I to III of the DCFR are still essentially and recognisably PECL. That PECL has been found entirely suitable for this purpose by a greatly expanded group of lawyers from a greatly expanded European Union is a tribute to its underlying strength. It is to be hoped that the minor changes made to PECL in the DCFR, not all of which have been mentioned above, will be regarded as improvements. If they are not, there are plenty of commentators from all over Europe who will be able to say so.

<sup>56</sup> E.g., article III.–7:202 dealing with the period of prescription of a right established by legal proceedings and related articles.